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*ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY
LITIGATION TO THE PRESENT TIME*
IN THE
UNITED STATES, ENGLAND AND CANADA.

BY
STEWART RAPALJE
AND
WILLIAM MACK.

VOLUME III.

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CITIZENSHIP; DOMICIL; RESIDENCE.

Averment of diverse citizenship, to give federal courts jurisdiction, see PLEADING, 11.

Jurisdiction as dependent upon, see JURISDICTION, 4.

Jurisdiction of federal courts as dependent upon, see FEDERAL COURTS, 3-6, 10.

1. Corporations, how far deemed "citizens," generally.*—(1) Rule stated.—Strictly speaking corporations cannot be citizens. *Pacific R. Co. v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 590, 23 Fed. Rep. 565, 5 McCrary (U. S.) 373. *Kranshaar v. New Haven Steamboat Co.*, 7 Robt. (N. Y.) 356. *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (U. S.) 270, 4 Am. Ry. Rep. 462.

And in order to hold them amenable to federal jurisdiction, on the ground of citizenship, it is necessary to assume that all the stockholders are citizens of the state by which the corporation was created. *Pacific R. Co. v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 590, 23 Fed. Rep. 565, 5 Mc-

Crary (U. S.) 373.—DISTINGUISHED IN *Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co.*, 29 Fed. Rep. 337.

(2) *Within the meaning of the U. S. constitution.*—A corporation is not a citizen within the meaning of the United States Constitution, art. 4, § 2, providing that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. *Paul v. Virginia*, 8 Wall. (U. S.) 168.—FOLLOWED IN *Norfolk & W. R. Co. v. Pennsylvania*, 45 Am. & Eng. R. Cas. 9, 136 U. S. 114.—*Pembina C. S. M. & M. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737.—FOLLOWED IN *Norfolk & W. R. Co. v. Pennsylvania*, 45 Am. & Eng. R. Cas. 9, 136 U. S. 114; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26; *Charlottesville, C. & A. R. Co. v. Gibbs*, 142 U. S. 386.

But a corporation aggregate may be a citizen, in the sense in which the term citizen is used in that part of the constitution which speaks of the judicial power of the United States. It may enforce legal rights, or may obtain redress for wrongs, not only in the state of its creation, but also in the other states of the Union, by virtue of the comity between the states. *Ducat v. Chicago*, 48 Ill. 172.

A corporation is but a creature of the local law, and has no absolute right to recognition in any of the states, save that in which it is created. The term "citizen," as used in the constitution, relates to natural persons only and does not include corporations. *Woodward v. Commonwealth*, (Ky.) 35 Am. & Eng. R. Cas. 498, 7 S. W. Rep. 613.

* Citizenship of corporations, see notes, 35 AM. & ENG. R. CAS. 507, 700; 12 *Id.* 299.

Citizenship of corporations. Adoption of foreign corporation, see note, 50 AM. & ENG. R. CAS. 622.

Citizenship of railroad companies. Foreign corporations, see note, 20 AM. & ENG. R. CAS. 622.

As to how far and for what purposes corporations are regarded as "persons," see note, 19 L. R. A. 223.

Status of corporations as to citizenship, see note, 2 L. R. A. 566.

(3) *Citizen of more than one state.*—When the same corporation owning a road which runs through several states is chartered by each of them, it is, by a useful fiction, to be considered, for purposes of jurisdiction, a citizen of each of the states; and where such a corporation is sued in one of the states in which it holds a charter as a citizen of that state, it cannot set up that it is likewise a citizen of another. The fiction that makes two or three corporations out of what is in fact one is established for the purpose of giving each state its legitimate control over the charters which it grants; but the acts and neglects of the corporation are done by it as a whole. *Horne v. Boston & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 287, 18 *Fed. Rep.* 50.—FOLLOWING *Ohio & M. R. Co. v. Wheeler*, 1 *Black* (U. S.) 286.—FOLLOWED IN *Nashua & L. R. Co. v. Boston & L. R. Co.*, 16 *Am. & Eng. R. Cas.* 488, 19 *Fed. Rep.* 804; *Colglazier v. Louisville, N. A. & C. R. Co.*, 20 *Am. & Eng. R. Cas.* 611, 22 *Fed. Rep.* 568; *Union Trust Co. v. Rochester & P. R. Co.*, 29 *Fed. Rep.* 609.

A railroad corporation organized by the legislature of one state, but having portions of its lines in a second state, will be considered a corporation of the second state so far as to be amenable to its laws. *McGregor v. Erie R. Co.*, 35 *N. J. L.* 115.

A railroad company chartered in an adjoining state does not become a Delaware corporation by simply obtaining a Delaware charter authorizing it to extend its road into the state, but without acting under the charter or building an extension. *Philadelphia, W. & B. R. Co. v. Kent County R. Co.*, 5 *Houst. (Del.)* 127.

2. Corporations as citizens of state where chartered.—(1) *Generally.*—In the strict sense of the word, corporations are not citizens of any state, but for the purposes of jurisdiction are regarded as citizens of the state which created them. *Kranshaar v. New Haven Steamboat Co.*, 7 *Robt. (N. Y.)* 356.

Even though they may have their offices and transact their business elsewhere. *Pacific R. Co. v. Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 590, 23 *Fed. Rep.* 565.

A corporation can have no legal existence outside of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of that law, and where that law ceases to operate the corporation can have no ex-

istence. It must dwell in the place of its creation. *Hatch v. Chicago, R. I. & P. R. Co.*, 6 *Blatchf. (U. S.)* 105.—FOLLOWING *Bank of Augusta v. Earle*, 13 *Pet. (U. S.)* 519; *Ohio & M. R. Co. v. Wheeler*, 1 *Black* (U. S.) 286.—*Rece v. Newport News & M. V. R. Co.*, 32 *W. Va.* 164, 9 *S. E. Rep.* 212.—QUOTING *Baltimore & O. R. Co. v. Koontz*, 104 *U. S.* 5.

Although a corporation, being an artificial body created by legislative power, is not a citizen, within several provisions of the constitution, yet where rights of action are to be enforced by or against a corporation it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states. A corporation created by the laws of a state is, in suits brought in a federal court in that state, to be considered as a citizen of such state, whatever its status or citizenship may be elsewhere by the legislation of other states. *Chicago & N. W. R. Co. v. Whitton*, 13 *Wall. (U. S.)* 270, 4 *Am. Ry. Rep.* 462.—FOLLOWED IN *Phinizz v. Augusta & K. R. Co.*, 56 *Fed. Rep.* 273; *Baltimore & O. R. Co. v. Cary*, 28 *Ohio St.* 208. QUOTED IN *Paul v. Baltimore & O. & C. R. Co.*, 44 *Fed. Rep.* 513. RECONCILED IN *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 *Woods (U. S.)* 447. REVIEWED IN *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp. (U. S.)* 525.

Under the clause of the constitution of the United States extending the judicial power of the United States to controversies between citizens of different states, a corporation, in respect to the jurisdiction of the federal courts, is regarded as a citizen of the state where it was created. *Baltimore & O. R. Co. v. Cary*, 28 *Ohio St.* 208, 14 *Am. Ry. Rep.* 97.—FOLLOWING *Ohio & M. R. Co. v. Wheeler*, 1 *Black* (U. S.) 286; *Baltimore & O. R. Co. v. Harris*, 12 *Wall. (U. S.)* 65; *Chicago & N. W. R. Co. v. Whitton*, 13 *Wall. (U. S.)* 270.

(2) *Doing business in another state by permission.*—A corporation does not cease to become a citizen of the state creating it by the fact that a part of its business is carried on in another state by permission of such state. *Kranshaar v. New Haven Steamboat Co.*, 7 *Robt. (N. Y.)* 356.—REVIEWING *Ohio & M. R. Co. v. Wheeler*, 1 *Black* (U. S.) 286.—*Williams v. Missouri, K. & T. R. Co.*, 3 *Dill. (U. S.)* 267.

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The fact that a corporation created in one state is doing business in another state by permission, and is sued in such state, and process is served upon its local representative there, does not prevent it from appearing as a corporation of the state where it is created. *Hatch v. Chicago, R. I. & P. R. Co.*, 6 Blatchf. (U. S.) 105.—QUOTED IN *Erie R. Co. v. Stringer*, 32 Ohio St. 468.

(3) *Presumption of citizenship*.—A corporation is conclusively presumed to be a citizen of the state which created it. *Southern Pac. R. Co. v. Harrison*, 73 Tex. 103, 11 S. W. Rep. 168.

For the purpose of determining the jurisdiction of the federal courts, a corporation is conclusively presumed to be a citizen of the state which created it and where its chief office and place of business is located. *Connor v. Vicksburg & M. R. Co.*, 35 Am. & Eng. R. Cas. 696, 36 Fed. Rep. 273.

And a railroad company chartered in one state remains a citizen of that state, though it be permitted, under the laws of an adjoining state, to go into that state and buy and operate a railroad. *Williams v. Missouri, K. & T. R. Co.*, 3 Dill. (U. S.) 267.—APPROVING *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65. DISTINGUISHING *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 286.—DISTINGUISHED IN *Copeland v. Memphis & C. R. Co.*, 3 Woods (U. S.) 651. REFERRED TO IN *Wilkinson v. Delaware, L. & W. R. Co.*, 20 Am. & Eng. R. Cas. 597, 22 Fed. Rep. 333. REVIEWED IN *Blackburn v. Selma, M. & M. R. Co.*, 2 Flipp. (U. S.) 525.

Strictly speaking, corporations are not citizens; and in order to hold them amenable to federal jurisdiction on the ground of citizenship, it is necessary to assume, often contrary to the facts, that all the stockholders are citizens of the state in which the corporation was created. It is only by virtue of this presumption that a corporation can be said to be a citizen of any state. The presumption that all the stockholders are citizens of the state under whose laws they incorporate, is conclusive, and the fact will not be inquired into. *Pacific R. Co. v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 590, 23 Fed. Rep. 565, 5 McCrary (U. S.) 373.

A suit against a corporation in its corporate name must be regarded as a suit against citizens of the state which created it, the legal presumption being that its members are citizens of that state; and no averment

or evidence to rebut this presumption is admissible for the purpose of withdrawing a suit from a federal court that would otherwise have jurisdiction. *Hatch v. Chicago, R. I. & P. R. Co.*, 6 Blatchf. (U. S.) 105. *Allegheny County v. Cleveland & P. R. Co.*, 51 Pa. St. 228.

(4) *Illustrations*.—The Louisville and Nashville railroad company is a corporation of Kentucky, and not of Tennessee, having from the latter state only a license to construct a railroad, within its limits, between certain points and to exert there some of its corporate powers. *Goodlett v. Louisville & N. R. Co.*, 33 Am. & Eng. R. Cas. 1, 122 U. S. 391, 7 Sup. Ct. Rep. 1254.—FOLLOWING *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 295.

The American Express Company is a joint-stock company created under the laws of New York, with power to sue and be sued in the name of its president or treasurer, and is a citizen of that state, and may sue in the federal courts thereof without regard to the citizenship of the individual stockholders of the company. *Fargo v. Louisville, N. A. & C. R. Co.*, 10 Biss. (U. S.) 273, 6 Fed. Rep. 787.—REVIEWING *Westcott v. Fargo*, 61 N. Y. 542.—*Malitz v. American Exp. Co.*, 1 Flipp. (U. S.) 611.

3. Corporations as citizens of state or district where sued.—(1) Generally.

—While a natural person can have but one domicile, a corporation may be created by the laws of several states and become a distinct corporation in each, domiciled therein, and may be sued as a distinct corporation in the state courts of such states. *Guinault v. Louisville & N. R. Co.*, 40 Am. & Eng. R. Cas. 340, 41 La. Ann. 571, 6 So. Rep. 850.

Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued, like natural persons, in transitory actions arising *ex contractu* or *ex delicto* in any state where legal service of process can be had. *New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244.

For the purpose of federal jurisdiction a corporation chartered by several states must, when sued in either state, be treated as a citizen of that state alone, without regard to where it has its principal place of business. *Phinizy v. Augusta & K. R. Co.*, 56 Fed. Rep. 273.—FOLLOWING *Shaw v. Quincy Mining Co.*, 145 U. S. 449, 12 Sup.

Ct. Rep. 935; Chicago & N. W. R. Co. v. Whitton, 13 Wall. (U. S.) 283; Nashua & L. R. Co. v. Boston & L. R. Co., 136 U. S. 356, 10 Sup. Ct. Rep. 1004.

Individual corporations existing under the laws of Pennsylvania and New York, consolidated under laws of both states, were sued after consolidation in a federal court in Pennsylvania. Held, that the company, for the purposes of jurisdiction, was a citizen of Pennsylvania. *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. Rep. 609.

(2) "Inhabitant."—For purposes of litigation corporations are to be considered inhabitants of the state under whose laws they exist. *Lathrop v. Union Pac. R. Co.*, 1 Mac-Arth. (D. C.) 234.

A company is an inhabitant of any district in which it operates its road, within the meaning of U. S. Rev. St. § 739, providing that civil suits shall be instituted in the district in which the defendant is an inhabitant. *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. Rep. 608.—FOLLOWING *United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297.—*United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297.—FOLLOWED IN *United States v. Central Pac. R. Co.*, 49 Fed. Rep. 304. QUOTED IN *Williams v. East Tenn., V. & G. R. Co.*, 90 Ga. 519.

The Texas statute which provides that suits against a railroad corporation may be brought in any county through or into which the line of such corporation extends is subordinate, in so far as the federal courts are concerned, to the act of congress requiring civil suits to be brought within the district of which the defendant is an inhabitant; and where another statute of the state declares that "the public office of a railroad corporation shall be considered the domicile of such corporation," a domestic railroad company of that state is an "inhabitant" of the district within which such "public office" is situated, and cannot be sued by an alien in a circuit court held in another district of that state through which it operates its road, and in which it maintains ticket and freight offices and depots. *Galveston, H. & S. A. R. Co. v. Gonzales*, 57 Am. & Eng. R. Cas. 71, 151 U. S. 496, 14 Sup. Ct. Rep. 401.

4. Residence of corporations.*—(1) Generally.—The residence of a railway

* Residence of corporations, see notes, 35 AM. & ENG. R. CAS. 507; 17 Id. 173.

company is limited to the line of the legally defined route of their road. *Connecticut & P. R. R. Co. v. Cooper*, 30 Vt. 476.

The residence of the corporators has no bearing upon the question of the locality or residence of the corporation to which they belong. *Connecticut & P. R. R. Co. v. Cooper*, 30 Vt. 476. Compare, however, *Pacific R. Co. v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 590, 23 Fed. Rep. 565, 5 McCrary (U. S.) 373.

(2) *County in which road is operated.*—A railway corporation, in legal contemplation, resides in the counties through which its road passes and in which it transacts its business. It has a legal residence where it exercises corporate powers and privileges. *Richardson v. Burlington & M. R. Co.*, 8 Iowa 260.—FOLLOWING *Baldwin v. Burlington & M. R. Co.*, 5 Iowa 518.—DISTINGUISHED IN *Dubuque v. Illinois C. R. Co.*, 39 Iowa 56. QUOTED IN *McCabe v. Illinois C. R. Co.*, 4 McCrary (U. S.) 492, 13 Fed. Rep. 827.

An averment in a complaint, in an action against a railroad corporation, that the road is run and operated in the county where suit is brought, is sufficient as to the residence of the company. *Heenan v. New York, W. S. & B. R. Co.*, 1 How. Pr. N. S. (N. Y.) 53.

(3) *Place of business.*—The residence of a domestic corporation must be ascertained by its place of business. If it have several places of business it must also be deemed to have several places of residence. *Pond v. Hudson River R. Co.*, 17 How. Pr. (N. Y.) 543.

Railroad corporations may be regarded as resident in each county in which they have an office or agency, or an officer or agent upon whom process may be served. *New Albany & S. R. Co. v. Haskell*, 11 Ind. 301.

(4) *Head office—Principal place of business.*—Where a corporation is not located by the terms of its charter, its residence and location are regarded as being in the place where it keeps its principal office and does its corporate business. *Galveston, H. & S. A. R. Co. v. Gonzales*, 57 Am. & Eng. R. Cas. 71, 151 U. S. 496, 14 Sup. Ct. Rep. 401.—QUOTING *Connecticut & P. R. R. Co. v. Cooper*, 30 Vt. 476.

A railway company, being a corporation, can have only one residence, and that its head office. Such company having its head office outside of the Province of Quebec

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Neither the principal place of business of a corporation nor the place in which its officers reside is necessarily the place of residence of the corporation. *California Southern R. Co. v. Southern Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 172, 65 *Cal.* 394, 4 *Pac. Rep.* 344.—DISTINGUISHED IN *Cohn v. Central Pac. R. Co.*, 71 *Cal.* 488, 12 *Pac. Rep.* 498; *St. Louis, O. H. & C. R. Co. v. Fowler*, 113 *Mo.* 458.

Where a railroad charter specifies that the principal office of the company shall be in a designated place, it does not necessarily follow that the residence of the company is at the same place; but it is otherwise with corporations such as banks chartered for the express purpose of carrying on business at one designated place. *Davis v. Central R. & B. Co.*, 17 *Ga.* 323.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 *Fed. Rep.* 608.

Under the New York Code Civil Pro. § 3343, the location of a corporation created by federal law is ascertained by reference to its principal office, and its domicile will be regarded as at the same place. *Rosenbaum v. Union Pac. R. Co.*, 2 *How. Pr. N. S.* (N. Y.) 45; *affirmed* (?) 100 *N. Y.* 617, *mem.*

The residence of a railway company, for the purpose of bringing actions in their favor, is the county or town, upon the line of their road, where their principal office and the centre of their business operations are situated. *Connecticut & P. R. R. Co. v. Cooper*, 30 *Vt.* 476.

The Connecticut and Passumpsic River railroad company was chartered to construct a railroad from White River Junction, Windsor county, to the north line of the state, in Orleans county, and their railway was constructed and in operation from White River Junction to St. Johnsbury, in Caledonia county. The company had no office in Windsor county except its ordinary stations, but had a general office in Orleans county. *Held*, that the corporation did not have such a residence in Windsor county as would enable it to maintain suits there against residents in other counties. *Connecticut & P. R. R. Co. v. Cooper*, 30 *Vt.* 476.

For the purpose of an action to collect assessments upon stock, the only place of residence of the Dalton and Gadsden railroad is where its principal office is situated,

though its road has been located in another county. *Ross v. Harvey*, 32 *Ga.* 388.

(5) *Residence of president—Vice-president.*—For the purpose of jurisdiction the residence of a railroad corporation, where it has no president in the state, but has a vice-president, is determined by the residence of such vice-president. *Harper v. Newport News & M. V. R. Co.*, (Ky.) 14 *S. W. Rep.* 346.—DISTINGUISHING *Chesapeake, O. & S. W. R. Co. v. Heath*, 87 *Ky.* 651, 9 *S. W. Rep.* 832. FOLLOWING *Sherrill v. Chesapeake, O. & S. W. R. Co.*, 89 *Ky.* 302, 12 *S. W. Rep.* 465.

(6) *Chartering state.*—Where a corporation derives its charter from an adjoining state alone, its domicile is in that state exclusively; and it cannot reside both in Maryland and in the other state at the same time. *Baltimore & O. R. Co. v. Glenn*, 28 *Md.* 287.—RECONCILING *State v. Northern C. R. Co.*, 18 *Md.* 213.

A railroad corporation can have no legal existence out of the sovereignty by which it is created; but its existence as a person capable of contracting may be recognized in another state, and as such it may there be contracted with. *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 *Ga.* 327.

A company chartered like the defendant for the purpose of operating a road in a foreign jurisdiction and lines of vessels outside of New York, which necessarily requires most of its property and business to be out of the state, remains, nevertheless, a New York corporation and a resident thereof. *Crowley v. Panama R. Co.*, 30 *Barb. (N. Y.)* 99.—FOLLOWED IN *McDonald v. Mallory*, 77 *N. Y.* 546.

Under the judiciary act of congress of 1887 a corporation cannot be a resident of a state other than that in which it is incorporated. *Miller v. Wheeler & W. Mfg. Co.*, 46 *Fed. Rep.* 882.—FOLLOWING *Booth v. St. Louis F. E. Mfg. Co.*, 40 *Fed. Rep.* 1.

5. *Change of citizenship or domicile.*—A corporation is an artificial being, and can have no legal existence out of the boundaries of the sovereignty by which it is created. It must dwell in the place of its creation and cannot migrate to another sovereignty. *Land Grant R. & T. Co. v. Coffey County Com'rs*, 6 *Kan.* 245.

But while a corporation must live and have its being in that state only, there is no insuperable objection to its power of contracting in another. Being an artificial per-

son, it may, like natural persons, through the intervention of agents, make contracts within the scope of its limited powers in a state where it does not reside, provided such contracts are permitted to be made by the laws of the place. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287.

Corporations, unlike natural persons, cannot change their domicile; they have a stationary habitation and can only have transactions away from their home through their agents. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287.—REFERRED TO IN *Glenn v. Williams*, 60 Md. 93.

A corporation must have a local habitation. It cannot fix a nominal domicile in the country while its actual domicile for business is in the city; and its local existence must be held to be in some place in the state where its business is carried on. *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. Rep. 978.

A railroad company chartered in one state is not empowered to change its domicile to another state because it is authorized to go into that state and acquire and manage property there. *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492.

Neither does authority given by the legislature of Ohio to such corporation to act in that state give it the right to migrate to that state as an Indiana corporation. *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492.

Under the provisions of the judiciary act of congress of 1887, providing that "when jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either plaintiff or defendant," for the purposes of jurisdiction a corporation cannot acquire a residence except in the state of its corporation. *Booth v. St. Louis F. E. Mfg. Co.*, 40 Fed. Rep. 1.—QUOTING *Germania Fire Ins. Co. v. Francis*, 11 Wall. (U. S.) 210; *Ex parte Schollenberger*, 96 U. S. 377; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5.—FOLLOWED IN *Miller v. Wheeler & W. Mfg. Co.*, 46 Fed. Rep. 882.

For the purpose of jurisdiction of the federal courts, under a statute providing that the courts have jurisdiction only between citizens of different states, citizenship is ordinarily determined by residence; but this is often subject to qualification. It often depends upon the intent of the party; but a prolonged absence from the state is

not alone sufficient to show that a party has changed his citizenship; but where a party sues in one state, claiming to be a citizen of another, the fact that he has a farm, and continues to vote there, is evidence tending to show citizenship. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 574, 18 Fed. Rep. 282.

CITY COUNCIL.

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— killing stock, necessity and sufficiency of demand or notice of, see ANIMALS, INJURIES TO, 308-312.

— labor and materials, when prior to mortgage, see MORTGAGES, 91, 95.

— rights of assignee of, see ASSIGNMENT, 18.

— lien, affidavit to, notice of, etc., see LIENS, 31-37, 49-51.

For loss or damage to goods, reasonable time to make, see CARRIAGE OF MERCHANDISE, 488, 489.

— stipulation as to time and place of presenting, see BILLS OF LADING, 96, 97.

— wages, assignment, priority, and release of, see EMPLOYÉS, 10, 11, 15.

Notice of, to carrier, before removal of live stock, see CARRIAGE OF LIVE STOCK, 80-84.

— under English statutes, in condemnation proceedings, see EMINENT DOMAIN, 1133-1136.

Of creditors, priority in insolvency, see INSOLVENCY, 7; RECEIVERS, VI.

— laborers, assignability of, see ASSIGNMENT, 4.

— subrogation of party paying, see SUBROGATION, 5.

— patented inventions, see PATENTS FOR INVENTIONS, 9.

— third persons, to property attached, see ATTACHMENT, 63-66.

— title, as a defense in ejectment, see EJECTMENT, 20.

Rule of carrier requiring notice of, see CARRIAGE OF MERCHANDISE, 422.

Stipulation by carrier for notice of, see EXPRESS COMPANIES, 68, 69.

Under land grants, determination of conflicting, see LAND GRANTS, 6.

What deemed inferior to execution lien, see EXECUTION, 16.

— enforceable under Mass. Relief Act of 1876, see EASTERN R. CO., 1.

— provable in proceedings for dissolution, see DISSOLUTION, 23.

When inferior to mortgage lien, see MORTGAGES, 109-120.

CLAIMS AGAINST UNITED STATES.

1. For supplies—Contract, generally.—An offer in writing to sell and deliver 150,000 bushels of corn at a certain place, accepted with a condition imposed that none of the grain be purchased along the line of the only railroad leading to the point named, accompanied by an order in favor of the vendors to the government's superintendent of the road, requesting him to transport the corn of the vendors already purchased alongside the line of the road, constitutes one transaction and one agreement, being a proposal by the vendors, accepted conditionally by the vendees, and the condition, with a modification, assented to by the vendors. *Brandeis v. United States*, 3 Ct. of Cl. 99.

2. — advertising bids.—A secretary of the treasury advertised for seal-locks for railroad cars carrying merchandise through the United States and Canada. A subsequent secretary contracted for locks for the use of such cars and for bonded warehouses. *Held*, a sufficient compliance with the act of March 2, 1861, providing that all purchases and contracts for supplies or services in any of the departments shall be made by advertising for proposals. *International S. & R. Supply Co. v. United States*, 13 Ct. of Cl. 209.

3. — ratification of contract.—The written order for seal-locks for cars did not specify the price nor time, but was followed by an oral agreement fixing the price and about the time of delivery. Afterward a part of the locks was accepted and the secretary ordered changes in the others. *Held*, that whether the first order constituted a binding executory contract or not, the subsequent acts were a sufficient ratification and bound the government. *International S. & R. Supply Co. v. United States*, 13 Ct. of Cl. 209.

4. — excuse for non-delivery.—An agreement by a quartermaster with contractors that they shall be allowed to transport the grain which he has purchased from them over a railroad controlled by defendants, may not bind the defendants, but certainly will excuse the contractors, so far as time is concerned, for the non-delivery should the defendants refuse to let the grain be transported; for it at least makes the delivery within the prescribed time conditional and dependent upon the use of the road. *Brandeis v. United States*, 3 Ct. of Cl. 99.

5. For building engines, generally.—Where a party is ordered to construct locomotive engines for the use of the government to the exclusion of all other interests or contracts, and it is agreed that he shall be indemnified for all damages he may suffer from a compliance with the order, and he is compelled to postpone contracts on hand to comply with the order of the government, he is entitled to compensation for any damage he may suffer from such postponement. *Baird v. United States*, 5 Ct. of Cl. 348.

6. — accord and satisfaction.—The claimants agree to build railroad engines for the government to the exclusion of all other contracts with private cus-

tomers. The government agrees to indemnify the claimants from all losses in consequence. As each engine is delivered the claimants present a bill for items of loss on that engine "due to us as part of the indemnity promised." The total of these bills is \$114,949.87. After all are presented the government allows them \$125,497.26, upon their assurance that this "will finally close our account." They subsequently sue for losses on certain engines which were to have been delivered to third parties. *Held*, that this constituted an accord and satisfaction of all losses existing prospective for which defendants could be held liable under their contract of indemnity. *Norris v. United States*, 14 Ct. of Cl. 354.

7. For carriage of goods, generally.

—A land-grant railroad transported over its road officers and men of the army and Indian prisoners, under a special contract with the quartermaster-general as to the compensation therefor. Afterward, by the act of March 3, 1875, the power to agree upon rates was taken from the quartermaster-general and conferred upon the court of claims. The contract rates were very near those which the company would be entitled to under the rates established by the court in former cases. *Held*, that the court would disregard the slight difference and allow the contract rate. *Chicago, M. & St. P. R. Co. v. United States*, 18 Ct. of Cl. 359.—FOLLOWED IN *Flint & P. M. R. Co. v. United States*, 18 Ct. of Cl. 420.

8. — **claimant's contributory negligence.**—Though the president exercised the authority given to him by the act of January 31, 1862 (12 Stat. at L. 334), in taking possession, to a certain extent, of the claimant's road, and though the officers of the quartermaster department interfered with the claimant's management by compelling them to receive larger quantities of government supplies than the road had terminal facilities for handling and storing, yet if the claimants were guilty of contributory negligence which tended to consummate or increase the injury, they cannot recover from the government the damages they were compelled to pay as common carriers to a third person for delay in the transportation of his grain. It was the duty of a railroad in such a case to make every effort to keep its tracks clear, and failure to show such effect is fatal to a recovery against the government. It is no defense in such a case

that the road had not at the point of delivery sufficient warehouses and terminal facilities to dispose of the freight shipped there. *Illinois C. R. Co. v. United States*, 16 Ct. of Cl. 312.

9. **For goods seized by military forces.**—In 1862 the United States forces captured cotton in Mississippi, a part of which was lost *in transitu* by a railroad, and another part went into the possession of a forwarding house and was never accounted for. The government neglected to prosecute a claim against either. *Held*, that the government is not liable to the owner for the value; but the claim will be dismissed without prejudice to the equitable interest of the claimant if the government ever recovers. *Terry v. United States*, 8 Ct. of Cl. 277.

Where a claimant proves the capture of his cotton at a certain place, a shipment of all cotton captured at the same time and place upon a railway in the possession of and operated by the military authorities, the arrival of cotton from that vicinity in Nashville, and its transfer from the quartermaster department to a treasury agent, and finally a sale of the cotton thus transferred and an unclaimed fund arising therefrom in the treasury, he is entitled to the legal presumption established by the supreme court in *Crussell's Case*, 7 Ct. of Cl. 276, that the proceeds of his cotton are in the treasury, within the meaning of the abandoned or captured property act, 12 Stat. at L. 820. *Ross v. United States*, 10 Ct. of Cl. 424.

10. **For selling company's rolling stock, etc.**—The offer of the war department in 1865 to turn over the Southern railroads to their owners, with "all rolling stock and material," when complied with and carried into effect must be regarded as a contract. And where material belonging to a road was casually sold after the road had been turned over to the company, an action will lie to recover the money. *Winchester & P. R. Co. v. United States*, 27 Ct. of Cl. 494.

11. **For rebuilding bridges destroyed by military order.**—Where a railroad company assented to the government's rebuilding certain bridges, asserting at the same time that those destroyed by its own military authorities should be rebuilt at its own cost, and only those destroyed by the public enemy at the cost of the company, the assent was in legal effect

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a license which set bounds to the liability of the one party and imposed conditions upon the acts of the other. *Pacific R. Co. v. United States*, 20 Ct. of Cl. 200.

12. For balance of salary unpaid.—Where one statute establishes the salary of the auditor of railroad accounts at \$5000 and another appropriates only \$3600 therefor, and the latter contains no provision repealing acts inconsistent and none declaring that payment of the amounts appropriated shall be in full compensation, it is simply a case of inadequate appropriation, and the officer can recover the difference. *French v. United States*, 16 Ct. of Cl. 419.—**DISTINGUISHING** *Fisher v. United States*, 15 Ct. of Cl. 323.

13. Rights of purchasers at foreclosure sale.—Whether an accrued claim against the United States passes to the purchaser of all assets and franchises of an insolvent railroad company under a decree of foreclosure of a mortgage, notwithstanding the provisions of U. S. Rev. St. § 3477, making void all assignments of claims against the United States, before the issuance of a warrant for payment, *quere*. *St. Paul & D. R. Co. v. United States*, 18 Ct. of Cl. 405.

14. Department in which claim must be prosecuted.—The war department is the proper department for a claim for railroad supplies furnished to the army. If the claim remains in the war department, and is neither allowed nor transmitted to the accounting officers, the secretary of the treasury cannot refer it. *Alexandria, L. & H. R. Co. v. United States*, 26 Ct. of Cl. 327.

15. Limitation of time in which to prosecute.—Where a claim is referred to this court under U. S. Rev. St. § 1063, it must appear that it was presented to the proper department within six years, or it will be barred by the statute of limitations. *Alexandria, L. & H. R. Co. v. United States*, 26 Ct. of Cl. 327.

An action may be maintained against the government upon a treasury draft issued in payment of an account audited and certified at the treasury, notwithstanding that the original cause of action is barred by the statute of limitations. *Buffalo Bayou, B. & C. R. Co. v. United States*, 16 Ct. of Cl. 238.

The purpose of the act of February 26, 1853 (U. S. Rev. St. § 3477), is not to protect individuals nor to regulate the business

transactions of private persons, but to prevent frauds upon the treasury, and it is in the nature of a statute of frauds. *Buffalo Bayou, B. & C. R. Co. v. United States*, 16 Ct. of Cl. 238.

Courts cannot enforce assignments or powers which the statute of limitations declares void. But if a government creditor voluntarily gives such an assignment or power, and the officers of the treasury treat it as valid and pay the debt to the person named therein, the parties would thereby take the instrument out of the operation of the statute, and courts must then deal with it as if no such statute existed. *Buffalo Bayou, B. & C. R. Co. v. United States*, 16 Ct. of Cl. 238.

16. Examination of officers of claimant company.—The provision of U. S. Rev. St. § 1080, authorizing this court to make an order "directing any claimant * * * to appear * * * and be examined," extends to railroad corporations claimant, and they may be required to produce their officers for examination in the same manner and to the same extent as under a bill of discovery. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 1.

CLASSIFICATION.

Of freights, see CHARGES, 37, 38, 51; INTERSTATE COMMERCE, 44, 72-86, 130.
— mail carriers, see CARRIAGE OF MAILS, 2.
— passengers, see CARRIAGE OF PASSENGERS, 72.

CLOAK ROOMS.

Deposits of parcels in, liability, etc., see BAGGAGE, 128-131.

CLOUD ON TITLE.

Quieting title to lands granted by government, see LAND GRANTS, 80.

1. Right to bring suit to quiet title, generally.—The general rule in equity is that a bill to quiet title cannot be maintained without proof both of the legal title and possession in the complainant; but this rule does not apply to a land-grant railroad company where all the conditions of the grant have been complied with, the land earned, and become taxable to the grantee in the state where it is situate; where the grantee's equity has become per-

fect, and nothing remains to be done except the conveyance of the dry, legal title, which the grantee is powerless to compel the government to make. *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 263.

Plaintiff filed a bill to have a mortgage canceled, as a cloud on title to his land, and alleged that through the fraudulent representations of the defendant company and its agents he was induced to execute a note for a subscription to the stock of the company and secure it by a mortgage. *Held*, sufficient to show good ground for equitable interference; but where it appears that the note and mortgage have been transferred to a city that had issued bonds in aid of the railroad, as an indemnity or collateral security, the court will not decree that the city deliver up the note and mortgage to be canceled on the mere allegation that the city bonds are invalid, unless the holders of the bonds be made parties. *Burhop v. Milwaukee*, 18 Wis. 431.

2. — where party is in pari delicto.—Where the directors of a company enter into a contract for the construction of the road, and in pursuance of the contract execute a mortgage on its property, and the contract is declared void by reason of some of the directors being contractors, the company itself will be deemed a party to the fraud, and cannot maintain a bill to have the mortgage canceled as a cloud upon its title. *Lewis v. Meier, & McCrary (U. S.)* 286, 14 Fed. Rep. 311.—**QUOTING Philadelphia, W. & B. R. Co. v. Quigley**, 21 How. (U. S.) 202.

3. Laches.—Where a land-grant railroad company files a bill to remove a cloud from the title to a portion of its lands it cannot be charged with laches with respect to the time between the date of the grant and the time of complete performance of the conditions imposed, as the title is not perfected so that a suit could be maintained before the conditions are complied with. *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 263.

4. Limitation of time in which to sue.—Where a land-grant railroad company files a bill to remove a cloud from the title to a portion of its lands, the statute of limitations does not run against the company between the time that its inchoate title attaches and the time of conveying the legal title by the general government. During that time the United States has such an interest, though not a party to the suit, as to

prevent the running of the statute. *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 263.—**FOLLOWING United States v. Curtner**, 38 Fed. Rep. 1.

5. Sufficiency of bill.—A bill filed by a land-grant railroad company to quiet title charged that the United States had full title at the time complainant's grant attached, and that the defendant claimed under a state patent as certain indemnity lands which the state claimed under a grant from the general government. *Held*, sufficient to show a cloud upon the title, though there was no averment that the lands had been listed to the state. *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 263.

6. Questions of fact.—In a suit against a railroad company to quiet title, where it was a material question whether the company had a valid easement in the land, depending upon whether the entry upon said land by the company and the construction of the roadway were with the knowledge and consent of the owner, and the owner testified that he objected to and protested against the entry, which statement was not denied by the defendant, it was error in the court to take the case from the jury and direct a verdict for the company. *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. Rep. 419.

7. Decree.—The evidence in this case shows that before plaintiff's road was built over defendant's land defendant promised that he would give the right of way therefor. While the road was not located relying upon this particular grant of right of way, it appears that the securing of the right of way generally was a condition to its location. *Held*, that a decree quieting the title thereof in plaintiff was justified by the facts. *Cherokee & D. R. Co. v. Renken*, 77 Iowa 316, 42 N. W. Rep. 307.

8. Matters adjudicated.—In an action against a company to quiet title to land used as a right of way, an easement claimed by the defendant will be cut off by a decree in the plaintiff's favor, unless it be set up and protected by the decree; and the right to use the land as a right of way, and all damages, prospective or otherwise, arising from the appropriation of the land by the company, may be adjudicated in the one action. *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308, 12 West. Rep. 910, 15 N. E. Rep. 451.—**FOLLOWING Indiana, B. & W. R. Co. v. Allen**, 113 Ind. 581.

C. O. D.

- Duty of carrier to collect price, see **CARRIAGE OF MERCHANDISE, 270.**
 Liability for loss of C. O. D. goods, see **CARRIAGE OF MERCHANDISE, 33; EXPRESS COMPANIES, 52.**
 Notice to consignor of consignee's refusal to receive goods, see **CARRIAGE OF MERCHANDISE, 242, 308.**

COAL.

- Carrier not bound to furnish cars for, until mined, see **CARRIAGE OF MERCHANDISE, 56.**
 Discrimination as to receiving and delivering, rates on, etc., see **DISCRIMINATION, 31-52.**
 Duty of lessee to pay for waste coal, see **LEASES, ETC., 77.**
 Extra charge for handling, see **CHARGES, 66.**
 Freight rates on anthracite, see **INTERSTATE COMMERCE, 48.**
 Tax on coal mined in one state to be shipped to another, see **INTERSTATE COMMERCE, 207.**
 Transportation of, when deemed a public use, see **EMINENT DOMAIN, 188.**

COIN.

- Allowing premium as damages for loss of, see **CARRIAGE OF MERCHANDISE, 759.**
 When payment must be made in, see **PAYMENT, 4.**

COLLATERAL ATTACK.

- On charters, see **CHARTERS, 85.**
 — condemnation proceedings, see **EMINENT DOMAIN, 864-866.**
 — letters of administration, see **EXECUTORS AND ADMINISTRATORS, 3.**
 — petition, in municipal aid proceedings, see **MUNICIPAL AND LOCAL AID, 98.**
 Forfeiture not enforced on, see **DISSOLUTION, 21.**
 Upon election of directors, see **DIRECTORS, 12.**
 — judgments, see **JUDGMENT, 32-36.**
 — validity of consolidation, see **CONSOLIDATION, 14.**

COLLATERAL SECURITY.

See **PLEDGE.**

COLLECTION.

- By express companies, see **EXPRESS COMPANIES, 16-21.**

- Of railway fares, see **TICKETS AND FARES, 117-129.**
 — taxes, see **TAXATION, VIII.**
 — tolls by distress, see **DISTRESS, 2.**

COLLECTOR OF CUSTOMS.

- Powers, duties, and liabilities of, see **REVENUE, 2.**

COLLISIONS.

- Actual, necessity of, to give right of action for personal injury, see **TRESPASSERS, INJURIES TO, 32.**
 Application of the doctrine of comparative negligence to cases of death caused by, see **COMPARATIVE NEGLIGENCE, 9.**
 At crossings of other railroads, see **CARRIAGE OF PASSENGERS, 212.**
 Between cable-cars and other vehicles, see **CABLE RAILWAYS, 15.**
 — street-cars and teams, or other objects, see **STREET RAILWAYS, 357, 358, 458, 473-475.**
 — train and animal killed, alleging in complaint, see **ANIMALS, INJURIES TO, 338.**
 — — — — necessity of, to warrant recovery, see **ANIMALS, INJURIES TO, 73-81, 135.**
 Contributory negligence in endeavoring to avoid, see **DEATH BY WRONGFUL ACT, 187.**
 Jumping from moving car to escape, see **CARRIAGE OF PASSENGERS, 439.**
 On elevated railway during blizzard, see **ELEVATED RAILWAYS, 206.**
 Riding in baggage-car at time of, see **CARRIAGE OF PASSENGERS, 497.**
 With animals at crossings, see **ANIMALS, INJURIES TO, 196-198.**
 — evidence to prove, see **ANIMALS, INJURIES TO, 456.**
 — baggage-trucks, see **CARRIAGE OF PASSENGERS, 277.**
 — bridge piers, see **BRIDGES, ETC., 49.**
 — cattle on track, see **CARRIAGE OF PASSENGERS, 211.**
 — object near track—arm out of window, see **CARRIAGE OF PASSENGERS, 485-493.**
 — trolley cars, see **ELECTRIC RAILWAYS, 28.**

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I. IN GENERAL.

1. Validity and effect of statutes.

—The Ohio act of 1860 (1 Swan & C. 372 a), entitled "An act to prevent collisions on railroads within the state of Ohio," is a valid exercise of the power of prescribing reasonable regulations to prevent collisions at railroad crossings. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604, 16 Am. Ry. Rep. 291.

Companies are responsible for accidents or collisions on their roads, unless they can show that the precautions prescribed by §§ 1167, 1168 of the Tennessee Code were complied with. *Louisville & N. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45.—QUOTED IN East Tenn., V. & G. R. Co. v. Rush, 15 Lea (Tenn.) 145.

2. Recovery by one company against the other.—Where a collision between the plaintiff's train and the defendant's train occurred on a track used by them in common, whilst the plaintiff or its agent was engaged in the violation of a valid city ordinance limiting the rate of speed in the running of trains in the city, and the jury believed from the evidence that the collision would not have occurred but for such violation, the plaintiff could not recover, it not appearing that the defendant could have avoided the consequences of the plaintiff's negligence after becoming aware of the same. *Central R. & B. Co. v. Brunswick & W. R. Co.*, 87 Ga. 386, 13 S. E. Rep. 520.

II. INJURIES TO PASSENGERS.*

1. Collisions Between Trains.†

3. Negligence of the companies.—

(1) *Generally.*—Where the jury found that while the train on which plaintiff was being carried was ascending a steep grade a number of cars, including the caboose, in which the plaintiff and others were seated, became detached from the engine and the forward part of the train, and the detached cars, running backwards, came into collision with the engine on an advancing train, which was following the forward train at an interval of only eight minutes, and which could not be seen from the forward train, it cannot be said, as a matter of law, that the

railroad company was exercising due care in running trains up a steep grade, on a curved track, where one train could not be seen from the other, without a greater interval between them. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869.

A company is chargeable with gross negligence in wrecking a passenger car, on the main track, by another train which the conductor knew was approaching, whether the wrecking be due to a failure on the part of the conductor to warn the men on the approaching train or their failure to stop after being warned. *Louisville & N. R. Co. v. Long*, (Ky.) 22 S. W. Rep. 747.

A regulation requiring hand-cars to send out flagmen when they were in a dangerous position would not make a failure to send out the flagmen negligence, if the danger was caused by the failure of an approaching train to slacken its speed and give the signals. *International & G. N. R. Co. v. Gray*, 27 Am. & Eng. R. Cas. 318, 65 Tex. 32.

It is culpable negligence for a company to leave a freight car on a side-track in such a position as to make a collision with an incoming passenger train inevitable. *Farlow v. Kelly*, 11 Am. & Eng. R. Cas. 104, 108 U. S. 288, 2 Sup. Ct. Rep. 555.

(2) *Illustrations.*—An engine was left in the evening with fires banked in charge of an employé, on a siding, two tracks off the main track. It was the duty of the employé to remain in charge all night, but about one o'clock at night he left the engine, and in some way unexplained it was run on the main track, put in motion, and collided with a passenger train about a half mile distant, and injured a passenger. *Held*, that there was not sufficient proof of negligence to make the company liable. *Mars v. Delaware & H. Canal Co.*, 54 Hun (N. Y.) 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107. —FOLLOWING Carpenter v. Boston & A. R. Co., 24 Hun (N. Y.) 108.

Defendant was employed by the government to carry prisoners and their guards. Plaintiff was injured by a collision while riding on a car platform, where he was stationed as a guard. *Held*, that the company was liable for the injury, and it could not claim exemption on the ground that it was but an agent of the government. *Truex v. Erie R. Co.*, 4 Lans. (N. Y.) 198.

The engineer of a locomotive, through whose negligence a collision is about to oc-

* Consult also title CARRIAGE OF PASSENGERS.
† Collision between two conveyances. Right of passenger to recover, see note, 2 AM. & ENG. R. CAS. 180.

cur, may perhaps, in any criminal aspect of the case, be justified in leaping from the engine to save himself from death or great bodily harm, even though in so doing he puts in jeopardy the lives of others. So held, in an action by a passenger injured in a collision. *Bunting v. Hogsett*, 48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31.

But nevertheless the engineer or his employer may be held responsible for an injury which resulted from his primary act of negligence, and was rendered possible by his leaping from the engine and submitting it without control to the consequences of the collision. *Bunting v. Hogsett*, 48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31.

(3) *Damages*.—Exemplary damages should not be awarded to a passenger for an injury caused by a collision, unless the collision resulted from wilful misconduct. *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 6 Am. Ry. Rep. 512.

And a verdict for \$10,000 is excessive where there was no bad motive or purpose to injure, and the neglect was not so wanton as to demand the severest punishment. *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. Rep. 357.

A theatrical manager purchased tickets over a railroad, at the terminus of which the troupe were to take a train on a connecting road. A collision occurred on the first road, and plaintiff and his troupe failed to reach their destination in time for the performance, and were compelled to refund \$288 for theatre tickets that had already been sold. Plaintiff did not notify the company of his engagement until at the point of delay, late at night, and then by telegraph; but it did not appear that the telegram was received in time to avoid the delay. Held, that the damages resulting from a failure to keep the engagement were too remote to be recovered. *Georgia R. Co. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274.

4. Where two railroads cross.*—Where trains move upon intersecting lines of railroad the persons in control of them must exercise a proper lookout for the approach of another train, and must also have their own train under proper control, so that it can be promptly stopped. The facts in this case show that defendant's employees were guilty of negligence in this respect. *Kansas City, Ft. S. & M. R. Co. v. Stinner*,

52 Am. & Eng. R. Cas. 462, 51 Fed. Rep. 649, 2 C. C. A. 437.

The duty of an engineer is not fully performed by merely bringing his train to a stop at a stopping-board before reaching a railway crossing. It is his duty to observe the track he is about to cross, to ascertain whether there are any trains on it with which he would be liable to collide, and, even if he had the right of way, yet if he saw that a train upon the other road had passed its stopping-board without stopping, or was approaching it at such a rate of speed as to indicate that it would not stop, and hence that there would be danger of a collision in case he proceeded, he would not be justified in doing so, if he could stop his train before reaching the crossing. *Pratt v. Chicago, M. & St. P. R. Co.*, 38 Minn. 455, 38 N. W. Rep. 356.

It is the safety of passengers depends on it, it is the duty of the carrier, at crossings of railways, to send persons ahead to scan the track to see whether other trains are approaching. *West Chicago St. R. Co. v. Martin*, 47 Ill. App. 610.

A passenger on one road may recover for injuries by another road, where the tracks cross, caused by negligently backing its cars against the one in which the passenger is, regardless of whether the company carrying him is itself free from negligence or not. *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 21 Am. & Eng. R. Cas. 478, 98 Ind. 186.

Defendants' railway crossed the track of another on the level, and both were bound by statute to stop at least a minute before crossing, but neither did so. Defendants' line was signaled as clear, and their train, in which plaintiff was a passenger, went on without stopping. The other line was signaled as not clear, but the train on it ran on, disregarding this signal, and struck the defendants' train at the crossing, whereby the plaintiff was injured. If either train had pulled up about two seconds sooner the collision would have been avoided. Held, that the defendants were liable to the plaintiff, for that their neglect to stop the required time was, so far as the plaintiff was concerned, a part of the cause of his injury and sufficiently proximate. *Graham v. Great Western R. Co.*, 41 U. C. Q. B. 324.

The Central I. R. Co. stopped one of its trains at M. junction, and, for convenience in transferring baggage, the baggage-car was stopped in front of the baggage-room of the

* See also post, 30.

depot, so that the rear passenger car was left standing over a cross-track of the Chicago, M. & St. P. R. Co.; and in moving certain freight cars out of the way of an engine the employés of the latter road pushed the cars on the cross-track, and some of them, being heavily loaded, broke loose and ran down the grade into the passenger car of the Central, threw it from the track, turned it over, and fatally injured a passenger therein. *Held*, that the Central Co. was guilty of negligence. *Kellow v. Central Iowa R. Co.*, 21 *Am. & Eng. R. Cas.* 485, 68 *Iowa* 470, 23 *N. W. Rep.* 740, 27 *N. W. Rep.* 466.

5. Which company responsible for the collision, generally.—A company allowing third persons to use its spur-track and cars to be loaded with coal for transportation over its road is liable for their negligence in leaving the loaded cars too near its main track, whereby a collision with a moving train is caused. *Georgia Pac. R. Co. v. Underwood*, 44 *Am. & Eng. R. Cas.* 367, 90 *Ala.* 49, 8 *So. Rep.* 116.

A company is not responsible to a passenger injured in a collision brought about by the negligence of the servants of another company, which has statutory running powers over the line of the first company. *Wright v. Midland R. Co.*, 42 *L. J. Ex.* 89, *L. R.* 8 *Ex.* 137, 21 *W. R.* 460, 29 *L. T.* 436.

6. Joint and several liability of both companies.*—Where the negligence of two railway companies concurs in producing a collision in which a passenger is injured, a joint action may be maintained against both. *Colegrove v. New York & N. H. R. Co.*, 20 *N. Y.* 492; *affirming* 6 *Duer* 382.—APPLIED IN *Busch v. Buffalo Creek R. Co.*, 29 *Hun* (N. Y.) 112; *Schmidt v. Steinway & H. P. R. Co.*, 55 *Hun* (N. Y.) 496, 29 *N. Y. S. R.* 201, 8 *N. Y. Supp.* 664, 9 *N. Y. Supp.* 939; *Mott v. Hudson River R. Co.*, 8 *Bosw.* (N. Y.) 345. APPROVED IN *Covington Transfer Co. v. Kelley*, 36 *Ohio St.* 86. DISAPPROVED IN *Lockhart v. Lichtenhaier*, 46 *Pa. St.* 151. DISTINGUISHED IN *Quinn v. Illinois C. R. Co.*, 51 *Ill.* 495; *Callahan v. Sharp*, 27 *Hun* (N. Y.) 85. FOLLOWED IN *Brown v. New York C. R.*

Co., 32 *N. Y.* 597; *Webster v. Hudson River R. Co.*, 38 *N. Y.* 260. NOT FOLLOWED IN *Mooney v. Hudson River R. Co.*, 5 *Robt.* (N. Y.) 548. QUOTED IN *Willis v. Long Island R. Co.*, 34 *N. Y.* 670. REVIEWED IN *The Bernina*, 12 *P. D.* 58.—*Wabash, St. L. & P. R. Co. v. Shacklet*, 12 *Am. & Eng. R. Cas.* 106, 105 *Ill.* 364.

Even though there be no concert of action between the companies. *Flaherty v. Minneapolis & St. L. R. Co.*, 39 *Minn.* 328, 40 *N. W. Rep.* 160, 1 *L. R. A.* 680.

A passenger injured by a collision at the crossing of the tracks of two companies may recover full compensation from either company found to be negligent. The company against which a recovery is had cannot complain although the other company may also have been in fault. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 52 *Am. & Eng. R. Cas.* 462, 51 *Fed. Rep.* 649, 2 *C. C. A.* 437.

If the negligence of two railroads concurs in producing a collision and injuring a passenger where their tracks cross, each company is liable for the full damages. Each company is bound to the same degree of care; hence it is proper for the court to refuse an instruction, at the instance of one, defining the duty of the other in approaching the crossing, and making it liable if it failed to discharge the duty. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 49 *Fed. Rep.* 209, 4 *U. S. App.* 109, 1 *C. C. A.* 231.

7. Passenger's contributory negligence, generally.*—A passenger lawfully riding in the post-office department of a baggage-car at the time of a collision may recover for injuries received, where it appears that his being there did not act directly or even remotely in producing the collision. *Carroll v. New York & N. H. R. Co.*, 1 *Duer* (N. Y.) 571.—DISTINGUISHED IN *Lehey v. Hudson River R. Co.*, 4 *Robt.* (N. Y.) 204. REVIEWED IN *Baltimore & O. R. Co. v. State*, 41 *Am. & Eng. R. Cas.* 126, 72 *Md.* 36; *Huelsenkamp v. Citizens' R. Co.*, 37 *Mo.* 537.

A passenger is not bound to select a seat with a view of diminishing the hazards of the journey; and any indiscretion in select-

* Right of one injured through concurrent negligence of two carriers to maintain joint action against both, see note, 38 *AM. REP.* 514.

Collision of trains of different roads. When both companies are jointly liable, see note, 75 *AM. DEC.* 419.

* See also *post*, 23, 35, 36. See also COMPARATIVE NEGLIGENCE, 9.

Negligence of train-hands cannot be imputed to passenger who is injured by collision between trains of different roads, see note, 54 *AM. REP.* 135.

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ing it will not relieve the company from liability where he is injured in a collision caused by the gross negligence of the company. So *held*, where a passenger was injured while lawfully riding in a baggage-car, though it appeared that he might not have been injured if he had been in the passenger car. *Carroll v. New York & N. H. R. Co.*, 1 *Duer* (N. Y.) 571.

If a person who has boarded a train goes from one car to another whilst it is in motion for the purpose of finding a seat, although he takes all risks which are obvious or are incident to the motion of the train, he does not take the risk of a collision with a locomotive, engine, or other train. *Dewire v. Boston & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 57, 148 *Mass.* 343, 19 *N. E. Rep.* 523, 2 *L. R. A.* 166.

A passenger who sees a train on an intersecting road approaching a crossing is not guilty of contributory negligence because he fails to pull the bell-rope and warn the engineer. *Grand Rapids & I. R. Co. v. Ellison*, 117 *Ind.* 234, 39 *Am. & Eng. R. Cas.* 480, 20 *N. E. Rep.* 135.

If a passenger leaps from a moving car and is injured, in an attempt to avoid an impending collision, he is not chargeable with contributory negligence if he acted as a person of ordinary prudence would have done. *Twomey v. Central Park, N. & E. R. R. Co.*, 69 *N. Y.* 158, 18 *Am. Ry. Rep.* 113. *Burl v. New York C. R. Co.*, 31 *N. Y.* 314.

The fact that a person injured was riding in the baggage-car, with the knowledge of the conductor, or that he was riding free, will not preclude him from a recovery for an injury caused by a collision. *Washburn v. Nashville & C. R. Co.*, 3 *Head* (Tenn.) 638.

8. — must be proximate cause.—Where a passenger sues to recover for an injury caused by a collision, an answer is not sufficient that sets up that the passenger was at the time of the accident standing upon the car platform contrary to a known rule of the company, and that it was dangerous to stand upon the car platform while the train was in motion; it should also appear that such disobedience was the proximate cause of the injury. *Lafayette & I. R. Co. v. Sims*, 27 *Ind.* 59.—QUOTED IN *Stoner v. Pennsylvania Co.*, 98 *Ind.* 384.

9. — and is a question of fact.—A passenger sued for personal injuries received in a collision. It appeared that before reaching his destination plaintiff had stood

for some time near the open front door of the car, and when the collision occurred he was thrown through the door and injured. *Held*, that the question of his contributory negligence was properly submitted to the jury. *Worthen v. Grand Trunk R. Co.*, 125 *Mass.* 99.

In going over a long bridge plaintiff, a passenger, stood on a car platform, when the train parted, and the engine with the cars attached ran across the bridge before stopping, and the rear portion, running by its own momentum, collided therewith and injured plaintiff. Notices were posted in the cars forbidding passengers to ride on the platform, but plaintiff claimed that he had not noticed them. *Held*, that the question of plaintiff's contributory negligence was properly submitted to the jury, and a verdict in his favor would not be disturbed. *Goodrich v. Pennsylvania & N. Y. C. & R. Co.*, 29 *Hun* (N. Y.) 50.—QUOTING *Nolan v. Brooklyn City & N. R. Co.*, 87 *N. Y.* 63. *REVIEWING Clark v. Eighth Ave. R. Co.*, 36 *N. Y.* 135; *Ginna v. Second Ave. R. Co.*, 67 *N. Y.* 596; *Ward v. Central Park, N. & E. R. R. Co.*, 11 *Abb. Pr. N. S.* 411; *Solomon v. Central Park, N. & E. R. R. Co.*, 1 *Sweeney* 298; *Robertson v. New York & E. R. Co.*, 22 *Barb.* 91; *Willis v. Long Island R. Co.*, 34 *N. Y.* 670.

10. Pleading—Declaration—Complaint.—Declaration in case stated that the plaintiff, being pregnant, at the request of defendants became a passenger in one of their carriages, to be safely conveyed by them for reward; that the defendants received her as such passenger, and it was their duty to use due care in conveying her; yet the defendants, not regarding, etc., so negligently conducted themselves that a collision took place with another train, by means whereof the carriage in which the plaintiff rode was broken, etc., and thereby the plaintiff was much affrighted and alarmed, whereby she became sick, sore, and disordered, and so continued from thence hitherto; and thereby also, by reason of the terror and alarm occasioned to her by the said collision, and of such sickness caused thereby, she had a premature labor and bore a still-born child. *Held*, on demurrer, that a sufficient cause of action was disclosed. *Fitzpatrick v. Great Western R. Co.*, 12 *U. C. Q. B.* 645.

Where a passenger sues for injuries received in a collision, a complaint charging

that the company ran its train "with carelessness and with gross negligence" sufficiently charges negligence. *Ohio & M. R. Co. v. Davis*, 23 Ind. 553.

A complaint by a passenger of a company against a different company for an injury resulting from a collision at a crossing caused by the careless backing of a train of the latter into the car occupied by the plaintiff is good, without averring that the company carrying the plaintiff was without fault. *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 21 Am. & Eng. R. Cas. 478, 98 Ind. 186.

11. Admissibility of evidence.—Where a passenger sues for being injured in a collision, and the company admits negligence, and only puts in issue the amount of damages, it is proper for plaintiff to prove the speed of the train at the time of the injury, for the purpose of showing the violence of his fall or the extent of the injuries. *Gillispie v. Coney Island & B. R. Co.*, 41 N. Y. S. R. 97, 16 N. Y. Supp. 850.

Plaintiff sued for an injury received in a collision at or near a station, and testified that the train had been racing with another train, for the purpose of showing that it was running at an unusual rate. Held, that it was proper for the company then to ask a witness whether or not the train approached the station at the usual speed. *Worthen v. Grand Trunk R. Co.*, 125 Mass. 99.

Under a general charge of negligence in the running and operation of defendant's cars, whereby an injury was received by a collision of cars, evidence of the structure and condition of the colliding car, and of the fact that it was not supplied with a sand-box or appliance which would have made it more easy to slacken or arrest its progress on a descending grade, is material and proper, as bearing on the question of the manner in which it should have been run and operated and the character and degree of care with which it should have been managed, although the structure of the car and the want of a sand-box may not be alleged specifically as negligence. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; affirming 41 Ill. App. 311.

In an action for injury from collision evidence may be given that one part of plaintiff's business "was dealing in land, that he had a quantity of land on hand, and to show the value of the business and the profits arising

therefrom." *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47.

12. Presumption and proof of negligence.—An injury to passengers by colliding with cars of another road raises a *prima-facie* presumption of negligence on the part of the carrier, if the passengers were themselves free from negligence. *West Chicago St. R. Co. v. Martin*, 47 Ill. App. 610.

In an action by a passenger to recover damages for an injury by a collision, proof that a collision did take place, and that plaintiff was thereby injured, is *prima-facie* evidence of want of skill on the part of the company; and it casts the burden on the company to show that its employes were in every respect qualified, and that they acted with reasonable skill and the utmost caution, and that the collision could not have been prevented by any human care or foresight. *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869. *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135. *Iron R. Co. v. Mowery*, 3 Am. & Eng. R. Cas. 361, 36 Ohio St. 418, 38 Am. Rep. 597.—FOLLOWED IN *Cleveland, C., C. & I. R. Co. v. Walrath*, 8 Am. & Eng. R. Cas. 371, 38 Ohio St. 461, 43 Am. Rep. 433.—*Delaware, L. & W. R. Co. v. Napheys*, 1 Am. & Eng. R. Cas. 52, 90 Pa. St. 135.

Proof of a collision of trains of independent companies in daylight, where their tracks cross, raises a presumption of negligence on the part of one or both; and where a passenger is injured and sues for damages, it is proper to refuse an instruction that such presumption does not apply to one of the companies. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 49 Fed. Rep. 209, 4 U. S. App. 109, 1 C. C. A. 231.

13. Rebutting the presumption.—In a collision case the fact that a bell was rung and a light was carried on the top of the rear end of the train was not sufficient to acquit the defendant of the charge of negligence. *Weber v. New York C. & H. R. R. Co.*, 67 N. Y. 587.

A passenger was injured by a collision of the train in which he was riding with two loaded coal cars. On the morning of the day of the accident the coal cars had been left on a side-track at a distance of about two miles from the place of collision. The cars were properly braked, and a throw-off

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switch, which would have derailed the cars if left undisturbed, was left open so as to throw the cars from the track if they were moved. The cars remained in this condition during the day. Late in the afternoon a boy got upon the cars, loosed the brake by hammering it with a coupling-pin, and closed the throw-off switch. The cars ran down the siding onto the main line and collided with the train on which plaintiff was riding. It appeared from the evidence that there was another throw-off switch nearer the main line, but that this had not been opened by defendant. It also appeared that there were no locks on either switch. *Held*, that the evidence was sufficient to rebut the presumption of negligence, and that a verdict for the company should be sustained. *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103, 27 Atl. Rep. 689.—APPLYING Pennsylvania R. Co. v. MacKinney, 124 Pa. St. 462; *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 180. FOLLOWING *Deyo v. New York C. R. Co.*, 34 N. Y. 9. REVIEWING *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *Latch v. Rumner R. Co.*, 3 H. & N. 930.

14. Burden of proof.*—Proof of the collision, when a passenger sues for injuries caused by it, imposes on the company the burden of proving that it did not occur by reason of any failure to exercise the care and diligence required of carriers of passengers. *Graham v. Burlington, C. R. & N. R. Co.*, 34 Am. & Eng. R. Cas. 397, 39 Minn. 81, 38 N. W. Rep. 812. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869. *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135. *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242. *Delaware, L. & W. R. Co. v. Napheys*, 1 Am. & Eng. R. Cas. 52, 90 Pa. St. 135.

15. Sufficiency and effect of evidence, generally.—It was negligence of the grossest character, and for which the company must be held responsible, that the engine driver in charge of the train refused and neglected to stop his train, against repeated signals by persons warning him of the approaching danger, when he might have done so, and thereby avoided such collision. *Pittsburg, Ft. W. & C. R. Co. v. Bumstead*, 48 Ill. 221.

In an action to recover for personal in-

juries to a passenger caused by a collision of two trains, there being evidence that the accident occurred through the negligence of the railroad company, and that the plaintiff used due care to prevent accident, judgment for plaintiff will be affirmed. *Chicago, B. & Q. R. Co. v. Dickson*, 42 Ill. App. 363.

The evidence showing, among other things, that a rescuing engine with a snow-plow approached a stalled train during a snowstorm without slackening speed, and ran into such train, killing a passenger in the rear car thereof, is held sufficient to go to the jury on the question of the gross negligence of the employes of the company, even though a finding that the men on the engine could have seen the stalled train in time to have stopped might not be warranted by the evidence. *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 30 N. W. Rep. 282, 57 Am. Rep. 388, n.

16. — to demand submission of case to the jury.—In an action to recover damages for personal injuries to plaintiff, a passenger on defendant's road, caused by a collision of the train with a freight car which had been moved by the wind from a side-track onto the main track, defendant's evidence was to the effect that when the freight car was placed on the side-track it was secured by setting the brakes. Plaintiff gave evidence tending to show that, if the brakes had been properly set, such a wind as there was prior to the collision would not have moved the car. *Held*, that the question as to whether the car was sufficiently secured was properly submitted to the jury. *Webster v. Rome, W. & O. R. Co.*, 115 N. Y. 112, 21 N. E. Rep. 725, 23 N. Y. S. R. 778; affirming 40 Hun 161.

17. Proper instructions.—A passenger who is injured in a collision may recover, if the jury believe he was without fault himself, though the injury did not occur precisely as he testified; and an instruction substantially stating this as the law is unobjectionable. *Pollard v. New York & N. H. R. Co.*, 7 Bosw. (N. Y.) 437.

Where a suit was brought by a person who was injured by a collision, it was correct in the court to instruct the jury that, if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the ser-

* See also *post*, 22.

vants of the defendants, then and there employed on the road, he was entitled to recover notwithstanding the circumstances that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars. And the fact that the engineer having the control of the colliding locomotive was forbidden to run on that track at the time, and had acted in disobedience of such orders, was no defense to the action. *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.—DISTINGUISHING *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49.—APPLIED IN *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392. CRITICISED IN *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456. DISTINGUISHED IN *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418; *Higley v. Gilmer*, 3 Mont. 90. QUOTED IN *Topeka City R. Co. v. Higgs*, 34 Am. & Eng. R. Cas. 529, 38 Kan. 375; *State v. Western Md. R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110); *Lemon v. Chanslor*, 68 Mo. 340; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Gulf, C. & S. F. R. Co. v. McGown*, 26 Am. & Eng. R. Cas. 274, 65 Tex. 640; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328; *Blackmore v. Toronto St. R. Co.*, 38 U. C. Q. B. 172. REVIEWED IN *Pittsburg, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246.

18. Erroneous instructions.—(1)

Generally.—When a passenger sues for a personal injury caused by a collision, and there is no evidence that the injury was the result of wantonness or wilfulness on the part of the defendant, it is reversible error to charge the jury that plaintiff was entitled to more than actual damages if the defendant should be found guilty of wilful misconduct. *St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300, 11 Am. Ry. Rep. 102.

It was erroneous to charge the jury as follows: "You cannot find from the evidence that the engineer in charge of the engine propelling the defendant's freight train was guilty of negligence," because if it were admitted that the engineer was not guilty, other employes might have been; and whether he was guilty of negligence or not, under these circumstances, was a ques-

tion for the jury. *Birmingham Mineral R. Co. v. Jacobs, (Ala.)* 55 Am. & Eng. R. Cas. 299, 13 So. Rep. 408.

A charge that "the only negligence for which the plaintiff can recover, under the evidence in this case, is the negligence of the conductor in not stopping defendant's freight train before crossing the dummy-track, if the jury believed from the evidence that said freight train did not stop for such crossing," took from the jury the consideration of the negligence, if it existed, of the other employes of the company, and was erroneous, because the negligence of the conductor was not necessarily the only negligence which entitled the plaintiff to recover. *Birmingham Mineral R. Co. v. Jacobs, (Ala.)* 55 Am. & Eng. R. Cas. 299, 13 So. Rep. 408.

In an action for injuries caused by the colliding of two trains of the same company, where there was evidence that the plaintiff received injuries which would entitle him to a recovery, and which, he claimed, caused subsequent sickness, an instruction in such terms that they must infer that plaintiff could not recover unless the sickness which came on two or three days after it was caused by it, is erroneous. *Graham v. Burlington, C. R. & N. R. Co.*, 34 Am. & Eng. R. Cas. 397, 39 Minn. 81, 38 N. W. Rep. 812.

(2) *Misleading.*—Suit for damages for personal injuries suffered in a collision of a passenger train with a water train, the negligence alleged being that the water train was sent out with a conductor and in charge of an inexperienced engineer. The defendant attempted to prove that it was not negligence to send out the water train without a conductor, and that the engineer in charge was sufficiently acquainted with the road. To present these issues a lengthy and intricate charge was given, correct in the main, but so intricate and involved as to confuse and mislead the jury. Such charge is improper. *Gulf, C. & S. F. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. Rep. 556.

The jury should have been instructed that if the plaintiff knew that it was the custom of his employer (the railway company) to run the water train without a conductor, and if an ordinarily prudent man would, under these circumstances, have known that it was dangerous to operate it in that manner, he could not recover on the ground of the failure of the defendant to

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put the train in charge of a conductor. *Gulf, C. & S. F. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. Rep. 556.

(3) *Properly refused*.—A passenger was injured by a collision while still standing up in the car soon after leaving the station. The company introduced evidence to show that passengers from that station were always provided with a car on the side-track, and did not enter the car in which plaintiff was. Plaintiff then testified, which was uncontradicted, that the car he found on the side-track was full, and that he was looking for a seat in the car which he entered when injured. *Held*, that it was proper to refuse to instruct the jury that plaintiff could not recover if a rule of the company made it the duty of plaintiff to take a seat in the car on the side-track, if there was room in such car. *Pollard v. New York & N. H. R. Co.*, 7 Bosw. (N. Y.) 437.

Plaintiff was injured by a rear collision. He testified that he was standing up in the car near the rear door, and when the car was struck was thrown forward nearly to the stove and injured. Several other persons in the car testified that both he and they were thrown forward. The company then introduced witnesses who testified, basing their opinions upon experience and the laws of motion, that plaintiff could not have been thrown forward if his car was struck in the rear. The company asked an instruction to the jury that "if they believed from the evidence that the injury was caused by the car which was coming up being propelled against the car in which he was standing, as testified to by him, then he was not entitled to recover." *Held*, that the instruction was properly refused. *Pollard v. New York & N. H. R. Co.*, 7 Bosw. (N. Y.) 437.

19. Riding on freight train against rules and without paying fare.—One who rides without paying fare in the caboose of a freight train, by invitation or license of the conductor, cannot recover against the company for personal injuries caused by a collision with another train. *Powers v. Boston & M. R. Co.*, 153 Mass. 188, 26 N. E. Rep. 446.

A rule forbidding the carrying of passengers upon freight or construction trains without a pass does not apply only to passengers paying fare, but applies to a former employé riding on a freight train by invita-

tion of the conductor. *Powers v. Boston & M. R. Co.*, 153 Mass. 188, 26 N. E. Rep. 446.

2. Collisions Between Trains and Street-cars.

20. Generally.—In an action against a street-railway company and a railroad company for injuries sustained by reason of a collision between a street-car and a railroad train, it appeared that a flat-car was being backed by an engine about the time the gates at a crossing were being shut, and that the street-car was upon the track, being unable to get off by reason of the closing of the gate. *Held*, that the street-railway company was liable if, before passing on the track, it was apparent to the driver that the gate was down on the further side of the crossing, but that if the flagman of the railroad company saw, or could have seen, the street-car before closing the gate, notwithstanding the negligent conduct of the driver, both companies were liable. *Downey v. Philadelphia & R. R. Co.*, (Pa.) 58 Am. & Eng. R. Cas. 594, 29 Atl. Rep. 126.

21. Railroad and street-car companies are both liable, when.—An action may be maintained against a railroad company and a street-railway company jointly for an injury caused by a collision between a street-car and a railroad train at a grade crossing. *Downey v. Philadelphia & R. R. Co.*, (Pa.) 58 Am. & Eng. R. Cas. 594, 29 Atl. Rep. 126.

Where a train of cars on a steam railroad collides with a street-car at a grade crossing, and a passenger in the street-car is injured, both companies are answerable to the passenger, if they were both negligent, and the passenger may maintain his suit against either. If the collision was the result wholly of the negligence of the street-car company, the railroad company is not liable. *O'Toole v. Pittsburgh & L. E. R. Co.*, 158 Pa. St. 99, 27 Atl. Rep. 737.

A passenger on a street-car was injured through the concurrent negligence of the street-car company and a railroad company. He sued both companies jointly, and the jury returned a verdict against both, with a verdict over for the same amount in favor of the street-car company against the railroad company. *Held*, both being at fault, that one company could not recover from the other. *Texas & P. R. Co. v. Doherty*,

4 *Tex. App. (Civ. Cas.)* 231, 15 *S. W. Rep.* 44.

22. Burden of proof.*—A passenger upon a horse-car having been injured by reason of a collision of the car with a steam-engine at a railway crossing, in an action against both the horse-car company and the steam-car company, charging concurrent negligence, the burden is upon the horse-car company to show proper care and upon the plaintiff to show negligence upon the part of the steam-car company. *Central Pass. R. Co. v. Kuhn*, 32 *Am. & Eng. R. Cas.* 16, 86 *Ky.* 578, 6 *S. W. Rep.* 441.—DISAPPROVING *Curtis v. Rochester & S. R. Co.*, 18 *N. Y.* 534.

23. Passenger's negligence†—Duty to look and listen.—A passenger in a street-car approaching a grade crossing of a railroad is under no obligation to look out and listen for approaching locomotives and to jump off the car in apprehension of a possible collision. *O'Toole v. Pittsburgh & L. E. R. Co.*, 158 *Pa. St.* 99, 27 *All. Rep.* 737.—DISTINGUISHING *Dean v. Pennsylvania R. Co.*, 129 *Pa. St.* 514.

3. Collisions Between Street-cars.

24. Generally.—Where one street-car is approaching a point where the track of another company passes and a car is already on the crossing, the person in charge of the former must so manage his car as to avoid a collision, regardless of the speed of the other. *Chicago City R. Co. v. McLaughlin*, 40 *Ill. App.* 496.

Where the plaintiff's own evidence shows the operation of causes beyond the control of the carrier, as the presence of *vis major* or the tortious acts of a stranger tending to produce the accident, the plaintiff, in order to make out a *prima-facie* case, will generally be obliged to go further and prove the actual concurrence of the negligence of the defendant as an operating and efficient cause, or that by the exercise of due diligence the accident might have been avoided. *Smith v. St. Paul City R. Co.*, 16 *Am. & Eng. R. Cas.* 310, 32 *Minn.* 1, 50 *Am. Rep.* 550, 18 *N. W. Rep.* 827.

Where two street-railroad companies are jointly negligent in producing a collision which injures a passenger, the comparative

degrees of negligence between the two cannot be considered as affecting the liability of either; so when one company is shown to have been negligent the other company cannot complain because the complaint was not dismissed as to it. *Schneider v. Second Ave. R. Co.*, 15 *N. Y. Supp.* 556.

If one injured by a collision of the cars of two street-railroad companies was a passenger of one company and brings his action against the other, he must prove that the latter alone was chargeable with the negligence in consequence of which the injury occurred. *People's Pass. R. Co. v. Lauderbach*, (Pa.) 26 *Am. & Eng. R. Cas.* 166, 3 *Atl. Rep.* 672.

25. Evidence and its sufficiency.—In an action by a passenger of one street-car company against another for injury caused by a collision between both, he must prove negligence against the defendant, not presumption of negligence arising against such carrier from the fact of the injury. The defendant would be entitled to an instruction of this nature, and a general instruction that plaintiff must make out his case by a preponderance of evidence is not equivalent thereto. *Tompkins v. Clay St. Hill R. Co.*, 18 *Am. & Eng. R. Cas.* 144, 66 *Cal.* 163, 4 *Pac. Rep.* 1165.

In an action against a city street-railway company to recover damages for negligently colliding with a horse-car at an intersection of the tracks and thereby causing the death of the plaintiff's intestate, it is competent to show, as bearing on the question of negligence, that defendant's grip-car was not so near the crossing when the horse-car was crossing the cable track as to make it impossible to stop before it came in contact with the horse-car. *Chicago City R. Co. v. McLaughlin*, 146 *Ill.* 353, 34 *N. E. Rep.* 796.

Where two street-car companies are sued jointly to recover for injuries received in a collision, it is error to allow one company to contradict the evidence of the driver of the car of the other by showing contradictory statements; but where such evidence is introduced over the plaintiff's objection it should not affect his recovery. *Schneider v. Second Ave. R. Co.*, 15 *N. Y. Supp.* 556.

Plaintiff proved that the firm in which K., defendant's testator, was a partner was engaged in the brewery business; that the truck had the firm-name on it; that many trucks of the same kind were employed in its business; that the truck was loaded with

* See also *ante*, 14.

† See also *ante*, 7-9.

ale barrels at the time of the accident, and was engaged in delivering ale from the brewery of the firm. *Held*, the evidence was sufficient to authorize a finding that the truck belonged to defendant's firm, and that the driver was in its employ when the truck collided with a street-car. *Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. Rep. 353, 33 N. Y. S. R. 729.

26. Presumption of negligence.—Where the cars of two street-car companies have equal rights at a point where their tracks cross, proof that the rear end of one car is struck by the front end of another, unexplained, raises a presumption of negligence in the management of the colliding car. *Chicago City R. Co. v. McLaughlin*, 40 Ill. App. 496.

Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident; and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of plaintiff's own case. *Smith v. St. Paul City R. Co.*, 16 Am. & Eng. R. Cas. 310, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. Rep. 827.—*QUOTING Scott v. London Dock Co.*, 3 H. & C. 597.

27. Company's negligence is a question of fact.—Where two street railways cross each other at right angles and a collision occurs between cars of the two roads, it appearing from the evidence that the driver or gripman of either car could have seen the approach of the other in time to avoid a collision by stopping his own car, the question of culpable negligence, in either or both, is properly left to the jury. *Kuttner v. Lindell R. Co.*, 29 Mo. App. 502.

Plaintiff, a passenger in one of the cars of defendant, the S. A. R. R. Co., was injured by a collision of the car with one belonging to defendant, the H., W. S. & P. F. R. R. Co., whose track crossed that of the former company. In an action to recover damages plaintiff's evidence was to the effect that the driver of the car in which he was, when within sixty-five feet of the crossing of the two tracks could see the other track west, the direction whence the car thereon was approaching, seventy-five feet from the intersection, and when within forty feet

could see one hundred and forty feet west; he was driving at about six miles an hour. *Held*, that the question as to the negligence of the driver, in not stopping the car, was properly submitted to the jury. *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 30 N. E. Rep. 752, 44 N. Y. S. R. 680; *reversing on other grounds* 27 J. & S. 536, 39 N. Y. S. R. 370, 15 N. Y. Supp. 556.

A passenger was injured while on a street-car by the car on another line, where their tracks crossed, colliding with his. It appeared that the colliding car was on a downgrade and the driver called to the other that his car was unmanageable; but there was evidence showing that a brake was broken through a flaw therein, and that there was a rear brake by which the car might have been stopped had it been applied, if there had been a conductor to do so. *Held*, sufficient proof of negligence on the part of the colliding car to justify a submission to the jury. *Schneider v. Second Ave. R. Co.*, 15 N. Y. Supp. 556, 27 J. & S. 536, 39 N. Y. S. R. 37; *reversed on other grounds* in 133 N. Y. 583, 30 N. E. Rep. 752, 44 N. Y. S. R. 680.

28. Instructions.—Plaintiff sued for damages for an injury resulting from a collision of defendants' car with another car. *Held*, the judge correctly charged the jury, that if they believed there was gross neglect or carelessness or want of skill on the part of the servants of the company, then it was for them to assess the damage, for such an amount as they might deem the circumstances of the case justified. *Varillat v. New Orleans & C. R. Co.*, 10 La. Ann. 88.

III. INJURIES TO EMPLOYEES.*

29. Company's negligence, generally.—Men in charge of a construction train left the rear car across the track of another road, and a special train not running on schedule time collided therewith. *Held*, that those in charge of the construction train were not free from negligence, as they had no occasion to obstruct the track at the time. *Albert v. Sweet*, 42 Am. & Eng. R. Cas. 216, 116 N. Y. 363, 22 N. E. Rep. 762, 26 N. Y. S. R. 738; *affirming* 3 N. Y. S. R. 738. And see also *Fletcher v. Boston & M. R. Co.*, 1 Allen (Mass.) 9.

30. — at the crossing of two railroads.†—A company which fails to stop a

* Consult also title EMPLOYEES, INJURIES TO.

† See also *ante*, 4.

train on approaching a crossing of another road is liable for the death of a brakeman on such other road killed in the ensuing collision, where the deceased was not guilty of contributory negligence. *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 So. Rep. 800.

The plaintiff, a conductor of a Grand T. railway train, was injured while his train was crossing the track of the defendants' railway on a level by the defendants' train running into it. On approaching the crossing the defendants attempted to stop their train by the air-brakes, but, owing to the bursting of a tube, they failed to act, and although every effort was made to stop the train with the hand-brakes and by reversing the engine, a collision occurred. It was shown that these brakes were the best known appliance for stopping trains; that they were in common use on railways; that they had been properly examined and tested during the day; and that the defect arose from no want of care on the part of the defendants. *Held*, that the plaintiff was entitled to recover. *Brown v. Great Western R. Co.*, 2 Ont. App. 64; *affirming* 40 U. C. Q. B. 333.

31. Negligence must be the proximate cause.—The putting of a freight car in motion at a place where men are known to be or where it is known they may be passing, without a brakeman upon it, and without other means of controlling its momentum, is evidence tending to prove negligence; but whether it is sufficient evidence thereof is a question of fact for the jury to determine. It is immaterial when the act of causation of the motion of the freight car was begun. If the company put it in motion before the plaintiff commenced to remove the hand-car, and continued to move it until it struck the plaintiff, the striking was none the less the immediate act of the defendant. *Lake Shore & M. S. R. Co. v. Hundt*, 140 Ill. 525, 30 N. E. Rep. 458; *affirming* 41 Ill. App. 220.

A special train had been sent out without any notice to those in charge of a shifting-engine at a certain station, and the engineer of which, seeing the special approaching and a collision inevitable, jumped from his engine. The collision sent the shifting-engine forward with increased speed unattended, and it ran into another engine and killed a fireman thereon. *Held*, sufficient to justify a finding that the accident

was the direct result of starting the uncontrolled shifting-engine. *Nary v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630, 55 Hun 612, 9 N. Y. Supp. 153; *affirmed* in 125 N. Y. 759, *mem.*, 36 N. Y. S. R. 1010.—*APPLYING* *Lowery v. Manhattan R. Co.*, 99 N. Y. 158. *DISTINGUISHING* *Ryan v. New York C. R. Co.*, 35 N. Y. 210.

32. — and is a question of fact.—In an action to recover damages for alleged negligence, causing the death of W., plaintiff's intestate, it appeared that the death resulted from a collision, in the night time, between a freight train upon which W. was employed as fireman and an engine left standing on defendant's main track, in violation of one of its rules, by its engineer while waiting for orders. There was evidence that said engineer and other engineers had for at least a year been in the habit of frequently disobeying said rule. The complaint was dismissed. *Held*, error; that the question of defendant's negligence should have been submitted to the jury. *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. Rep. 1042, 38 N. Y. S. R. 523; *affirming* 58 Hun 606, 34 N. Y. S. R. 822, 11 N. Y. Supp. 914. And see also *Lake Shore & M. S. R. Co. v. Hundt*, 140 Ill. 525, 30 N. E. Rep. 458; *affirming* 41 Ill. App. 220.

33. Sufficiency of proof of negligence.—In an action by a servant for an injury received while using a hand-car, by running a freight car onto the hand-car, the declaration alleged that the plaintiff was in the act of removing the hand-car when the freight car was switched upon him. The evidence tended to show that the car doing the damage was "kicked" or switched onto the track when the injury was received. *Held*, that there was evidence in support of the charge of negligence. *Lake Shore & M. S. R. Co. v. Hundt*, 140 Ill. 525, 30 N. E. Rep. 458; *affirming* 41 Ill. App. 220.

The mere fact of a collision of trains does not establish a presumption of negligence on the part of the company in favor of its employes, such a presumption existing only in favor of passengers. *Smith v. Missouri Pac. R. Co.*, 113 Mo. 70, 20 S. W. Rep. 896.

The depot agent of one road was also the telegraph operator and flagman of another road which crossed the former. As a train approached on one road and was slowing for a stop, the agent displayed the signal indicating that the track was clear,

and at the moment a train was seen approaching on the other road, which was behind time, but the agent knew when it left the station, seven miles distant. The agent signaled the second train to stop, and then again signaled the first train to proceed. Both trains moved on, and when the danger signal was given to both they were too near to avoid a collision, and an engineer on the second train approaching was killed. *Held*, sufficient to show that it was gross negligence on the part of the agent, under the circumstances, to signal the first train to move on; and it could not be held as a matter of law that the deceased saw the danger signal first given to his train, and if he did he might have been deceived by the second signal to the first train, mistaking it as a signal to his train to move on. *Wood v. New York C. & H. R. R. Co.*, 70 N. Y. 195, 18 Am. Ry. Rep. 548.

In an action by a brakeman against his company for damages resulting from a collision caused by an unattached freight car getting upon and obstructing the main track, where evidence shows that the freight car had been left on a level side-track with brakes properly set; that a train had passed safely about an hour and a quarter before; that the night was dark and stormy, and a violent thunder-storm was raging, with a high wind previous to and at the time of the accident; and the only reasonable inference was that the car was blown onto the main track by the wind—there is not evidence to warrant a finding by the jury that the agent at the depot could have discovered the obstruction in time to avert the collision. *Toner v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 31 N. W. Rep. 104, 33 N. W. Rep. 433.—DISTINGUISHING *Hulehan v. Green Bay, W. & St. P. R. Co.*, 68 Wis. 520.

34. Duty to notify conductor.—Where it is the duty of the conductor of a construction train, under his orders and the general rules of the company, to hold his train until a certain passenger train has passed, it is not necessary to notify the conductor that the passenger train is behind time. *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409.

Where a freight-train running wild is given orders to leave a certain station ahead of a following passenger train, which was

only a few minutes behind and was making up lost time with no limitation as to speed, common prudence requires that it should be made certain that the conductor of the passenger train should have, before he left the station, an order in writing notifying him of the condition of the preceding freight, and the time when it left, and specially directing him to look out for this train and restrain the speed of his own train. The jury having found that the failure to give this order was culpable negligence, the court will not disturb their verdict. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425.

35. Employee's contributory negligence.—An engineer who was killed in a collision at a railway crossing had a right to rely upon the performance by those in charge of the other train of every act imposed on them by law; and where the statute required them to stop within 100 feet of the crossing, it was proper to presume that they would do so. In an action for damages on account of the death of plaintiff's intestate, negligence cannot be imputed to the deceased on account of his failure to anticipate culpable negligence on the part of defendant's employes, but it was the duty of the deceased to look out for an approaching train, notwithstanding his train had the right of way by law, and it was culpable negligence in the defendant's employes not to accord it to him, and notwithstanding he might presume they would not violate their legal obligation. He could not indulge a presumption that the other company would comply with the law, where the facts reasonably indicated that they would not. *Birmingham Mineral R. Co. v. Jacobs*, (Ala.) 55 Am. & Eng. R. Cas. 299, 13 So. Rep. 408.

The rule that an engineer in charge of an engine propelling a passenger train should exercise more care than an engineer in charge of an engine propelling a freight train has no application to this case, and cases of this character, if ever true. *Birmingham Mineral R. Co. v. Jacobs*, (Ala.) 55 Am. & Eng. R. Cas. 299, 13 So. Rep. 408.

If the theory of the plaintiff is correct, the facts to sustain which the jury found to be proved, he was not chargeable with negligence in not avoiding the collision which caused the injury, from the fact that in approaching a station three miles from the place of the collision his train (he being en-

gineer) was running at a rate of speed so high that the train was not then under his control, no accident having occurred there, and it not appearing that the collision occurred by reason of the speed at which the train was then running. *Georgia Pac. R. Co. v. Bowers*, 86 Ga. 22, 12 S. E. Rep. 182.

A compliance with the duty of giving the statutory signals before crossing another road will not relieve an engineer from the duty of keeping his train under such control as to enable him to stop it in time to avoid a collision with another train at the crossing; and his failure so to do is not excused by reason of the greater rate of speed at which the other train is being run, which constitutes the only difference in the negligent conduct of the two engineers. *Kelly v. Duluth, S. S. & A. R. Co.*, 92 Mich. 19, 52 N. W. Rep. 81.

The freight train had been ordered to run into the yard at the station where the accident happened ahead of the schedule time, and was running at the time from seven to ten miles an hour; the night was dark and foggy; the engineer of the engine drawing the train testified that he gave the usual signal of the train's approach by a sharp whistle about a half mile from the yard and rang his bell continuously; that he kept a sharp lookout for objects on the track ahead; that the stationary engine had no light which could be seen, and he did not see it until he arrived within sixty or seventy feet of it, when he discovered it by the reflection of his own headlight, when it was too late to stop the train or for him or the deceased, a fireman, who was engaged in the performance of his duties, to escape. *Held*, that neither the engineer nor the deceased was chargeable with negligence. *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. Rep. 1042, 38 N. Y. S. R. 523; *affirming* 58 Hun 606, 34 N. Y. S. R. 822, 11 N. Y. Supp. 914.

36. — a question of fact.—Plaintiff, a locomotive engineer of one of defendant's passenger trains, was injured by a collision of his train with freight cars which a switching-crew were running on the main track, on the time of plaintiff's train, contrary to the rules of the company. *Held*, that, upon the evidence, it was a question for the jury whether plaintiff was guilty of contributory negligence in not keeping a proper lookout for obstructions on the track; also that plaintiff did not assume the risks incident

to such negligent obstruction of the track by other employes, merely because he entered defendant's service with knowledge that they might be negligent in that respect, and that the company had adopted rules regulating the conduct of engineers for the purpose of preventing, as far as possible, collisions in such cases. *Hall v. Chicago, B. & N. R. Co.*, 46 Minn. 439, 49 N. W. Rep. 239.

The brakeman on a passenger train was injured in a collision with a freight train. It was in evidence that it was the duty of the flagman to stop the freight train in time to allow the passenger train to take a certain switch; that the flagman did make some signal to the freight train, and at once signaled the passenger train to move up, but that both trains advanced, causing the injury. *Held*, sufficient evidence to justify a submission to the jury as to the competency of the flagman, and the negligence of the company in retaining him in its employ. *Bossout v. Rome, W. & O. R. Co.*, 32 N. Y. S. R. 884, 10 N. Y. Supp. 602, 57 Hun 589; *affirmed* in 126 N. Y. 646, *mem.*, 37 N. Y. S. R. 962.

It was claimed on the part of defendant that the company's rules forbade a train from running through a yard at a greater speed than four miles an hour. *Held*, that, assuming there was evidence of such a rule, it was not clear that the rate of speed, or any want of care or caution in running the freight train, contributed to the accident, and that the question should have been submitted to the jury. *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. Rep. 1042, 38 N. Y. S. R. 523; *affirming* 58 Hun 606, 34 N. Y. S. R. 822, 11 N. Y. Supp. 914.

If the speed of a train be so checked that when it came to the stopping post, near where two railroad tracks crossed, the engineer had it under complete control and could see if a train was approaching on the other road as readily as though his engine was brought to an absolute stand-still, then it cannot be said, as a matter of law, that the failure of the engineer to come to a full stop was any act of negligence contributing to a collision. *Kansas City, Ft. S. & M. R. Co. v. McDonald*, 51 Fed. Rep. 178, 4 U. S. App. 563, 2 C. C. A. 153.

The mere facts that an engineer running a train upon a railroad, after seeing a signal to stop and after reversing his engine,

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might, with probable safety to himself, have gotten off from his locomotive before its collision with another train then approaching, and that he remained at his post, grasping the reversing-lever and throttle until the collision occurred, will not justify the court in holding, as matter of law, that he was negligent. *Cottrill v. Chicago, M. & St. P. R. Co.*, 47 Wis. 634, 3 N.W. Rep. 376.

37. Instructions.—When the injury is charged to be the result of negligence of an agent of the defendant companies in operating a semaphore, or signal, at the intersection of the two roads, a clause in an instruction for the plaintiff, that "if the jury find from the evidence that said collision occurred solely by reason of gross negligence of one N. E. T. (the agent) in operating the semaphore"—held, not open to the objection that it assumed as true the negligence of such agent. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; reversing 18 Ill. App. 640.

In an action against two railway companies to recover for the death of a conductor caused by a collision of trains at the intersection of the two roads, the declaration alleged that the deceased conductor, and those engaged with him under his supervision in the management of the train, were in the exercise of due care at the time of the injury. The court instructed the jury that if they found, from the evidence, that the collision occurred solely by reason of the gross negligence of the station agent, whose duty it was to give signals, and that the deceased was exercising due and proper care and diligence, then the plaintiff might recover. Held, that the instruction was erroneous in omitting to require the jury to find, from the evidence, whether the engineer and others engaged in operating the train were free from negligence, or were exercising due care at the time. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; reversing 18 Ill. App. 640.—**DISTINGUISHED** IN *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237.

COLLUSION.

Among bidders, effect of, on validity of foreclosure sale, see MORTGAGES, 286.

As ground of abatement, see ABATEMENT, 3.

Delivery by, after stoppage in transitu, see CARRIAGE OF MERCHANDISE, 505.

COLOR OF TITLE.

As a defense in ejectment, see EJECTMENT, 20.

In the law of adverse possession, see ADVERSE POSSESSION, 5.

COLORADO.

Absolute liability for killing stock in, see ANIMALS, INJURIES TO, 126 (2).

Animals running at large in, see ANIMALS, INJURIES TO, 264.

Constitutional provisions in, relative to eminent domain, see EMINENT DOMAIN, 7.

Constitutionality of statutes of, relative to condemnation of land, see EMINENT DOMAIN, 25.

Deductions for benefits in, see EMINENT DOMAIN, 730.

Double damages for killing stock, under statute of, see ANIMALS, INJURIES TO, 590.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 15.

COLOR-BLINDNESS.

Statutory examinations for, see EMPLOYÉS, 3; MEDICAL SERVICES, 19.

COLORED PERSONS.

Ejection of, from car reserved for white persons, see STATIONS AND DEPOTS, 109.

Rights of, as passengers under Interstate Commerce Act, see INTERSTATE COMMERCE, 222.

1. Civil rights acts of congress.—

A provision in an act of congress admitting a railroad into the District of Columbia, providing that no person should be excluded from the cars of the company on account of color, means that colored passengers shall have equal accommodations with whites. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445, 3 Am. Ry. Rep. 413.—REVIEWED IN *Quigley v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 107.

The act of congress of March 1, 1875, known as the civil rights bill, is constitutional only when applied to rights of citizens of the United States as such, and not when applied to violations of rights existing by virtue of state citizenship. *Cully v.*

Baltimore & O. R. Co., 1 Hughes (U. S.) 536.

The Civil Rights Act of March 1, 1875, §§ 1, 2, making it a crime to refuse any one on account of race or color the full and equal accommodations and advantages of inns, public conveyances on land and water, theatres and other places of public amusement, are unconstitutional as applied to the states, not being authorized by either the 13th or 14th amendments to the U. S. constitution. *United States v. Stanley*, 109 U. S. 3, 3 *Sup. Ct. Rep.* 18.

A colored person cannot maintain an action, under the act of March 1, 1875, known as the civil rights bill, for being excluded from a car employed in local travel. It is only within the power of congress to legislate for the protection of the rights of citizens of the United States as such. *Cully v. Baltimore & O. R. Co., 1 Hughes (U. S.) 536.*

A circuit court of the United States, under the civil rights act of March 1, 1875, has no jurisdiction of a suit by a colored woman for being refused admittance to a first-class coach as a passenger, where she held a first-class ticket, where both plaintiff and the company are citizens of the same state, and the contemplated journey was between points in the same state, and where there is no allegation in the complaint that the state has denied plaintiff the equal protection of its laws, or made or enforced any law which abridges plaintiff's privileges or immunities as a citizen of the United States. *Smoot v. Kentucky C. R. Co., 13 Fed. Rep.* 337.

2. — of Louisiana.—A long line of decisions, state and federal, maintains that statutes or regulations enforcing the separation of the white and colored races in public conveyances and in public schools—so long, at least, as the facilities or accommodations provided are substantially equal—do not abridge any privilege or immunity of citizens, or otherwise contravene the fourteenth amendment of the United States constitution. *Ex parte Plessy*, 58 *Am. & Eng. R. Cas.* 550, 45 *La. Ann.* 80, 11 *So. Rep.* 948, 18 *L. R. A.* 639.

In such matters equality, and not identity or community of accommodations, is the extreme test of conformity to the requirements of the amendment. *Ex parte Plessy*, 58 *Am. & Eng. R. Cas.* 550, 45 *La. Ann.* 80, 11 *So. Rep.* 948, 18 *L. R. A.* 639.

Act 111 of the Louisiana legislature of 1890, regulating accommodations of the races on railways, does not violate the thirteenth amendment of the United States constitution, because such accommodations involve no badge of slavery or involuntary servitude, which is the sole subject of that amendment. *Ex parte Plessy*, 58 *Am. & Eng. R. Cas.* 550, 45 *La. Ann.* 80, 11 *So. Rep.* 948, 18 *L. R. A.* 639.

The regulation of domestic commerce is as exclusively a state function as the regulation of interstate commerce is a federal function. The statute is an exercise of the police power, and expresses the legislative conviction that the separation of the races in railway conveyances, with proper sanctions for substantial equality of accommodations, is in the interest of public order, peace, and comfort. It is a matter of legislative power and discretion with which courts cannot interfere. *Ex parte Plessy*, 58 *Am. & Eng. R. Cas.* 550, 45 *La. Ann.* 80, 11 *So. Rep.* 948, 18 *L. R. A.* 639.

A proper construction of the statute does not, as contended by relator, authorize a conductor to assign a passenger to a coach to which his race does not belong, nor does it bind the passenger to accept such wrongful assignment nor exempt the officers from action for damages in case of such wrongful assignment and refusal to carry when disobeyed. The discretion vested in the conductor to decide primarily the coach to which each passenger belongs is only the necessary discretion attending every imposition of any duty, to determine whether the circumstances under which the duty arises exist. He exercises such discretion at his peril, and that of his employer. *Ex parte Plessy*, 58 *Am. & Eng. R. Cas.* 550, 45 *La. Ann.* 80, 11 *So. Rep.* 948, 18 *L. R. A.* 639.

The Louisiana act of 1869, No. 38, is not in conflict with the constitution of the United States, art. 1, § 8, nor with art. 14 § 1, as it does not undertake to regulate commerce. The first section of the act forbids those engaged in the business of a common carrier of passengers from discriminating against passengers on account of race or color. Neither does the act deprive any one of life, liberty, or property without due process of law. *Decuir v. Benson*, 27 *La. Ann.* 1.

A carrier may make reasonable rules and regulations for the government of passen-

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gers, but a regulation which discriminates against passengers on account of race prejudice is not reasonable. *Decuir v. Benson*, 27 La. Ann. 1.

3. — of Mississippi.—The Mississippi Act of March 2, 1888, § 1, providing "that all railroads carrying passengers in this state, other than street railroads, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing cars by a partition so as to secure separate accommodations," is not in violation of the constitution of the United States, art. 1, § 8, granting to congress the right to regulate interstate commerce, when applied to passengers traveling wholly within the state, though the railroad may be engaged in interstate traffic. *Louisville, N. O. & T. R. Co. v. State*, 39 Am. & Eng. R. Cas. 399, 66 Miss. 662, 6 So. Rep. 203; affirmed in 41 Am. & Eng. R. Cas. 36, 133 U. S. 587, 10 Sup. Ct. Rep. 348.—DISTINGUISHING *Hall v. De Cuir*, 95 U. S. 485; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557.—APPROVED IN *Illinois C. R. Co. v. People*, 143 Ill. 434.

The Mississippi Act of March 2, 1888, § 3, making it a misdemeanor for any railroad company to refuse or neglect to furnish separate but equal accommodations for white and colored passengers, is valid and enforceable in the state courts. *Louisville, N. O. & T. R. Co. v. State*, 39 Am. & Eng. R. Cas. 399, 66 Miss. 662, 6 So. Rep. 203; affirmed in 41 Am. & Eng. R. Cas. 36, 133 U. S. 587, 10 Sup. Ct. Rep. 348.

The Mississippi act of March 2, 1888, requiring railroads to provide equal but separate accommodations for white and colored passengers within the state, was not repealed by the Act of March 14, 1888, § 3, known as the "railroad supervision bill." *Louisville, N. O. & T. R. Co. v. State*, 39 Am. & Eng. R. Cas. 399, 66 Miss. 662, 6 So. Rep. 203.

4. — of Pennsylvania.—Although the Pa. Act 1867, § 38, was intended to prevent companies from making distinctions between passengers on account of race and color, it did not intend that said companies should be debarred from making reasonable police arrangements in the management of their road; and if they choose to designate a particular car for certain passengers, they are not to be compelled to assign a reason therefor. *Central R. Co. v. Green*, 86 Pa. St. 421.

Where a colored man and wife sued for the wife's being excluded from a car on account of color, and the railroad claimed the exclusion was because the man was smoking, the court did not invade the province of the jury by telling them there was no doubt about the exclusion. The jury were left to determine if it was on account of the woman's color. *Central R. Co. v. Green*, 86 Pa. St. 421.

The penalty prescribed by the Pennsylvania act of March 22, 1867, relating to the exclusion of colored persons from the cars of the railroad companies, is given by way of punishment to the offender rather than by way of compensation to the party aggrieved, and where, therefore, several persons are aggrieved by the commission of a single offense, a recovery by one is a bar to recovery by the rest. *Central R. Co. v. Green*, 86 Pa. St. 427.

Before the passage of the Pennsylvania act of March 22, 1867 making it an offense for railroad companies to make any distinction between passengers on account of race or color, a railroad had a right to assign white and colored passengers to different seats, but of equal accommodation. *West Chester & P. R. Co. v. Miles*, 55 Pa. St. 209.—FOLLOWED IN *Britton v. Atlanta & C. A. L. R. Co.*, 88 N. Car. 536.

5. Discrimination against, generally.—Under a statute which required the railroad corporation to furnish two convenient rooms at every ticket station for the comfortable accommodation of passengers, and declares the agents at these stations to be conservators of the peace, such agents, without special direction from the company, may publish and enforce a regulation assigning two rooms of equal accommodation to white and colored passengers respectively. *Smith v. Chamberlain*, 38 So. Car. 529, 17 S. E. Rep. 371.—QUOTING *Commonwealth v. Power*, 7 Metc. (Mass.) 596; *Heard v. Georgia R. Co.*, 1 Int. Com. Rep. 314, 493.

A station agent in charge of railroad premises has the power, as incident to his position, without the express authority or

* Rights of colored passengers, see note, 18 L. R. A. 639.

Discrimination in transporting white and colored passengers, see notes, 39 AM. & ENG. R. CAS. 404; 18 Id. 398.

Discrimination between passengers on ground of race or color, see note, 41 AM. DEC. 482.

ratification of the railroad company, to make a regulation requiring white and colored persons to purchase their tickets in different rooms, without posting it or giving previous formal notice thereof. *Smith v. Chamberlain*, 58 Am. & Eng. R. Cas. 558, 38 So. Car. 529, 17 S. E. Rep. 371.

6. — excluding from ladies' car.—The fact that under the rules and regulations of the company a certain car has been designated for the exclusive use of ladies, and gentlemen accompanied by ladies, will not justify the exclusion of a colored woman from the privilege of such car upon no other ground than that of her color. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 1 Am. Ry. Rep. 531.

If a female passenger behaves herself in a proper manner she cannot be excluded from the ladies' car and compelled to take a seat in the smoking-car for an alleged want of chastity; and this is so whether she is white or colored. *Brown v. Memphis & C. R. Co.*, 5 Fed. Rep. 499; *adhered to on rehearing* in 1 Am. & Eng. R. Cas. 247, 7 Fed. Rep. 51.

Where a colored woman purchases a first-class ticket she is entitled to admission to a ladies' car, if there is room therein; and where the company's agents refuse her admittance thereto, and offer to carry her only on condition that she will ride in the smoking-car, where none but gentlemen are, some of whom were smoking, she has a right to refuse to go there, and can sue the company for damages. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683.

7. — excluding from cars set apart for use of white persons only.—The right of a company to assign white and colored passengers to separate though not unequal accommodations is recognized by the courts. *Ex parte Atlanta & C. A. L. R. Co.*, 18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749.—FOLLOWING *West Chester & P. R. Co. v. Miles*, 55 Pa. St. 205; *Day v. Owen*, 5 Mich. 520; *Hall v. De Cuir*, 95 U. S. 485.

A conductor of a passenger car has no right to eject a passenger on account of color or race. No regulation of the company will justify such a proceeding or protect him from liability in damages. *Derry v. Lowry*, 6 Phila. (Pa.) 30.

A reasonable regulation whereby colored passengers are required to occupy cars separate from white passengers, equal in accommodation, does not deprive such

colored passengers of the civil rights guaranteed to them under the constitutions of the state or of the United States. *Chilton v. St. Louis & I. M. R. Co.*, 58 Am. & Eng. R. Cas. 571, 114 Mo. 88, 21 S. W. Rep. 457, 19 L. R. A. 269.

The constitution of the United States, amendment 14, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and constitution of Missouri (1865), article 1, section 3, which provides that "No person can, on account of color, be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances," are not violated by a railway regulation which forbids negroes to travel in the same cars with white persons, where the company provides equally safe, commodious, and comfortable cars for the negroes as for such white persons. *Chilton v. St. Louis & I. M. R. Co.*, 58 Am. & Eng. R. Cas. 571, 114 Mo. 88, 21 S. W. Rep. 457, 19 L. R. A. 269.—QUOTING *Chesapeake, O. & S. W. R. Co. v. Wells*, 85 Tenn. 614.

A company is not liable in damages to a mulatto passenger who, having declined a seat in a coach free to persons of both sexes, regardless of race or color, and equal in all respects to any coach in the train, and having also refused to surrender her ticket unless admitted to a seat in another coach reserved exclusively for white ladies and their gentlemen attendants, quits the train of her own accord on being informed by the conductor of his purpose to eject her on account of her refusal to surrender her ticket. *Chesapeake, O. & S. W. R. Co. v. Wells*, 31 Am. & Eng. R. Cas. 111, 85 Tenn. 613, 4 S. W. Rep. 5.—QUOTED IN *Chilton v. St. Louis & I. M. R. Co.*, 114 Mo. 88. REVIEWED IN *Memphis & C. R. Co. v. Benson*, 31 Am. & Eng. R. Cas. 112, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. Rep. 5.

8. — accommodations equal to those furnished white persons.—A company in the management of its complicated interests may be authorized in law, on showing a proper or sufficient state of facts, to establish, in the opinion of the court, the reasonableness of the rule, in setting apart one or more cars for the use exclusively of colored passengers, and a like number more or less, as the service may require, for the

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use exclusively of white passengers; but whenever the company enforces such a rule the company is charged with the duty of furnishing to colored people who pay first-class fare cars to ride in that are as safe and comfortable in their conditions and appointments as the cars furnished to white passengers who pay first-class fare. *Houck v. Southern Pac. R. Co.*, 38 *Fed. Rep.* 226.

Carriers are required by law not to make any unjust discrimination between passengers paying the same fare; but equal accommodations do not mean identical accommodations. Races and nationalities may under some circumstances be separated, but the carrier must furnish substantially the same accommodations to all. Colored people and white people may be separated, if carriers proceed according to this rule. *Logwood v. Memphis & C. R. Co.*, 21 *Am. & Eng. R. Cas.* 256, 23 *Fed. Rep.* 318.

White and colored passengers may be assigned to separate cars set apart for their use, if such cars be substantially alike and have equal accommodations. *Murphy v. Western & A. R. Co.*, 21 *Am. & Eng. R. Cas.* 258, 23 *Fed. Rep.* 637. *The Sue*, 22 *Fed. Rep.* 843.

Where a colored woman purchases a first-class ticket the company is bound to furnish her with a car equal in all respects to the cars provided for first-class white female passengers. *Gray v. Cincinnati Southern R. Co.*, 11 *Fed. Rep.* 683.

A colored man was traveling as a passenger on a steamboat, and when supper was announced, he seated himself at the table, but was requested to go to another table, as his presence was offensive to the white passengers, which he declined to do. The evidence showed that he held a first-class ticket and was an educated clergyman. His supper was served him at the table where he sat, but the other passengers were removed to another table. *Held*, that he had no cause of action against the owners of the vessel. *McGuinn v. Forbes*, 37 *Fed. Rep.* 639.

9. — in the matter of protection.—A colored passenger upon a train is entitled to the same protection against drunken and violent men seeking to molest, outrage, and humiliate him as a white passenger. This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law. *Richmond & D.*

R. Co. v. Jefferson, 52 *Am. & Eng. R. Cas.* 438, 89 *Ga.* 554, 16 *S. E. Rep.* 69.

A company owes to every passenger, white or black, protection from the violence and assaults of fellow-passengers or intruders, and will be held responsible for the neglect of its servants when injury so inflicted might have been foreseen and prevented by the exercise of proper care. *Britton v. Atlanta & C. A. L. R. Co.*, 18 *Am. & Eng. R. Cas.* 391, 88 *N. Car.* 536, 43 *Am. Rep.* 749.

A colored woman with two companions entered a smoking-car and were told by the conductor that two other cars were set apart for colored people. He advised them to take one of these cars, but did not insist on their following the advice. He saw that their presence was obnoxious to white persons in the car and was likely to lead to difficulty, but took no further steps to prevent it. *Held*, that it was the duty of the conductor to protect plaintiff and her companions, and that the company was liable for an assault on her by the white passengers. *Britton v. Atlanta & C. A. L. R. Co.*, 18 *Am. & Eng. R. Cas.* 391, 88 *N. Car.* 536, 43 *Am. Rep.* 749.

10. — pleading.—An allegation in the complaint that the company "injuriously and unlawfully made a distinction on account of the color and the supposed race of the plaintiff, so as to damage, and actually damage her standing, comfort, and happiness," in itself states no cause of action. *Redding v. South Carolina R. Co.*, 5 *So. Car.* 67.

Under a complaint by a colored woman against the receiver of a railroad corporation for the rude and violent removal of plaintiff by defendant's agent from a room in one of defendant's depots, assigned for the use of ladies, to another room assigned for the use of men, the defendant, under a general denial, may prove a regulation of the agent under which the first room was reserved for the use of white passengers. The *So. Car. Code* does not recognize special pleas. *Smith v. Chamberlain*, 58 *Am. & Eng. R. Cas.* 558, 38 *So. Car.* 529, 17 *S. E. Rep.* 371.

11. — evidence.—In an action by a colored woman for expulsion from a waiting-room at a station set apart by the agent for the exclusive use of white persons, and in which chewing and smoking of tobacco were not allowed, and for compelling her to

go into another room provided for colored persons, in which there had been at some time chewing and smoking, but in which it did not appear that there were chewing and smoking at the time she was ordered into it, the mere circumstance that there had been such use of tobacco at some time in that room and not in the other was not conclusive on the question as to whether or not the accommodations of the two rooms were substantially equal. *Smith v. Chamberlain*, 58 Am. & Eng. R. Cas. 558, 38 So. Car. 529, 17 S. E. Rep. 371.—QUOTING Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

12. — Instructions.—A colored passenger sued for personal injuries which he claimed were inflicted by the conductor, but which the jury found were committed by another passenger, without the knowledge of the conductor, while plaintiff was riding on a platform, having refused, after being ordered from a ladies' car, to go into a smoking-car. *Held*, that it was proper to refuse to instruct the jury that a failure to provide separate accommodations for white and colored passengers, as required, was the proximate cause of the injury. *Royston v. Illinois C. R. Co.*, 67 Miss. 376, 7 So. Rep. 320.

There being evidence that the waiting-room for colored people was more than one hundred yards from the station proper, an instruction that denies the right of plaintiff, a colored woman, to enter the waiting-room for whites, if there was a suitable or comfortable waiting-room for colored people, is objectionable as ignoring the question of distance. *Rose v. Louisville, N. O. & T. R. Co.*, 70 Miss. 725, 12 So. Rep. 825.

13. — damages.—(1) *Generally—Compensatory—Mitigation.*—If the jury believe that a colored man, suing for being ejected from a car set apart for white people, entered the car knowingly and to procure a removal for the purpose of bringing a suit, it does not defeat a recovery, but should be considered in mitigation of damages. But if the jury believe that such was not his purpose, they should give full and liberal compensation for his suffering and other injuries, and allow such punitive damages as they may think right in preventing the recurrence of a like mischief. *Murphy v. Western & A. R. Co.*, 21 Am. & Eng. R. Cas. 258, 23 Fed. Rep. 637.

A colored woman purchased a first-class

ticket, but the company refused to carry her except in the smoking-car, in which were men only, some of whom were smoking. She was ladylike in appearance and conduct, and at the time was carrying a sick child. *Held*, that she was entitled to such compensatory damages as would make her whole, considering her loss of time and the inconvenience she was put to, and the expense of prosecuting the suit. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683.

(2) *Nominal—Excessive.*—In an action for refusing to stop a street-car and take aboard a colored passenger, unless special damage be shown, the plaintiff is entitled to nominal damages only. But plaintiff is entitled to nominal damages, though no actual damage be proved, for her mere wrongful exclusion from the car. *Pleasants v. North Beach & M. R. Co.*, 34 Cal. 586.

A verdict of five hundred dollars damages given for refusing to stop a street-car and take aboard a colored passenger, where there was no proof of special damage or malice or wanton or violent conduct on the part of defendant, is excessive. *Pleasants v. North Beach & M. R. Co.*, 34 Cal. 586.—REVIEWED IN *Quigley v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 107.

A verdict of seven hundred and fifty dollars is excessive in a case where the plaintiff, a colored woman, after stepping upon the platform of a street-car, was somewhat rudely pushed back by the conductor, causing her to tread upon and tear her dress, and compelled to wait for the next car. *Turner v. North Beach & M. R. Co.*, 34 Cal. 594.—FOLLOWED IN *Pleasants v. North Beach & M. R. Co.*, 34 Cal. 586. QUOTED IN *Hays v. Houston & G. N. R. Co.*, 46 Tex. 272; *Quigley v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 107. RECONCILED IN *Kline v. Central Pac. R. Co.*, 37 Cal. 400.

Where a colored woman was refused admittance to a ladies' car on account of her color, and was directed to take a seat in another car, which was set apart for and mostly occupied by men, but which she declined to do, insisting upon her right to be admitted to the ladies' car, and the evidence justifying the conclusion that the brakeman, in excluding her from that car, did so in a very rude manner, and in the presence of several persons—*held*, a verdict of \$200 was not excessive, she being entitled to something for the indignity and disgrace. *Chicago & N.*

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W. R. Co. v. Williams, 55 Ill. 185, 1 Am. Ry. Rep. 531.—REVIEWED IN *Quigley v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 107.

14. Decisions under the Interstate Commerce Act.—It is a lawful duty which a carrier owes the traveling public engaged in interstate travel over its line to afford the equal protection of the law alike to all such passengers, without regard to race, color, or sex, against undue prejudice and disadvantage from disorderly conduct on the part of other passengers or persons. *Heard v. Georgia R. Co.*, 2 Int. Com. Rep. 508, 3 Int. Com. Com. 111.

Passengers paying the same fare, whether white or colored, are entitled to equality of transportation in respect to the character of the cars furnished and the conveniences supplied, under section 3 of the Interstate Commerce Act. *Heard v. Georgia R. Co.*, 1 Int. Com. Rep. 719, 1 Int. Com. Com. 428.

So where a colored man pays the fare of a first-class passenger he is entitled to the accommodations provided for that class of passengers. *Council v. Western & A. R. Co.*, 1 Int. Com. Rep. 638, 1 Int. Com. Com. 339.

And to remove a colored passenger who holds a first-class ticket to a second-class car is unjust discrimination, within the meaning of the Interstate Commerce Act. *Council v. Western & A. R. Co.*, 1 Int. Com. Rep. 638, 1 Int. Com. Com. 339.

It is "undue and unreasonable prejudice and disadvantage," within the meaning of the Interstate Commerce Act, section 3, to require a colored passenger holding a first-class ticket to go into an inferior second-class car. *Council v. Western & A. R. Co.*, 1 Int. Com. Rep. 638, 1 Int. Com. Com. 339. *Heard v. Georgia R. Co.*, 1 Int. Com. Rep. 719, 1 Int. Com. Com. 428.

White and colored passengers may be separated if the cars provided for each are equally safe and comfortable and equipped without any discrimination. *Council v. Western & A. R. Co.*, 1 Int. Com. Rep. 638, 1 Int. Com. Com. 339. *Heard v. Georgia R. Co.*, 2 Int. Com. Rep. 508, 3 Int. Com. Com. 111. *Heard v. Georgia R. Co.*, 1 Int. Com. Rep. 719, 1 Int. Com. Com. 428.

Where a colored passenger complains of discrimination against him by requiring him to go into an inferior car, and the complaint is in the nature of a claim for damages, the commission will leave him to his remedy in the courts, where he may have a trial by jury. *Council v. Western & A. R.*

Co., 1 Int. Com. Rep. 638, 1 Int. Com. Com. 339.

COMBUSTIBLE MATERIALS.

Accumulation of, when contributory negligence, see FIRES, 111.

Carrying as freight, see CARRIAGE OF MERCHANDISE, 448.

In stock car, effect of, see CARRIAGE OF LIVE STOCK, 47.

Liability for having on right of way, see FIRES, 11.

COMMENCEMENT.

Of action, to stop running of limitation, what is, see LIMITATIONS OF ACTIONS, 12.

— when interest runs from, see INTEREST, 14.

— carrier's liability for baggage, see BAGGAGE, 47-50.

— proceedings to condemn, when constitutes a "taking," see EMINENT DOMAIN, 154.

COMMERCE.

See also INTERSTATE COMMERCE.

1. What is included in the term "commerce."*—Transportation of persons is as much commerce as transportation of property. *Louisville, N. O. & T. R. Co. v. State*, 39 Am. & Eng. R. Cas. 399, 66 Miss. 662, 6 So. Rep. 203.

Any regulation of the transportation of interstate commerce, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication, affecting commerce, operates as a regulation of commerce itself. *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 338.

Commerce with foreign nations and among the states embraces not only subjects which are national in their character and require, in order to preclude discriminating regulations by the states, uniformity of regulation affecting all the states, but also such matters within the purview of such commerce as are local in their nature or operation and can be properly regulated by provisions adapted to their particular circumstances. The power of congress to regulate commerce with foreign nations and among the states is exclusive only in so far as it relates to those subjects of such commerce

* What "commerce" includes, see note, 13 L. R. A. 686.

that fall within the former or national class. As to this class the states have no power to act, even in the absence of congressional regulation; but as to any subject within the other, or local class, the states have plenary power of control so long as congress does not act as to it. *Stockton v. Powell*, 29 Fla. 1, 10 So. Rep. 688.—REVIEWING *Huse v. Glover*, 119 U. S. 543.

2. Power of congress to regulate.—

Under art. 1, § 8, of the Constitution of the United States, the power of congress to regulate commerce among the states—interstate commerce—which consists, among other things, in the transportation of goods from one state to another, is exclusive. *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698, 5 Pac. Rep. 6.

And inaction on the part of congress is equivalent to a declaration that commerce shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. *Bagg v. Wilmington*, 4 & A. R. Co., 49 Am. & Eng. R. Cas. 46, 69 N. Car. 279, 14 S. E. Rep. 79.

The power to regulate commerce among the states is given exclusively to congress; the transportation of freight or the subject of commerce is a constituent part of commerce itself; the transportation of passengers or merchandise through a state, or from one state to another, is commerce among the states, and exclusively within the control of congress; but, as a general rule, each state may control, as a matter of domestic concern, all the railroads and other things, proper subjects of public control, which are located entirely within the borders of the state, although such regulating control may affect incidentally general interstate commerce, with which the subject may connect. *Railroad Com'rs v. Chicago, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.—QUOTING *Pacific Coast Steamship Co. v. Board of R. Com'rs*, 18 Fed. Rep. 10; *Kaiser v. Illinois C. R. Co.*, 18 Fed. Rep. 151; *Illinois C. R. Co. v. Stone*, 20 Fed. Rep. 468; *Louisville & N. R. Co. v. Railroad Com'rs*, 19 Fed. Rep. 679.

Congress will not interfere in the interest of interstate commerce, exclusive of state authority, except where the subjects upon

which its powers are exercised are national in their character and require uniformity of regulation affecting all the states alike. When the subjects within that power are purely local in their nature or operation, or constitute mere aids to commerce, their regulation and management may be provided for by the states themselves until congress intervenes and supersedes their action; consequently, in the absence of congressional action, a state has authority to regulate the erection of a bridge, entirely within the state, across a navigable river which runs partly within and partly without the state. *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.—FOLLOWING *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Palmer v. Com'rs of Cuyahoga County*, 3 McLean (U. S.) 226; *Mississippi & M. R. R. Co. v. Ward*, 2 Black (U. S.) 494; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 721; *Pound v. Turck*, 95 U. S. 462; *Northern Transp. Co. v. Chicago*, 99 U. S. 643; *Mobile v. Kimball*, 102 U. S. 691; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 687, 2 Sup. Ct. Rep. 185; *Miller v. Mayor, etc., of N. Y.*, 109 U. S. 385, 3 Sup. Ct. Rep. 228; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. Rep. 423; *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 281, 7 Sup. Ct. Rep. 206; *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. Rep. 313; *Sands v. Manistee River Imp. Co.*, 123 U. S. 293, 8 Sup. Ct. Rep. 113; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. Rep. 811; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 585, 7 Sup. Ct. Rep. 4.

The power of congress to regulate commerce between the states extends not only to the control of navigable waters of the country and the lands under them for the purpose of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient. *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411.

3. What state laws are attempts to regulate, generally.—The federal courts have settled the question that no state can pass a law, whether congress has already acted upon the subject or not, which will directly interfere with the free transportation from one state to another, or through a state, of anything which is the subject of interstate commerce. *State v.*

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Saunders, 19 Kan. 127. *Welton v. Missouri*, 91 U. S. 275.—QUOTED IN *Hardy v. Aitchison*, T. & S. F. R. Co., 18 Am. & Eng. R. Cas. 432, 32 Kan. 698; *Wigton v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 184.—REVIEWED IN *Bagg v. Wilmington, C. & A. R. Co.*, 109 N. Car. 279.

Such legislation by the states is inhibited as it impedes, obstructs, or controls commerce, or comes in conflict with some statute passed by congress to regulate it. *Bagg v. Wilmington, C. & A. R. Co.*, 49 Am. & Eng. R. Cas. 46, 109 N. Car. 279, 14 S. E. Rep. 79.—REVIEWING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470; *Welton v. Missouri*, 91 U. S. 282; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 358; *Wallington v. Michigan*, 116 U. S. 446.

Statutes of the states of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states, declared to be contrary to the constitution and laws of the United States, and therefore null and void. *Smith v. Turner*, 7 How. (U. S.) 283.—DISTINGUISHED IN *Commonwealth v. Erie R. Co.*, 62 Pa. St. 286. FOLLOWED IN *McGwigan v. Wilmington & W. R. Co.*, 95 N. Car. 428. QUOTED IN *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658; *Clarke v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 158.

4. — **statutes regulating the carriage of persons and goods.**—Sections 1310-1316, inclusive, of Iowa Code, requiring railway companies connecting with the Union P. R. Co. to transfer their freight, passengers, and express matter at Council Bluffs, are in conflict with the acts of congress of July 1, 1862, and June 15, 1866, and cannot, therefore, be enforced. *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 338.

The statute of Maine (Rev. St. ch. 24, § 50), requiring carriers who bring into the state persons not having a settlement therein to remove them beyond the state if they fall into distress within a year, etc., is a regulation of foreign and interstate commerce, and is in violation of art. 1, § 8, clause 3, of the constitution of the United States, and is therefore void. *Bangor v. Smith*, 83 Me. 422, 22 Atl. Rep. 379.

An attempt on the part of the Mississippi railroad commission, under the act of March 11, 1884, to fix the tariff rates on the interstate traffic of a railroad company
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is an unlawful interference with the right of congress to regulate commerce among the states, and is ground for an injunction. *Mobile & O. R. Co. v. Sessions*, 28 Fed. Rep. 592.—DISTINGUISHING *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607. FOLLOWING *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334.

The Kansas Act of 1876, ch. 82, § 6, attempting to prohibit the transportation from that state to other states of prairie chickens which had been killed in the state, is unconstitutional as an attempt to regulate interstate commerce. *State v. Saunders*, 19 Kan. 127.

5. — **statutes regulating charges, fares, and tickets.**—The Iowa Act of 1875, ch. 68, § 3, providing that "the tariff of rates established in the following schedule shall be considered the basis on which to compute the compensation for transporting freights, goods, merchandise, or property over any kind of railroad within this state," does not apply to shipments from points in the state to another state; but if applied to such shipment, it is unconstitutional as an attempt to regulate interstate commerce. *Carton v. Illinois C. R. Co.*, 6 Am. & Eng. R. Cas. 305, 59 Iowa 148, 44 Am. Rep. 672, 13 N. W. Rep. 67.—EXPLAINING *State v. Munn*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164. REVIEWING *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456.—FOLLOWED IN *State v. Chicago & N. W. R. Co.*, 27 Am. & Eng. R. Cas. 1, 70 Iowa 162.

The Mass. Statutes of 1885, ch. 338, § 2, providing that the railroad commissioners may fix the rates of freight to be charged by a railroad company between points outside the state and points within the state, violates art. 1, § 8, of the United States constitution, which provides that congress shall have the exclusive power to regulate "commerce among the several states," and is invalid. *Commonwealth v. Housatonic R. Co.*, 27 Am. & Eng. R. Cas. 31, 143 Mass. 264, 9 N. E. Rep. 547.—APPROVING *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557.

The Tennessee act of March 30, 1883, ch. 199, entitled "An act to provide for the regulation of railroad companies and persons operating railroads in this state to prevent discrimination upon railroads in this state, and to provide for the punish-

ment of the same, and to appoint a railroad commission," is unconstitutional as an attempt to regulate interstate commerce, when applied to interstate shipments of a railroad company. *Louisville & N. R. Co. v. Tennessee R. Co.*, 19 Fed. Rep. 679.—DISTINGUISHED IN *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 397. FOLLOWED IN *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468. QUOTED IN *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.

The Maine statute, which makes a ticket for a passage on any railroad binding on the railroad company for six years from its date, with the right of the holder of the ticket to stop off at usual stopping places as often as he pleases during that period, cannot apply to a ticket purchased in Canada for a continuous passage on a particular day over the defendant's road from that province through portions of the state of Vermont and New Hampshire into Maine. Such an application of the statute would work an interference with both foreign and interstate commerce in the carriage of passengers. *Lafarier v. Grand Trunk R. Co.*, 52 Am. & Eng. R. Cas. 226, 84 Me. 286, 24 Atl. Rep. 848.—DISTINGUISHING *Dryden v. Grand Trunk R. Co.*, 60 Me. 512. FOLLOWING *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388.

6. — statutes regulating navigation.—A law of a state giving certain designated persons the exclusive navigation of all the waters of the state is in conflict with that provision of the U. S. constitution authorizing congress to regulate commerce. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.—APPROVED IN *Clarke v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 158. QUOTED IN *Bullard v. Northern Pac. R. Co.*, 10 Mont. 168; *Commonwealth v. Erie R. Co.*, 62 Pa. St. 286.

A state law which requires vessels, under a penalty of \$500, to file a statement with the probate judge, of the name of the vessel, the name of the owner, etc., and forbids the vessel to leave until the law is complied with, is invalid as an attempt to regulate commerce. *Sinnot v. Davenport*, 22 How. (U. S.) 227.—FOLLOWED IN *New Orleans & M. Packet Co. v. James*, 32 Fed. Rep. 21.

The provision of La. Const. art. 236, providing that "no foreign corporation shall do business in this state without having one

or more known places of business and an authorized agent or agents in the state, upon whom process can be served," is null and void so far as it imposes a restriction on navigation, being in conflict with the act of congress of February 17, 1793, providing for the enrolment and license of vessels engaged in the coasting trade. *New Orleans & M. Packet Co. v. James*, 32 Fed. Rep. 21.—FOLLOWING *Sinnot v. Davenport*, 22 How. (U. S.) 227.

7. What state laws are not attempts to regulate, generally.—A state law imposing conditions on corporations for the privilege of entering and doing business in the state is constitutional. It is not an attempt to regulate commerce among the states. *Paul v. Virginia*, 8 Wall. (U. S.) 168.—FOLLOWED IN *Norfolk & W. R. Co. v. Pennsylvania*, 45 Am. & Eng. R. Cas. 9, 136 U. S. 114.

A state statute requiring companies to haul the cars of other companies over their tracks for a reasonable compensation is not unconstitutional as an attempt to regulate interstate commerce. *Rae v. Grand Trunk R. Co.*, 9 Am. & Eng. R. Cas. 470, 14 Fed. Rep. 401.

A state, upon giving a company permission to lay tracks in a certain city, provided that the company should pass the cars of connecting companies over the tracks, and also provided that the state should regulate the switching charges to be charged by such company to the others. Held, that these restrictions and regulations do not clearly show an attempt to regulate interstate commerce so as to violate the federal law; neither are they in violation of the Interstate Commerce Act, § 3. *State v. Chicago, M. & St. P. R. Co.*, 33 Fed. Rep. 391.

The regulation of domestic commerce is as exclusively a state function as the regulation of interstate commerce is a federal function. *Ex parte Plessy*, 58 Am. & Eng. R. Cas. 550, 45 La. Ann. 80, 11 So. Rep. 948, 18 L. R. A. 639.

8. — statutes regulating carriage of persons and goods.—The state may regulate the time or manner of making transfers of the subjects of commerce transported by railway carriage between points within its own limits, but cannot impose any burden upon transportation between points lying in different states. *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 338.

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That the statute of Iowa prohibiting corporations engaged in transporting goods or passengers between different states from limiting their liability as common carriers by contract is not a regulation of commerce among the states, see *Hart v. Chicago & N. W. R. Co.*, 27 Am. & Eng. R. Cas. 59, 69 Iowa 485, 29 N. W. Rep. 597.

Where a carrier within the state accepts goods destined for a point in another state, but contracts with the shipper that its responsibility shall cease when it carries the goods to another point within this state and there delivers them to another carrier, the contract does not relate to commerce between the states, but is one to be wholly performed within this state, and which may be controlled by the legislature of this state, without any violation of the constitution of the United States. *Heiserman v. Burlington, C. R. & N. R. Co.*, 16 Am. & Eng. R. Cas. 46, 63 Iowa 732, 18 N. W. Rep. 903.—DISTINGUISHED IN *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509. QUOTED IN *Carrier v. Chicago, R. I. & P. R. Co.*, 42 Am. & Eng. R. Cas. 349, 79 Iowa 80.

The statute of North Carolina (Code, § 1967) imposing a penalty for failure to ship freight within five days, is operative upon freights to be shipped to points outside the state as well as those to be delivered within its territory, and is not in conflict with the power conferred by the federal constitution upon congress to regulate commerce among the states of the Union. *Bagg v. Wilmington, C. & A. R. Co.*, 49 Am. & Eng. R. Cas. 46, 109 N. Car. 279, 14 S. E. Rep. 79.—QUOTING *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96.

9. — **statutes regulating delivery of goods received for carriage.**—The Arkansas act of February 27, 1885, prescribing a penalty for refusing to deliver any goods upon the payment or tender of the freight charges due, as shown by the bill of lading, is a mere police regulation, and is not void as an attempt to regulate interstate commerce. *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291, 5 S. W. Rep. 294.—QUOTING *Munn v. Illinois*, 94 U. S. 113; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. (U. S.) 567.

10. — **statutes regulating navigation.**—A state law requiring all vessels from foreign ports or other U. S. ports on

entering the port of New York to make a report of the names, ages, and last legal settlement of all persons on the vessels, is but a police regulation and valid. *New York v. Miln*, 11 Pet. (U. S.) 102.—DISTINGUISHED IN *Clarke v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 158.

A state law requiring every ship or vessel sailing from a port, whether to foreign or domestic ports, to take a pilot, and providing a penalty for refusing, is not an attempt to regulate commerce, within the meaning of the U. S. constitution and laws, and is therefore valid. *Cooley v. Port Wardens of Phila.*, 12 How. (U. S.) 299.—QUOTED AND DISTINGUISHED IN *Norfolk & W. R. Co. v. Commonwealth*, 88 Va. 95.

A state law allowing a master and port wardens, in addition to other fees, \$5 upon every vessel entering a port, is in conflict with the U. S. constitution. *Southern Steamship Co. v. Port Wardens of New Orleans*, 6 Wall. (U. S.) 31.—DISTINGUISHED IN *Commonwealth v. Erie R. Co.*, 62 Pa. St. 286.

The state may, for the purposes of commerce, partially hinder navigation by authorizing the construction of docks, bridges, and railroads, which are included in the demands of commerce, to which navigation is in a degree subject. *Kerr v. West Shore R. Co.*, 18 N. Y. S. R. 63, 2 N. Y. Supp. 686.—FOLLOWING *Delaware & H. Canal Co. v. Lawrence*, 2 Hun (N. Y.) 163; *New York, W. S. & B. R. Co. v. Walsh*, 27 Hun (N. Y.) 57.

11. **State laws imposing taxes on importers.**—A state law requiring all importers of goods, and all persons selling the same at wholesale, to pay a license tax is in conflict with the U. S. constitution. *Brown v. Maryland*, 12 Wheat. (U. S.) 419.—APPROVED IN *Clarke v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 158. DISTINGUISHED IN *Commonwealth v. Erie R. Co.*, 62 Pa. St. 286. FOLLOWED IN *Minneapolis, St. P. & S. St. M. R. Co. v. Milner*, 57 Fed. Rep. 276.

12. — **taxes on express companies.**—A state tax on the gross receipts of an express company doing an interstate business is void as an attempt to regulate interstate commerce. *State ex rel. v. American Exp. Co.*, 7 Biss. (U. S.) 227.

So long as it is not a direct tax on the property carried in the commerce between states, imposed either on the goods or di-

rectly collected from them, and is only a tax on the franchise granted to a carrier in consideration of the grant, or, what is the same thing, a tax or tribute demanded for the privilege of doing the business, the state law does not come within the terms of the United States constitution, reserving to congress the right to regulate interstate commerce. *Memphis & L. R. R. Co. v. Nolan*, 14 *Fed. Rep.* 532.

A license or privilege tax imposed by a state upon a foreign express company for the privilege of doing business in the state, which does not obstruct or prohibit its interstate business, is not unconstitutional as an attempt to regulate interstate commerce. *Memphis & L. R. R. Co. v. Nolan*, 14 *Fed. Rep.* 532.—QUOTING *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456.

13.—taxes on railroad running into other states.—The tax on railroads running into other states is not unconstitutional as operating upon commerce between the states, but is wholly a tax on property, as property located and used in this state. *State v. New York, N. H. & H. R. Co.*, 60 Conn. 326, 22 *Atl. Rep.* 765.

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I. ILLINOIS DOCTRINE.

1. Rule Stated and Explained.

1. Generally.*—Negligence, resulting in injury, is comparative, and it is not required that the plaintiff shall be free from all negligence himself, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to recover, if it appear the defendant was guilty

of a higher degree of negligence. *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534, 11 Am. Ry. Rep. 157.—FOLLOWING *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.

But in cases of mutual negligence, to authorize a recovery by the plaintiff, the negligence on the part of the defendant must be so much greater than that of the plaintiff as to clearly preponderate. *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499.—REVIEWING *Galena & C. U. R. Co. v. Dill*, 22 Ill. 264.—DISAPPROVED IN *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. FOLLOWED IN *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534. OVERRULED IN *Joliet v. Seward*, 86 Ill. 402.

2. Use of ordinary care by plaintiff.

—The rule of comparative negligence has no application and cannot be properly invoked except in cases where the party injured observed ordinary care for his own safety with reference to the particular circumstances involved. *Louisville, N. A. & C. R. Co. v. Johnson*, 44 Ill. App. 56. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; reversing 31 Ill. App. 563. *Illinois C. R. Co. v. Beard*, 49 Ill. App. 232. *Chicago, M. & St. P. R. Co. v. Krueger*, 23 Ill. App. 639; affirmed in part in 124 Ill. 457. *Chicago & N. W. R. Co. v. Thorson*, 11 Ill. App. 631. *Wabash, St. L. & P. R. Co. v. Moran*, 13 Ill. App. 72.

And that the defendant was guilty of gross negligence. *Gardner v. Chicago, R. I. & P. R. Co.*, 17 Ill. App. 262.

The rule of comparative negligence has no application where an unwise or injudicious rule of the master, well known and understood by the servant, produces a hazard which he is presumed to incur voluntarily as an incident of his employment. *Illinois C. R. Co. v. Neer*, 26 Ill. App. 356.

If a plaintiff exercises ordinary care under all the circumstances of the case, and the defendant is negligent, though not to the extent of being grossly so, he may recover although his care is not of that extreme degree denominated "great care," or such as men of extraordinary caution and prudence might have used. *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181.

Ordinarily the mere fact of running a train faster than allowed by ordinance is negligence, and when the injured party is

* Doctrine of comparative negligence, see notes, 15 AM. & ENG. R. CAS. 361; 19 Id. 362; 8 Id. 237.

himself at fault the doctrine of comparative negligence applies, and he cannot recover unless, under the circumstances, the negligence of the defendant is wilful or wanton. But the speed of the train alone cannot be regarded as furnishing a sufficient reason for holding that the injury was wilful or wanton. *Wabash, St. L. & P. R. Co. v. Weisbeck*, 14 Ill. App. 525. — QUOTING *Illinois C. R. Co. v. Hetherington*, 83 Ill. 516. REVIEWING *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 410; *Wabash R. Co. v. Henks*, 91 Ill. 413.

Where a person voluntarily and unnecessarily places himself in a position well known to be a place of danger and is injured, there can be no recovery, even for gross negligence on the part of the defendant, the act of the defendant not being wilful or wanton. The doctrine of comparative negligence does not apply unless the plaintiff was in the exercise of ordinary care., *Illinois C. R. Co. v. Beard*, 49 Ill. App. 232.

A plaintiff who has by his own want of ordinary care contributed to the injury complained of cannot recover, no matter what the degree of the defendant's negligence may be, short of that which establishes an inference of a wilful and intentional wrong, as a failure in that regard is in its legal sense "ordinary negligence," and therefore not subject to any comparison. The doctrine of comparative negligence is not applicable to such a case, as the negligence of the plaintiff is "ordinary" and not slight. *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181. — QUOTING *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425.

To enable a plaintiff to recover on the ground of mere negligence, as distinct from the wilful tort of the defendant, it must appear that plaintiff exercised ordinary care, such as reasonably prudent persons would exercise under like circumstances to avoid injury. Where there is a want of ordinary care on part of plaintiff the doctrine of comparative negligence does not apply. *Chicago, B. & Q. R. Co. v. Rogers*, 17 Ill. App. 638.

For it cannot be legally true, when the injured party fails to exercise ordinary care, and the defendant is guilty of negligence only, that the negligence of one is slight and that of the other gross in comparison

with each other. *Union R. & T. Co. v. Kallaker*, 12 Ill. App. 400. *Chicago, B. & Q. R. Co. v. Johnson*, 8 Am. & Eng. R. Cas. 225, 103 Ill. 512.

It is an essential element to the right of action for injuries occasioned by negligence of defendant that plaintiff must have exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property. Where a party has been injured for the want of ordinary care on his part, which is gross negligence, no action will lie unless the injury is wilfully inflicted by defendant. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

Notwithstanding a plaintiff may have been guilty of slight negligence, if that of the defendant, in comparison, amount to gross carelessness, he may recover; but if he failed to use that care which a man of ordinary prudence would have exercised under like circumstances, then no recovery can be had, unless the negligence of the defendant was so gross as to amount to a wanton or wilful wrong. *Chicago, B. & Q. R. Co. v. Colwell*, 3 Ill. App. 545.

3. Plaintiff's negligence equal to defendant's, or nearly so.—As a rule, where both plaintiff and defendant are guilty of gross negligence no recovery can be had, and it is error for the court to modify this rule where no facts appear in evidence to call for such modification. *Illinois C. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585. — DISAPPROVED IN *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. FOLLOWED IN *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63.

In cases of mutual negligence plaintiff cannot recover because there may be a greater degree of negligence on the part of defendant. *Chicago & A. R. Co. v. Mock*, 72 Ill. 141.

If the mutual negligence producing the injury is equal, or nearly so, or that of the plaintiff is greater than that of the defendant, he cannot recover; but if his negligence was slight in comparison to that of defendant, he may recover. *Chicago & A. R. Co. v. Murray*, 62 Ill. 326, 7 Am. Ry. Rep. 308. *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499.

If plaintiff is alone guilty of negligence, or the negligence of the parties is equal, or plaintiff's negligence is gross, no action will lie unless the injury is wilfully inflicted. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

The rule of comparative negligence re-

quires, and has always required, much more than a mere preponderance of negligence on the part of the defendant to authorize a recovery. When the plaintiff is chargeable with contributory negligence, though slight, there must be a wide disparity between his negligence and that of the defendant, or he cannot recover. *Parmelee v. Farro*, 22 Ill. App. 467.

In cases of mutual negligence the negligence of defendant must be so much greater than that of the plaintiff as to clearly and greatly preponderate. *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499.

4. Plaintiff's negligence "slight," defendant's "gross."—(1) *General rule stated.*—Under the rule of comparative negligence, when both parties are at fault the plaintiff may recover where it appears that his negligence is slight and that of the defendant is gross. *Chicago & A. R. Co. v. Gretsner*, 46 Ill. 74.—FOLLOWING *Chicago, B. & Q. R. Co. v. Dewey*, 26 Ill. 255; *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *Coursen v. Ely*, 37 Ill. 338; *Chicago & A. R. Co. v. Hogarth*, 38 Ill. 370; *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482; *Illinois C. R. Co. v. Simmons*, 38 Ill. 242; *St. Louis, A. & C. R. Co. v. Todd*, 36 Ill. 409. MODIFYING *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Dyer v. Talcott*, 16 Ill. 300; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558; *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510.—FOLLOWING *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510.—*Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576. *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510. *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63, 21 Am. Ry. Rep. 284. *Stratton v. Central City Horse R. Co.*, 1 Am. & Eng. R. Cas. 115, 95 Ill. 25.

If the negligence of the injured party has contributed to the injury he cannot recover, unless it appear that his negligence was no greater than that defined by the law as "slight negligence," and that defendant's negligence was "gross." *St. Louis, A. & T. H. R. Co. v. Andres*, 16 Ill. App. 292. *Chicago, B. & Q. R. Co. v. Dunn*, 61 Ill. 385, 12 Am. Ry. Rep. 427. *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 405.

Before a person can recover on account of the neglect of a statutory duty, it must appear not only that the injury complained of was the result of such neglect, but it must also appear that the injured party was in the exercise of due care. If the negli-

gence of the injured party contributes to the injury he cannot recover, unless it appears that his negligence was what the law denominates "slight" and that of the defendant "gross." *Wabash, St. L. & P. R. Co. v. Thompson*, 15 Ill. App. 117.—FOLLOWING *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512.—FOLLOWED IN *St. Louis, A. & T. H. R. Co. v. Andres*, 16 Ill. App. 292.—*Illinois C. R. Co. v. Goddard*, 72 Ill. 567.

Partial or slight negligence and inattention of the party injured will not bar recovery, when palpable negligence of the employer is proven. *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293.

In an action for injury to plaintiff while crossing a track, the rule of comparative negligence, that he can only recover where his negligence, if any, is slight and that of the company gross, applies under the Ill. Rev. St. of 1874, ch. 114, § 62, amending the law of 1885 with respect to the speed of trains in cities, etc., so as to make the liability of the company absolute only in the absence of evidence rebutting the statutory presumption of negligence. *Lake Shore & M. S. R. Co. v. Berlinsk*, 2 Ill. App. 427.

Under this statute when the proof establishes contributory negligence on the part of the plaintiff, the presumption of liability raised by the statute ceases, and as in other cases, the plaintiff can recover only where his negligence is slight and that of the defendant gross. *Lake Shore & M. S. R. Co. v. Berlinsk*, 2 Ill. App. 427.

(2) *Defendant's negligence gross, as compared with that of plaintiff.*—The words "gross" and "slight," as applied to the negligence of a plaintiff and defendant, are to a great extent relative terms. Often the determining of one, whether slight or gross, will depend upon the character of the other. The doctrine of comparative negligence is founded upon a comparison of the negligence of the plaintiff with that of the defendant, and is the very essence of the rule. *Moody v. Peterson*, 11 Ill. App. 180. *First Nat. Bank v. Eitemiller*, 14 Ill. App. 22. *Chicago & E. I. R. Co. v. O'Connor*, 13 Ill. App. 62. *Chicago, M. & St. P. R. Co. v. Mason*, 27 Ill. App. 450.

Negligence on the part of plaintiff, materially contributing to the injury, will not bar a recovery, provided the defendant was guilty of negligence of such degree that, when compared with the negligence of the plaintiff, the former is gross and the latter

slight. *Chicago, M. & St. P. R. Co. v. Krueger*, 23 Ill. App. 639; *affirmed in part in 124 Ill. 457*. *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.—QUOTING *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Butterfield v. Forrester*, 11 East 60; *Dyer v. Talcott*, 16 Ill. 300; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 559; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Thompson*, 17 Ill. 131; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541; *Illinois C. R. Co. v. Reedy*, 17 Ill. 580; *Chicago v. Major*, 18 Ill. 361; *Blyth v. Topham*, Cro. Jac. 158.—FOLLOWED IN *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534; *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74; *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510. QUOTED IN *Chicago & E. I. R. Co. v. O'Connor*, 13 Ill. App. 62; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.—*Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.—CRITICISED IN *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. DISTINGUISHED IN *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218. FOLLOWED IN *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.—*Chicago & N. W. R. Co. v. Clark*, 70 Ill. 276.—FOLLOWED IN *Willard v. Swanson*, 22 Ill. App. 424.—*Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425.—QUOTED IN *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181.—*Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. Rep. 381.—FOLLOWED IN *Willard v. Swanson*, 22 Ill. App. 424.—*First Nat. Bank v. Eitemiller*, 14 Ill. App. 22. *Wabash, St. L. & P. R. Co. v. Moran*, 13 Ill. App. 72. *Chicago, B. & Q. R. Co. v. Colwell*, 3 Ill. App. 545.

Where a plaintiff has been guilty of negligence contributing to the injury he cannot recover unless the negligence of the defendant is gross, and his own but slight in comparison. *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242.—QUOTING *Illinois C. R. Co. v. Hammer*, 85 Ill. 526.—*Pittsburgh, C. & St. L. R. Co. v. Shannon*, 11 Ill. App. 222.—QUOTING *Illinois C. R. Co. v. Hammer*, 85 Ill. 526.—*Illinois C. R. Co. v. Brookshire*, 3 Ill. App. 225. *Chicago & A. R. Co. v. Langley*, 2 Ill. App. 505. *Chicago & N. W. R. Co. v. Dimick*, 2 Am. & Eng. R. Cas. 201, 96 Ill. 42.

The rule is that a plaintiff who has been guilty of negligence contributing in a slight degree to the injury may recover of a defendant who has been grossly negligent; but in such case the negligence of the plaintiff must be slight and that of defendant

gross when compared with that of plaintiff, and both these terms, "gross" and "slight," or their equivalent, should be used in every instruction that attempts to lay down the rule. *Chicago, B. & Q. R. Co. v. Avery*, 8 Ill. App. 133.

In Illinois, when both plaintiff and defendant are charged with negligence, the jury must compare the negligence of the parties and determine whether that of plaintiff is slight and that of the defendant gross; and it is the duty of the court to instruct the jury to make this comparison. *Chicago & A. R. Co. v. Dillon*, 17 Ill. App. 355.

Where there is evidence tending to show that plaintiff's negligence was slight when compared with that of the company, and that of the latter was gross, a finding in favor of plaintiff, in an action to recover damages from the company for the breaking of plaintiff's wagon by running into it, will not be set aside. *Toledo, W. & W. R. Co. v. Spencer*, 66 Ill. 528.

(3) *Higher degree of negligence on defendant's part insufficient*.—The rule of comparative negligence does not permit a plaintiff to recover because defendant has been guilty of a greater degree of negligence than plaintiff. *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510.—FOLLOWING *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.

A mere preponderance of negligence on the part of defendant will not authorize a recovery. *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 405.

And it is error to instruct the jury that plaintiff can recover if the negligence of defendant was of a higher degree than that of plaintiff. *Illinois C. R. Co. v. Goddard*, 72 Ill. 567.

Plaintiff cannot recover unless defendant's negligence clearly and largely exceeds that of plaintiff. *Chicago & N. W. R. Co. v. Clark*, 70 Ill. 276. *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499. *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 451.

Although defendant's negligence may have been the prime cause of the injury to plaintiff, yet if plaintiff, by the exercise of due care, might have avoided receiving the injury, and his negligence is not slight and that of defendant gross, when compared with each other, plaintiff cannot recover. *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256.

* Ill. in action note, 38
† See

2. Illustrations of the Application of the Doctrine.

5. Generally.*—Plaintiff was employed to work a pump which was operated by horse-power at one of defendant's stations, and in doing so was injured. He charged negligence in the manner of constructing the pump, in that it was not constructed according to the statute. *Held*, that if the company was charged with negligence in constructing its pump, and plaintiff, with full knowledge of the facts, undertook to operate the same, he was chargeable, by the statute, with the same negligence in operating it, and the rule of comparative negligence did not apply. *Wabash, St. L. & P. R. Co. v. Thompson*, 15 Ill. App. 117; *former appeal*, 10 Ill. App. 271.

6. Injuries to children.—The doctrine of comparative negligence has no application where the plaintiff is a child seven years old and no negligence is chargeable to the parent or guardian. *Chicago, St. L. & P. R. Co. v. Welsh*, 118 Ill. 572, 9 N. E. Rep. 197.

Where there is negligence on the part of a parent charged with the care of a child of tender years, contributing directly to produce the injury, there can be no recovery, unless such negligence is slight, and that of defendant is gross in comparison in regard to that which produced the injury. It is not sufficient that defendant may have been guilty of a greater degree of negligence. *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441, 21 Am. Ry. Rep. 336.

7. Injuries to passengers.†—The doctrine of comparative negligence applies where a passenger sues the carrier for a personal injury. *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558.

And a passenger guilty of slight negligence may recover for a personal injury resulting from the gross negligence of the carrier. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197.

Where a person traveling on a railroad car permits his arm to rest on the base of the window and slightly project outside, and thereby has his arm broken in passing a freight train, the negligence of such per-

son is slight compared with the negligence of the company in permitting its freight cars to stand so near the track of its passenger train; and a recovery may be had for the injury sustained. *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333.—QUOTING *Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487. QUOTING AND APPROVING *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203. REJECTING *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294.—DISAPPROVED IN *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329. DISTINGUISHED IN *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49. REVIEWED IN *Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655.

Where a jury has found, from the evidence, that the act of a passenger in alighting from a train, at the time and under the circumstances appearing, was slight negligence, and the negligence of the servants of the company in starting its train, when compared with that of the passenger, was gross, and such finding is sustained by the appellate court, it is conclusive on this court, and cannot be re-examined. *Chicago & A. R. Co. v. Bonifield*, 8 Am. & Eng. R. Cas. 493, 104 Ill. 223.—QUOTED IN *Galveston, H. & S. A. R. Co. v. Smith*, 59 Tex. 406.

8. Injuries at public crossings.*—If a plaintiff who is injured at a highway crossing by a train omits some slight precaution for his safety, and the company omits all care on its part, the plaintiff will not be without remedy. If the plaintiff's negligence is slight, and that of the company, when compared with that of plaintiff, is gross, recovery may be had. *Wabash, St. L. & P. R. Co. v. Wallace*, 19 Am. & Eng. R. Cas. 359, 110 Ill. 114.

A person injured by a collision with a train at a crossing cannot recover damages from the company where he is not free from negligence himself, unless he shows that the company was guilty of a greater degree of negligence than he was. *So held*, where a person entered a railroad crossing with his ears bandaged, but who could have seen an approaching train if he had turned his face in that direction. *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499.—DISAPPROVED IN *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106. FOLLOWED IN

* Illinois doctrine of comparative negligence in actions for destroying property by fire, see note, 38 AM. DEC. 76.

† See also CARRIAGE OF PASSENGERS, 304.

* Law of comparative negligence at crossings, see note, 19 AM. & ENG. R. CAS. 362. See also CROSSINGS, INJURIES, ETC., 207.

Chicago, B. & Q. R. Co. v. Cauffman, 38 Ill. 424.

A person struck by a train of cars within the limits of a city, at a street crossing, may recover for his injuries if, at the time of the accident, the train was running at an improper rate of speed in reference to plaintiff's safety, even if he was guilty of slight negligence, provided the negligence of the company was gross when compared with that of plaintiff. *Wabash R. Co. v. Hendon*, 91 Ill. 406.

If a person travel along a track where cars are frequently passing, even for the purpose of crossing a public highway, unless the highway is so obstructed as to render it necessary to follow the track, he is guilty of such negligence as will prevent a recovery for any injury he may receive, unless there is a higher degree of negligence contributing to the injury on the part of the employés of the road. *Illinois C. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585.

9. Injuries causing death.—(1) *Generally*.—In a suit by an administrator for causing death of his intestate by negligence, plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of defendant gross, in comparison with each other. *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198.

Where a company is sued for negligently killing a person, where no claim is made that the act was wilful, it must appear that the deceased was in the exercise of ordinary care; otherwise the doctrine of comparative negligence has no application. *Chicago & N. W. R. Co. v. Thorson*, 11 Ill. App. 631.

Where the plaintiff sought to recover for the death of his intestate, caused by the alleged negligence of the defendant in the running and management of a locomotive and train of cars, the evidence tending to show contributory negligence on the part of the person killed, the trial court instructed the jury that, although it should appear that the plaintiff's intestate was not exercising ordinary care, yet the plaintiff might recover if the negligence of his intestate was slight and that of defendant was gross in comparison with each other. *Held*, that the rule was not correctly stated. *Chicago, B. & Q. R. Co. v. Johnson*, 8 Am. & Eng. R. Cas. 225, 103 Ill. 512.—QUOTING *Galena &*

C. U. R. Co. v. Jacobs, 20 Ill. 488; *St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300; *Blyth v. Birmingham Water Works Co.*, 11 Ex. 784; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 267. RECONCILING *Stratton v. Central City Horse R. Co.*, 95 Ill. 25.—FOLLOWED IN *Wabash, St. L. & P. R. Co. v. Thompson*, 15 Ill. App. 117; *Union S. Y. & T. Co. v. Monaghan*, 13 Ill. App. 148. QUOTED IN *Chicago & E. I. R. Co. v. O'Connor*, 13 Ill. App. 62. REVIEWED IN *Springfield City R. Co. v. De Camp*, 11 Ill. App. 475.

(2) *Illustrations*.—While attempting to cross a track with his team at a regular highway crossing, a man was struck by an approaching engine and killed, and it appeared that the company allowed the sight along its track, on its right of way, to be obstructed and failed to give the statutory signals until it was too late; and the train, out of time, was running at unusual speed. *Held*, that the negligence of the company was gross, and if deceased was guilty of negligence in failing to listen or look for a train out of time, such negligence was slight, and the company was liable. *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454, 18 Am. Ry. Rep. 378.—QUOTING *Continental Imp. Co. v. Stead*, 95 U. S. 161.—QUOTED IN *Chicago, B. & Q. R. Co. v. McGaha*, 19 Ill. App. 342.

Running a train at the rate of ten miles an hour in a populous city, in violation of an ordinance, at a point where there are many tracks and trains passing, is such gross negligence as to justify a verdict for the death of one killed, where the evidence shows deceased guilty of but slight, if any, negligence. *Pittsburgh, C. & St. L. R. Co. v. Knutson*, 69 Ill. 103.

Plaintiff's intestate was walking in the suburbs of a city on an old highway, on which defendants operated a dummy-line, and which was still used as a thoroughfare, when he was struck and killed by an engine running at the rate of twelve or thirteen miles an hour. Upon seeing the deceased on the track the engineer rang a bell, and he stepped off, but immediately stepped back and was struck. *Held*, that it could not be said that the negligence of the company, if existing at all, was gross as compared with that of plaintiff's intestate, and there could be no recovery. *Springfield City R. Co. v. De Camp*, 11 Ill. App. 475.—REVIEWING

* See also DEATH, ETC., 319, 343.

Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512.

In an action for the death of plaintiff's intestate, who was struck by a moving car at a street crossing, the court instructed the jury that if they believed, from the evidence, that the crossing was used by persons passing frequently between the hours of six and seven o'clock, A.M. and P.M., and that the defendant knew it, and that defendant's servants and employés were switching and moving cars on said crossing between said hours, at a time when it was dark, by pushing them across said street, then it was the duty of the defendant to take some means to warn the persons passing, or to prevent accident to them, and if the defendant did not do so, it was guilty of negligence; and if such negligence was the cause, or principal cause, of the death of the intestate, and if the jury also believe, from the evidence, that the intestate was not guilty of negligence which contributed to the injury, they should find a verdict of guilty. *Held*, that there was no error in the instruction to the prejudice of the defendant, and that it stated the rule as to comparative negligence more favorably to the defendant than it was entitled to have it laid down. *Peoria & P. U. R. Co. v. Clayberg*, 15 Am. & Eng. R. Cas. 356, 107 Ill. 644.

(3) — *collisions*.—In case of a collision of an engine, in a city, with a hand-car, resulting in the death of a laborer, where the engine was running at a speed prohibited by ordinance and no bell was rung or whistle sounded, and the hand-car had been in the habit of coming into the city at the hour the accident occurred, and the approach of the engine was concealed from the view—*held*, that the negligence of the company was gross, and that of the deceased, if any, was slight. *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391.

Plaintiff's intestate was killed while lawfully unloading wood from a car standing on a side-track. Several other empty cars stood some distance away on the same track when a freight train passed and then was switched onto the track where the deceased was at work, and backed against the empty cars and pushed the rear one against him, causing the accident. No warning was given except the ringing of a bell some forty rods away, and the deceased was not acquainted with the mode of switching cars,

nor aware that he was in danger, and could not see the train as it backed against the cars. *Held*, that the company was liable; that deceased, though to some extent at fault, was not guilty of such negligence as to prevent a recovery. *Illinois C. R. Co. v. Hoffman*, 67 Ill. 287.

10. Killing live stock.—In an action for killing of plaintiff's cow by a train in an incorporated town, it appeared that no bell was rung or whistle sounded, and that the train was running at a greater rate of speed than allowed by ordinance of the town. It also appeared that plaintiff's cow was running at large, contrary to ordinance. *Held*, that the negligence of plaintiff being slight as compared with that of the company, which was gross, plaintiff might recover. *Indianapolis & St. L. R. Co. v. Peyton*, 76 Ill. 340.—QUOTED IN *Cleveland, C., C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434.

Plaintiff sued to recover for injuries to his mules by reason of the failure of a company to fence its track, but it seemed that plaintiff was not entirely free from negligence. *Held*, that the company were not liable if plaintiff was guilty of negligence which contributed to the injury, unless the company was guilty of negligence more gross than that of the plaintiff. In such case the jury should compare the negligence of the two. *Illinois C. R. Co. v. Middletown*, 43 Ill. 64.

3. Evidence; Instructions; Questions for Jury.

11. Evidence—Burden of proof.

In a suit for a personal injury received by frightening a team and causing it to run away, by the sounding of a whistle on a locomotive, under an allegation that while defendant's train was approaching from the rear of the team its servants caused the whistle to be sounded in a loud, shrill, unnecessary, and negligent manner, "needlessly, wantonly, negligently, and maliciously"—*held*, competent for plaintiff to show negligence on the part of defendant, and for the latter to show plaintiff's negligence in putting himself in a place of danger, and in such case, unless the negligence of defendant was gross and that of plaintiff slight, in comparison, no recovery could be had. *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 431, 21 Am. Ry. Rep. 328.

* See also ANIMALS, INJURIES TO, 240-242.

A plaintiff is not required to prove, in order to recover, when he has been injured by the negligence of the defendant, that he was free of all, or merely slight, negligence, when considered in comparison with the gross negligence of the defendant. He may have been guilty of slight negligence, and yet have observed ordinary care. *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; *affirming* 22 Ill. App. 462.

The onus of establishing the relative degrees of negligence of the plaintiff and of the defendant is upon the former. *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425.

12. Instructions—Duty to give.—

If the company desires an instruction upon the doctrine of comparative negligence of the parties, it should so request. *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep. 263; *affirming* 19 Ill. App. 591.

Under the ruling of the Illinois court it is not necessary that the doctrine of comparative negligence shall be stated in the plaintiff's instructions. It is sufficient if the jury are correctly instructed in other respects in regard to the doctrine of negligence. But if an attempt is made to state the doctrine of comparative negligence it should be stated correctly. *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep. 263; *affirming* 19 Ill. App. 591.

The court cannot be said to have ignored the question of comparative negligence in an action involving the same, when no instruction is asked by either side upon that question. There is no error in giving an instruction for the plaintiff, stating the law correctly, merely because it ignores the question of comparative negligence. *Illinois C. R. Co. v. Haskins*, 22 Am. & Eng. R. Cas. 343, 115 Ill. 300, 2 N. E. Rep. 654.—RECONCILING *Chicago & N. W. R. Co. v. Dimick*, 96 Ill. 42.

An instruction merely relating to the measure of damages only may be properly given, notwithstanding the fact that it fails to state the law with regard to comparative negligence and ignores the question of care on the part of the deceased. *Chicago, M. & St. P. R. Co. v. Dowd*, 115 Ill. 659, 4 N. E. Rep. 368.

An instruction is not erroneous on the ground that it ignores the question of comparative negligence, where the jury were properly charged as to the right to recover under the doctrine of comparative negligence in another and separate instruction.

Pennsylvania Co. v. Marshall, 119 Ill. 399, 10 N. E. Rep. 220; *affirming* 18 Ill. App. 639.

In an action to recover for an injury alleged to have resulted from the negligence of defendant, an instruction that the jury cannot find for plaintiff unless they "believe from the evidence that the injury complained of was caused by the negligence of defendant, and the plaintiff was without fault," is erroneous, as ignoring the doctrine of comparative negligence. *Ohio & M. R. Co. v. Porter*, 92 Ill. 437.

In an action for personal injuries, where the evidence tends to show plaintiff guilty of some negligence, so that the question of comparative negligence is involved, and the case is closely contested upon that question, every instruction laying down the grounds upon which a recovery may or may not be had should state the rule in regard to the question of care or caution on the part of plaintiff. It is not enough that the instructions given for the opposite party give the rule of law on the subject. *Chicago & N. W. R. Co. v. Dimick*, 2 Am. & Eng. R. Cas. 201, 96 Ill. 42.—DISTINGUISHED IN *Pennsylvania Co. v. Marshall*, 119 Ill. 399. FOLLOWED IN *Willard v. Swanson*, 22 Ill. App. 424. QUOTED IN *Chicago & N. W. R. Co. v. Gertsen*, 15 Ill. App. 614. RECONCILED IN *Illinois C. R. Co. v. Haskins*, 22 Am. & Eng. R. Cas. 343, 115 Ill. 300.

In an action for injury resulting from negligence of defendant, where the alleged negligence consisted in running a railway train at too high a rate of speed within a city, the jury were instructed that if it appeared the train was running at a greater rate of speed than was allowed by ordinance, it would be presumed the injury was occasioned by the negligence of defendant, and defendant would be liable, "unless the presumption of negligence is overcome by evidence." The question of comparative negligence was in issue in the case, and the evidence was conflicting. *Held*, erroneous, because it failed to inform the jury in what manner the presumption of negligence might be rebutted. It should have stated the rule of comparative negligence, or referred to the instruction which did state the rule. *Wabash R. Co. v. Henks*, 91 Ill. 406.

13. Instructions—Interpretation.

—As applied to the doctrine of comparative

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negligence, the terms "want of ordinary care" and "gross negligence," used in an instruction, are not equivalent expressions. Where ordinary care is required the neglect of such a degree of care does not necessarily amount to gross negligence. *Chicago, B. & Q. R. Co. v. Avery*, 8 Ill. App. 133; *affirmed in 109 Ill. 314*.

The court instructed the jury, on behalf of the plaintiff, that they had "the right, under the law, to compare the negligence of the plaintiff and defendant, * * * although the jury may believe, from the evidence, that the plaintiff was not wholly without negligence; yet if you further believe, from the evidence, that the defendant was guilty of gross negligence, while the plaintiff was only guilty of slight negligence, then such slight negligence on the plaintiff's part will not prevent a recovery." *Held*, equivalent to informing the jury, as matter of law, that plaintiff had exercised ordinary care, and submitting to them only the question of the gross negligence of the defendant. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; *reversing 31 Ill. App. 563*.

Where the court instructed the jury, "that although a plaintiff, who had been guilty of negligence, can recover, if the jury believe, from the evidence, that the defendant has been guilty of negligence which is gross, in comparison with that of the plaintiff, which is slight, yet," etc.—*held*, that the words "which is slight" did not render the instruction subject to the objection that it told the jury the plaintiff's negligence was slight. The words "a plaintiff who has been guilty," etc., cannot be held to refer to the plaintiff in the suit. The purpose of the instruction was to state a hypothetical case, in order to present the abstract principle of comparative negligence. *Chicago & N. W. R. Co. v. Goebel*, 119 Ill. 515, 10 N. E. Rep. 369; *affirming 20 Ill. App. 163*.

An instruction stated, that "if the jury believe from the evidence that the plaintiff was injured in a manner stated in the declaration, through the fault of defendant's employes, etc., as alleged in the declaration," and that he was exercising due care "at the time," or if he was exercising ordinary care but was guilty of slight negligence, contributing to the injury, and that the defendant was guilty of gross negligence contributing

to the injury, but that the negligence of plaintiff was slight as compared with that of the defendant, which was gross, the plaintiff is entitled to recover. *Held*, that the words, "if the jury believe, from the evidence, that the plaintiff was injured in the manner stated in the declaration, through the fault of defendant's employes, etc., as alleged in the declaration," applied as well to the second clause of the instruction as to the first; and that the words "at the time" refer to the whole transaction or series of circumstances, from the time the plaintiff reached the tracks to the time when he was injured, and are not limited to the precise time the cars struck him. *Lake Shore & M. S. R. Co. v. Johnson*, 135 Ill. 641, 26 N. E. Rep. 510; *affirming 35 Ill. App. 430*.

14. Instructions—Essential elements.—The jury should not be left to apply the doctrine of comparative negligence without being told that in no event can the plaintiff recover if he has failed to exercise ordinary care. But when the series of instructions, taken as a whole, fully and fairly state the law, and they are not inconsistent or contradictory, the defendant will not be prejudiced by the omission of the requirement of ordinary care by the plaintiff, from his instruction. *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; *affirming 22 Ill. App. 462*.

Where the jury is instructed upon the doctrine of comparative and contributory negligence, both of the elements of the proposition, namely, the slight degree of negligence of the plaintiff and the gross negligence or wilful acts of the defendant, must be embraced in the instruction. *Union R. & T. Co. v. Kallaher*, 12 Ill. App. 400.

The element of comparison is as indispensable to a proper statement of the rule of comparative negligence as are the degrees of negligence of the respective parties; and an instruction which does not institute or direct such comparison is erroneous. *Chicago & E. I. R. Co. v. O'Connor*, 13 Ill. App. 62.—*QUOTING Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *East St. Louis P. & P. Co. v. Hightower*, 92 Ill. 139; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512.—*QUOTED IN Chicago, M. & St. P. R. Co. v. Mason*, 27 Ill. App. 450.—*First Nat. Bank v. Eitemiller*, 14 Ill. App. 22. *Chicago, M. & St. P. R. Co. v. Mason*, 27 Ill. App. 450.—*QUOTING Chicago & E. I. R. Co. v. O'Connor*, 13 Ill. App. 65; *East St.*

Louis, P. & P. Co. v. Hightower, 92 Ill. 139.

The expression, "some negligence," is not equivalent to the expression "slight negligence," used in describing in an instruction the negligence of a plaintiff in comparative negligence; yet where it appears that the jury were not misled by the use of the former expression it is not grounds for reversal. *Willard v. Swanson*, 22 Ill. App. 424.—FOLLOWING *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206; *Chicago v. Stearns*, 105 Ill. 554; *Chicago & N. W. R. Co. v. Dimick*, 96 Ill. 42; *Chicago & N. W. R. Co. v. Clark*, 70 Ill. 276; *Calumet I. & S. Co. v. Martin*, 115 Ill. 358.

15. Instructions correctly stating the law.—In a case involving the comparative negligence of the parties, an instruction stating that the omission to do certain acts by the defendant was culpable negligence, and if the injury was the result of such negligence, and that the party injured was not guilty of negligence contributing to the injury, the jury should find the defendant guilty, is not subject to the objection that it singles out and gives undue prominence to the question of the omission to perform the acts. *Peoria & P. U. R. Co. v. Clayberg*, 15 Am. & Eng. R. Cas. 356, 107 Ill. 644.

An instruction that if the company was guilty of negligence, and the deceased used ordinary care, or was guilty of slight negligence in comparison with the negligence of the company, and that of the company was gross, then plaintiff was entitled to recover, expressed the law accurately. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

16. Instruction incorrectly stating the law.—In a suit to recover for injury sustained by a collision with a train, on the ground of negligence in not giving the statutory signals before reaching a public crossing, an instruction leaving the jury at liberty to find for plaintiff, even if they found he was guilty of great negligence, does not state the law of comparative negligence correctly. *Illinois C. R. Co. v. Maffit*, 67 Ill. 431.

There are no degrees of gross negligence in law, and therefore it is error to so qualify an instruction as to leave the jury to understand that plaintiff may recover notwithstanding his want of ordinary care, if the negligence of defendant was greater than that of plaintiff, or of the deceased

where the suit is to recover damages for causing his death by negligence. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

The suit brought against a railway company for an injury claimed to have resulted from negligence, was tried by both parties on the theory that the doctrine of comparative negligence was applicable, and the defendant asked instructions laying down the rule adopted in this state. On appeal the defendant urged that an instruction given for the plaintiff stating the law of comparative negligence correctly, as expounded by our courts, was erroneous, as not stating the rule as it prevails in the state of Indiana, where the accident and injury occurred. *Held*, that the defendant was by its acts precluded from urging such ground of error. *Louisville, N. A. & C. R. Co. v. Shires*, 19 Am. & Eng. R. Cas. 387, 108 Ill. 617.

Where the evidence showed no negligence on the part of plaintiff to compare with that of defendant, and the court, at the instance of the plaintiff, incorrectly instructed the jury on the law relating to comparative negligence, the latter could not be held to complain of the erroneous instruction. *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 7 Am. Ry. Rep. 45.

In cases involving the mutual negligence of the plaintiff and defendant the following instructions relating to the rule of comparative negligence have been held erroneous:

An instruction to the effect that the jury could find for plaintiff, if defendant's servants were guilty of negligence, even where other instructions state the law correctly. *Chicago & A. R. Co. v. Murray*, 62 Ill. 326, 7 Am. Ry. Rep. 308.—APPLIED IN *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48.

An instruction that the deceased must have been free from contributory negligence, to authorize a recovery, the rule being that if his negligence was slight and that of the company gross, it was liable. *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391.

An instruction that plaintiff may recover if defendant is guilty of more negligence than that of plaintiff in causing the injury, because no such rule of liability is recognized in cases of mutual negligence, as that of a greater degree on the part of the plaintiff. *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365.—REVIEWED IN *Wormell v. Maine C. R. Co.*, 31 Am. & Eng.

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R. Cas. 272, 79 Me. 397, 4 N. Eng. Rep. 692, 10 Atl. Rep. 49.

An instruction which assumes that a mere preponderance of negligence on the part of defendant will entitle plaintiff to recover. *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.

An instruction that plaintiff may recover, though guilty of slight negligence, if defendant's employes fell short, in any degree, of the exercise of that high degree of care that under the circumstances it was reasonable to have used to prevent the injury. *Illinois C. R. Co. v. Hammer*, 85 Ill. 526.—NOT FOLLOWED IN *Colorado C. R. Co. v. Holmes*, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197; see 5 Colo. 516. QUOTED IN *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242; *Pittsburgh, C. & St. L. R. Co. v. Shannon*, 11 Ill. App. 222.

An instruction that plaintiff may recover unless his negligence, contributing to the injury, was equal to or greater than that of defendant. *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63, 21 Am. Ry. Rep. 284.—FOLLOWING *Illinois C. R. Co. v. Baches*, 55 Ill. 379.

An instruction that where a person is injured for want of ordinary care, no action will lie unless the injury was wilfully inflicted by defendant, or that if it were reasonably possible for plaintiff to have prevented the injury by the exercise of proper precaution; and if such care would have averted the injury, in such case, he was guilty of gross negligence and cannot recover, unless defendant wilfully inflicted the injury. *Stratton v. Centra. City Horse R. Co.*, 1 Am. & Eng. R. Cas. 115, 95 Ill. 25.

An instruction to the jury that they may find for the plaintiff if his negligence is slight and that of the defendant gross, inasmuch as it does not direct a comparison of the negligence of the two. *Union S. Y. & T. Co. v. Monaghan*, 13 Ill. App. 148.—FOLLOWING *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 522.

An instruction authorizing a plaintiff to recover if his negligence is slight in comparison with the negligence of the defendant, without requiring the negligence of the defendant to be gross. *Peoria, D. & E. R. Co. v. Miller*, 11 Ill. App. 375.

17. Instructions incorrectly defining terms "gross" and "slight."—In an action based on alleged negligence of the defendant, an instruction was asked

by the defendant that "slight negligence is any negligence which essentially contributes to the injury; gross negligence is such negligence only as evidences a disposition to inflict injury or see it inflicted,"—which was refused. *Held*, properly refused as not a correct definition of gross negligence. *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. Rep. 439; affirming 15 Ill. App. 85.

As applied to the doctrine of comparative negligence an instruction is not correct which adds: "Ordinary care is such as reasonably prudent persons would generally take under like circumstances, and want of such care would not be slight negligence on the part of plaintiff." *Chicago, R. I. & P. R. Co. v. Koehler*, 47 Ill. App. 147.

Where a company is sued for killing a party on its track, an instruction is erroneous which tells the jury that if the company was guilty of gross negligence resulting in death, and the deceased was guilty of only slight negligence contributing to the injury, such contributory negligence would not of itself prevent a recovery, without limiting the terms "slight" and "gross" to their legal definitions. *Springfield City R. Co. v. De Camp*, 11 Ill. App. 475.

18. Misleading instructions.—(1) *When misleading.*—Where an instruction on comparative negligence is given, and no instruction is given in the case telling the jury that no recovery can be had unless the plaintiff was in the exercise of ordinary care, there may be a misleading implication arising from the giving of such comparative-negligence instruction without the hypothesis of ordinary care. *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; affirming 22 Ill. App. 462.

An instruction on a question of comparative negligence asserted that if the defendant's track and platform are dangerous, and the defendant by reasonable care could have learned the fact, and the person injured could not by reasonable care have learned they were dangerous, and that the injury was caused thereby, the defendant was liable. *Held*, that the same was flatly contradictory and calculated to confuse and mislead. If reasonable care would have disclosed the fact of danger to one party, it would have done so equally to the other. *Chicago, R. I. & P. R. Co. v. Clark*, 15 Am. & Eng. R. Cas. 261, 108 Ill. 113.

An instruction was given, that if the jury

believed from the evidence "that defendant was guilty of considerable negligence, and plaintiff was guilty of but little negligence," they must find defendant guilty. *Held*, that while the words "considerable" and "little" were not the most appropriate in comparing the negligence of the parties, still, in view of evidence which seemed to preponderate in favor of plaintiff, and was so found by the jury, the instruction could not have misled them. *Illinois C. R. Co. v. Shultz*, 64 Ill. 172.

An instruction stated that if plaintiff failed to exercise ordinary care, and if by the exercise of such care he could have avoided the injury, he could not recover, unless it appeared that defendant was guilty of gross negligence. *Held*, that the necessary implication from the latter part of the instruction was, that gross negligence of defendant would obviate the necessity of ordinary care by plaintiff, and in that regard it was erroneous. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; *reversing* 31 Ill. App. 563.

An instruction that if in consequence of the neglect to ring a bell or sound a whistle, and keep the same ringing or sounding until the highway crossing was reached, the plaintiff was lulled into a false sense of security, and that in attempting to cross the track he was struck and injured, though somewhat careless in looking out for trains, he might recover, provided upon a comparison the negligence of the defendant was gross and plaintiff's only slight, is misleading and erroneous. Even if the omission may have lulled plaintiff into a false sense of security, it does not follow that such negligence on the part of the railway company occasioned the injury. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; *reversing* 31 Ill. App. 563.

(2) — *and when not*.—An instruction on behalf of the plaintiff that if he was guilty of some negligence, and that the defendant was guilty of gross negligence, which contributed to the injury, and that the plaintiff's negligence was slight as compared with defendant's, then such negligence on the part of the plaintiff will not prevent a recovery, taken in connection with an instruction for the defendant that the plaintiff, in order to recover, was bound to prove, by a preponderance of the evi-

dence, both that the defendant was guilty of negligence, as charged in the declaration, and that he (the plaintiff) was in the exercise of all reasonable and ordinary care at the time of the accident, states the whole law as to ordinary care and comparative negligence correctly to the jury. The plaintiff's instruction, so followed by the defendant's, is not calculated to mislead and induce the jury to infer that the plaintiff might recover, even if he failed to exercise ordinary care. *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; *affirming* 22 Ill. App. 462.

An instruction is not misleading which is to the effect that if the jury believe from the evidence that G. was killed in the manner stated through fault of the company, and was exercising due care himself, or if they believe that G. was guilty of slight negligence, and the company of gross negligence, contributing to the death, but that the negligence of G. was slight, and that of the company gross, as compared with each other, the plaintiff was entitled to recover. *Chicago & A. R. Co. v. Fietsam*, 123 Ill. 518, 15 N. E. Rep. 169, 12 West. Rep. 844; *affirming* 24 Ill. App. 210.

19. Instructions invading province of jury.—It is error to direct the jury as to what constitutes gross and slight negligence. This is a fact for the jury to find. *St. Louis, A. & T. H. R. Co. v. Pflugmacher*, 9 Ill. App. 300.

In a suit to recover for an injury occurring at a railway crossing, where the evidence tends to show that the crossing was a thoroughfare; that the train was running at nearly double the rate of speed allowed by city ordinance; that no bell was ringing or whistle sounding, nor a flagman there to warn persons not to pass, it is error in the court, in its instruction, to limit a recovery to negligence of the railroad and freedom of deceased from negligence materially contributing to the injury. The jury should be instructed to compare the negligence of the parties and say whether, when so compared, that of deceased was slight and that of the railroad gross. *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 405.—REVIEWED IN *Brown v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 222; *Wabash, St. L. & P. R. Co. v. Weisbeck*, 14 Ill. App. 525.

An instruction, that if the plaintiff was injured in the manner stated, through the fault of the defendant, in negligently run-

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in cars, and that the plaintiff was exercising due care at the time, or if said plaintiff was exercising ordinary care, but was guilty of slight negligence contributing to such injury, and that defendant was guilty of gross negligence, but that the negligence of plaintiff was slight and that of defendant was gross in comparison, the plaintiff is entitled to recover, does not assume that defendant's employes were at fault in running the cars, etc., and is not erroneous. *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. Rep. 510; affirming 35 Ill. App. 430.

20. Degree of negligence of the parties is a question of fact.—In the application of the doctrine of comparative negligence, it is a question for the jury to decide whether the negligence of the plaintiff is slight and that of the defendant is gross. *Chicago & A. R. Co. v. Robinson*, 8 Ill. App. 140.

Where a railroad company is charged with negligence in failing to fence its track where it runs through a field, whereby plaintiff's horses are injured, and plaintiff is charged with negligence in turning his horses in the field with blind bridles on, the question of whether the company was guilty of a greater degree of negligence than the plaintiff is for the jury. *St. Louis, A. & T. H. R. Co. v. Todd*, 36 Ill. 409.—CRITICISED IN *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. FOLLOWED IN *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.

It is negligence for a person to travel on a track of the depot grounds, and it is also negligence on the part of the company to have flying switches passing on a track without an engine attached, or a bell ringing, or a whistle sounding; and where both parties are at fault in these respects, it is for the jury to determine whether the negligence of plaintiff is slight and that of defendant gross; and if it is not, plaintiff cannot recover. *Illinois C. R. Co. v. Hammer*, 72 Ill. 347.—QUOTED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108.

Where a company is guilty of negligence in leaving a freight car across a sidewalk leading to a passenger depot, about the time for the arrival of a passenger train, and a person seeking to make the passenger train is also guilty of negligence in attempting to pass under the end of a freight car, though invited by the conductor of that train to do so, and the person in pass-

ing under the car is injured by the freight train suddenly starting, it should be left to the jury to say whether such person's negligence was slight and that of the agent gross, in obstructing the passage and in inviting the passenger to pass under the freight car. *Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. Cas. 254, 96 Ill. 162; reversing 1 Ill. App. 520.—DISTINGUISHED IN *Ohio & M. R. Co. v. Allender*, 47 Ill. App. 484.

II. IN OTHER JURISDICTIONS.

21. Application of the doctrine in Georgia.—(1) *Rule stated.*—Where a railroad is grossly negligent the plaintiff may recover for a personal injury, though he himself is somewhat in fault. *Augusta & S. R. Co. v. McElmurry*, 24 Ga. 75. And compare *Strong v. Sacramento & P. R. Co.*, 61 Cal. 326. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409.

No person shall recover from a railroad company for an injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. *Central R. Co. v. Brinson*, 19 Am. & Eng. R. Cas. 42, 70 Ga. 207.

Where a personal injury has been shown to have been done by the locomotives, or cars, or other machinery of a railroad company, or by any person in its employment or service, the presumption is against the company, but it may defeat a recovery by establishing either of the following defenses: That its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; that the damage was caused by the negligence of the person injured; that he consented to it; or that the person injured, by the use of ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence. If both the person injured and the agents of the company are at fault, there may be a recovery, but the damages are to be diminished by the jury in proportion to the default of the injured party. *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.—DISTINGUISHING *Central R. Co. v. Brinson*, 64 Ga. 479. QUOTING *Southwestern R. Co. v. Johnson*, 60 Ga. 667; *Central R. & B. Co. v.*

Dixon, 42 Ga. 327. REVIEWING *Georgia R. Co. v. Thomas*, 68 Ga. 744.

(2) *Illustrations*.—Where a passenger was guilty of negligence it is the duty of the jury to lessen the verdict in proportion to his want of ordinary care contributing to such injury. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

In an action for an injury to an employé caused by the negligence of a fellow-servant, if both employés were guilty of negligence, but the injured person could not by ordinary care have avoided the consequences to himself, the damages should be lessened in proportion to his want of ordinary care. This is the rule in an action brought by a widow for the homicide of her husband. *Atlanta & R. A. L. R. Co. v. Ayer's*, 53 Ga. 12.

The contributory negligence of the owner of a mule killed by the negligence of a railroad company will count against him in mitigation of damages; and this is true however slight his negligence may have been. *Georgia R. & B. Co. v. Neely*, 56 Ga. 540. —DISTINGUISHED IN *Georgia R. Co. v. Thomas*, 68 Ga. 744.

22. — In Kansas.—Where the negligence of one party is great and that of the other but slight, notwithstanding the slight negligence the party may recover. *Wichita & W. R. Co. v. Davis*, 32 Am. & Eng. R. Cas. 65, 37 Kan. 743, 16 Pac. Rep. 78. Compare *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114.

It is not necessary, in order to enable a party to recover for injuries done to his property, caused by the negligence of others, that he should be entirely free from all negligence himself; but if his negligence is slight and that of the other party is gross, or if his is remote and that of the other is the proximate cause of the injury, he may recover. *Union Pac. R. Co. v. Rollins*, 5 Kan. 167. —NOT FOLLOWED IN *Colorado C. R. Co. v. Holmes*, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197. —And see also *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 38. *Union Pac. R. Co. v. Henry*, 36 Kan. 565. *Pacific R. Co. v. Houts*, 12 Kan. 328.

Where two parties, each of whom is under duty to exercise ordinary care, are guilty of negligence contributing to the injury of one of them, the injured party cannot recover damages therefor from the other on the sole ground that his negligence was less than that of the other. *Kansas Pac. R. Co. v. Peavey*, 11 Am. & Eng.

R. Cas. 260, 29 Kan. 169, 44 Am. Rep. 630.

In an action for personal injuries, brought by an employé of the company, in a case where the company is liable only for ordinary negligence and not for slight negligence, if the plaintiff himself is guilty of ordinary negligence contributing to the injury he cannot recover if the negligence of the company or a fellow-employé is merely greater than his; for in this class of cases the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence, to sustain his action. *Kansas Pac. R. Co. v. Peavey*, 11 Am. & Eng. R. Cas. 260, 29 Kan. 169, 44 Am. Rep. 630.

An instruction to the jury that "if there was negligence on the part of both parties, and they find that the negligence of the plaintiff was only slight compared with that of the defendant, their verdict must be for the plaintiff," is erroneous, for the Kansas court does not indorse the rule of comparative negligence. *Atchison, T. & S. F. R. Co. v. Morgan*, 13 Am. & Eng. R. Cas. 499, 31 Kan. 77, 1 Pac. Rep. 298. —FOLLOWING *Sawyer v. Sauer*, 10 Kan. 466.

23. — In Oregon.—The absence of care on the part of the plaintiff, contributing to the injury, but not amounting to a want of ordinary care, will not excuse gross negligence in the defendant. *Bequette v. People's Transp. Co.*, 2 Oreg. 200. —FOLLOWED IN *Holstine v. Oregon & C. R. Co.*, 8 Oreg. 164.

Slight negligence will not prevent a recovery, if the negligence complained of has been gross. *Holstine v. Oregon & C. R. Co.*, 8 Oreg. 164. —FOLLOWING *Bequette v. People's Transp. Co.*, 2 Oreg. 200.

24. — In Tennessee.—The doctrine of comparative negligence has been repudiated in this state, and it is reversible error for the court to charge it where the law of contributory negligence should be given. *East Tenn., V. & G. R. Co. v. Hull*, 41 Am. & Eng. R. Cas. 495, 88 Tenn. 33, 12 S. W. Rep. 419. —FOLLOWED IN *East Tenn., V. & G. R. Co. v. Aiken*, 89 Tenn. 245.

The use of the words "grosser negligence" in a charge does not imply the doctrine of comparative negligence where they are immediately followed by the explanatory clause "that negligence which was the prime, principal, and proximate cause of the injury." *East Tenn., V. & G. R. Co. v. Gurley*, 17 Am. & Eng. R. Cas. 368, 12 La

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A charge embodying the doctrine of comparative negligence is erroneous; and comparative, not contributory, negligence is defined where the jury are instructed to decide against the party guilty of the "greater" or "grosser" negligence, without the qualification that the negligence must have been the "prime, principal, and proximate cause of the injury." *East Tenn., V. & G. R. Co. v. Aiken*, 89 Tenn. 245, 14 S. W. Rep. 1082. — DISTINGUISHING East Tenn., V. & G. R. Co. v. Gurley, 12 Lea (Tenn.) 55; East Tenn., V. & G. R. Co. v. Fain, 12 Lea (Tenn.) 35. FOLLOWING East Tenn., V. & G. R. Co. v. Hull, 88 Tenn. 33.

The doctrine of comparative, not of contributory, negligence is stated where the court, without modification in other parts of his charge, uses this language: "If the proof should show that it was the greater or grosser negligence of the defendant, through its agents or employes who were the superiors of this plaintiff, or by using defective, imperfect, and unsafe machinery, that he was injured, he could recover; but if, at the same time, the evidence shows you that the negligence or want of care or caution upon the part of the plaintiff himself contributed to that injury, then that would be contributory negligence, and would be looked to and considered in mitigation of damages; that is, you could not give as much damages for the injury he sustained where his own want of care or negligence contributed as you could where he had been entirely blameless. The greater the contributory negligence upon his part the less damages, if he should be entitled to any." *East Tenn., V. & G. R. Co. v. Hull*, 41 Am. & Eng. R. Cas. 495, 88 Tenn. 33, 12 S. W. Rep. 419.—DISTINGUISHING East Tenn., V. & G. R. Co. v. Gurley, 12 Lea (Tenn.) 55; East Tenn., V. & G. R. Co. v. Fain, 12 Lea (Tenn.) 35.

25. Doctrine denied in Alabama.—The doctrine of "comparative negligence" does not prevail in Alabama, and charges based on it are properly refused. *Cook v. Central R. & B. Co.*, 67 Ala. 533.—NOT FOLLOWING Illinois C. R. Co. v. Hetherington, 83 Ill. 510.

The Alabama court has rejected the doctrine of comparative negligence and adhered to the doctrine of contributory negligence. *Fraser v. South & N. Ala. R. Co.*, 28 Am. & Eng. R. Cas. 565, 81 Ala. 185, 1 So. Rep. 85.

If the deceased was negligent, it would not be proper to compare his negligence with defendant's negligence, or find against the guiltiest; but the proper inquiries should be whether the damage complained of was caused entirely by the negligence of defendant, or whether the plaintiff by want of ordinary care so far contributed to his own injury that, but for such contributory negligence, the accident would not have happened. These matters are for the consideration of the jury, under the evidence. *Birmingham Mineral R. Co. v. Jacobs*, (Ala.) 55 Am. & Eng. R. Cas. 299, 13 So. Rep. 408.

26. — in Arizona.—An instruction that if both parties were guilty of negligence then the negligence of the one party was to be balanced as against the negligence of the other, and the jury were to find for the party least guilty of negligence, is erroneous. The doctrine of comparative negligence is disapproved. *Prescott & A. C. R. Co. v. Rees*, (Ariz.) 28 Pac. Rep. 1134.

27. — in Indiana — in Iowa.—Where the company had been guilty of gross negligence or of wanton or wilful negligence and a trespasser on the track of slight negligence only, such trespasser is precluded from recovery. The doctrine of comparative negligence had no application in Indiana. *Terre Haute & I. R. Co. v. Graham*, 12 Am. & Eng. R. Cas. 77, 95 Ind. 286, 48 Am. Rep. 719.—REVIEWING Pennsylvania Co. v. Sinclair, 62 Ind. 301; Indianapolis & V. R. Co. v. McClaren, 62 Ind. 566. *Arts v. Chicago, R. I. & P. R. Co.*, 38 Iowa 293.

The doctrine of comparative negligence does not prevail in Iowa, but that of contributory negligence; and under this latter doctrine a plaintiff cannot recover for an injury to which his own negligence has contributed, notwithstanding the negligence of the company. *O'Keefe v. Chicago, R. I. & P. R. Co.*, 32 Iowa 467, 10 Am. Ry. Rep. 63. — FOLLOWED IN Newport News & M. V. R. Co. v. Howe, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121; *Lang v. Holiday Creek R. Co.*, 42 Iowa 677.

28. — in Michigan.—The doctrine of comparative negligence does not prevail

in the state of Michigan. *Matta v. Chicago & W. M. R. Co.*, 32 *Am. & Eng. R. Cas.* 71, 69 *Mich.* 109, 13 *West. Rep.* 717, 37 *N. W. Rep.* 54. *Mynning v. Detroit, L. & N. R. Co.*, 23 *Am. & Eng. R. Cas.* 317, 59 *Mich.* 257, 26 *N. W. Rep.* 514.

29. — in Missouri.—The doctrine of comparative negligence has never been recognized in Missouri. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 422, 94 *Mo.* 255, 13 *West. Rep.* 233, 237, 7 *S. W. Rep.* 1.

An instruction directing the jury that if they find that the plaintiff, in the act of driving his cattle over a crossing, where one was killed, was negligent, and that defendant's servants in operating the train at and before the accident were also negligent, and if they are unable to discriminate between the degrees of negligence of each of the parties, they should find for the defendant, is disapproved as apparently announcing the doctrine of comparative negligence, which the law of Missouri does not recognize; yet, where it is not perceived how it could affect defendant injuriously, it will not be deemed reversible error. *Brooks v. Hannibal & St. J. R. Co.*, 35 *Mo. App.* 571.

30. — in New Jersey.—It is a part of the rule of contributory negligence that the plaintiff's negligent act must proximately contribute to his injury; but if it so contribute, the comparative degrees of the plaintiff's and defendant's negligence will not be considered. *Pennsylvania R. Co. v. Righter*, 2 *Am. & Eng. R. Cas.* 220, 42 *N. J. L.* 180.

31. — in Pennsylvania.—In Pennsylvania the doctrine of comparative negligence does not obtain. So in an action for death, after instructing the jury that no recovery could be had, if the deceased contributed to the accident, it was error to add that very slight negligence on the part of the deceased, and gross negligence on the part of the defendant, would not prevent a recovery. So it is error to instruct: "Where the negligence is equal there can be no recovery." *Catawissa R. Co. v. Armstrong*, 49 *Pa. St.* 186.—QUOTED IN *O'Donnell v. Allegheny Valley R. Co.*, 59 *Pa. St.* 239.

32. — in Texas.—The doctrine of comparative negligence is not in force in the courts of Texas. *McDonald v. International & G. N. R. Co.*, (*Tex.*) 22 *S. W. Rep.* 939. *Houston & T. C. R. Co. v. Gorbett*, 49 *Tex.* 573.

Therefore it was not error to instruct the jury that plaintiff could not recover if the deceased was guilty of contributory negligence, although the company's servants were guilty of gross negligence. The true rule is that plaintiff is only entitled to recover when the negligence of defendant is the proximate cause of the injury; and, where the deceased stepped upon the track of the railroad immediately in front of the engine and in very close proximity to it, his action was such that the negligence of the engineer in not keeping a proper lookout would not be construed as entitling plaintiff to recovery. *McDonald v. International & G. N. R. Co.*, 55 *Am. & Eng. R. Cas.* 280, 86 *Tex.* 1, 20 *S. W. Rep.* 847.

So in an action by a passenger to recover for a personal injury, an instruction to the effect that plaintiff cannot recover if his own negligence contributed to the injury, except where the omission of the company to use proper care to avoid injuring him, after becoming aware of plaintiff's danger, was the proximate cause of the injury, is erroneous. *Galveston, H. & S. A. R. Co. v. Thornsberry*, (*Tex.*) 17 *S. W. Rep.* 521.

COMPARTMENT CARS.

Patents for signal-bells in, see PATENTS FOR INVENTIONS, 48.

COMPENSATION.

Claims against government for, see CLAIMS AGAINST UNITED STATES, 12.

Elements of, as damages, see DAMAGES, 24. For carrying the mails and mail clerks, see CARRIAGE OF MAILS, 9-17.

— construction of cattle-guards, see CATTLE-GUARDS, 19.

— "injuriously affecting" property not taken, when necessary, see EMINENT DOMAIN, 173.

— land compulsorily purchased, under English statutes, see EMINENT DOMAIN, 1150-1200.

— expropriated in Canada, see EMINENT DOMAIN, 1232-1273.

— taken for embankments, see EMBANKMENTS, 1.

— — who entitled to, see EMINENT DOMAIN, 424-447.

— property taken, how assessed, generally, see EMINENT DOMAIN, 448-472.

— — assessment by appraisers or viewers, see EMINENT DOMAIN, 473-485.

For property taken, assessment by arbitrators, see EMINENT DOMAIN, 486-492.

— — — — — commissioners, see EMINENT DOMAIN, 493-515.

— — — — — jury, see EMINENT DOMAIN, 516-594.

— running powers, how estimated, see LEASES, ETC., 119.

— services rendered to the government, see LAND GRANT RAILROADS, 10.

— the taking of abutting easements, see ELEVATED RAILWAYS, 59.

— — — — — a homestead for right of way, see HOMESTEAD, 3.

— use of track, how determined, see LEASES, ETC., 117.

— — — — — by rival company, see STREET RAILWAYS, 251-254.

Injunction, where not made or tendered, see ELEVATED RAILWAYS, 74.

Jurisdiction of equity of suits for, see EQUITY, 23.

Must be provided for, in delegating power to condemn property, see EMINENT DOMAIN, 90.

Necessity of, and how made or secured, in condemnation proceedings, see EMINENT DOMAIN, 371-442.

Obtainable at law, bars injunction suit, see ELEVATED RAILWAYS, 73.

Of agents, see AGENCY, 34-36.

— arbitrators, see ARBITRATION AND AWARD, 15.

— attorneys, see ATTORNEYS, 12-21.

— collector of customs, see REVENUE, 3.

— commissioners, see RAPID TRANSIT ACTS, 8.

— company's engineer, see CONSTRUCTION OF RAILWAYS, 53.

— corporate officers, see OFFICERS, 7.

— county treasurer, see COUNTIES, 8.

— creditors, upon abandonment of road, see ABANDONMENT, 11.

— directors, see DIRECTORS, 27-33.

— employees, generally, see EMPLOYÉS, 10-21.

— landowner, in case of abandonment of road, see ABANDONMENT, 10.

— mail clerks, inspectors, etc., see CARRIAGE OF MAILS, 19.

— officers, when may be reached in attachment, see ATTACHMENT, 30.

— physicians, see MEDICAL SERVICES, 15-17.

— president of corporation, see PRESIDENT, 13.

— purchaser in bad faith, for improvements, see MORTGAGES, 243.

— railway commissioners, see RAILWAY COMMISSIONERS, 42, 43.

— company, for carrying express matter, see EXPRESS COMPANIES, 12.

Of railway contractors, see CONSTRUCTION OF RAILWAYS, 36-38.

— receivers, see RECEIVERS, XI.

— superintendent, see SUPERINTENDENT, 5.

— trustees, see TRUSTS AND TRUSTEES, II.

— under mortgage, see MORTGAGES, 156-158.

— witnesses, see WITNESSES, 3.

Pleading in actions for, see MEDICAL SERVICES, 17.

Right of condemning company to enter before making, see EMINENT DOMAIN, 412-418.

— to, on part of railroad crossed by another, see CROSSING OF RAILROADS, 22, 38-51.

To abutting owners, see GOVERNMENT RAILROADS, 11.

— — — — — for construction of railway in street, see STREET RAILWAYS, 24, 62, 191-196.

— city for use of streets, see ELEVATED RAILWAYS, 45.

— company for laying out street across tracks, see CROSSING OF STREETS AND HIGHWAYS, 75-85.

— lessor—lessee running extra trains, see LEASES, ETC., 76.

— — — — — where third rail is necessary to narrow-gauge road, see LEASES, ETC., 120.

COMPENSATORY DAMAGES.

For injury to passenger, see CARRIAGE OF PASSENGERS, 617.

In stock-killing cases, see ANIMALS, INJURIES TO, 580.

When recoverable, failure to show case for exemplary damages, see DEATH, ETC., 423.

— the measure of recovery, see DAMAGES, 17-25.

— — — — — for wrongful expulsion from cars, see EJECTION OF PASSENGERS, 105-111.

COMPETENCY.

Of arbitrators in condemnation proceedings, see EMINENT DOMAIN, 486, 1254.

— conductor, evidence to show, see CARRIAGE OF PASSENGERS, 535.

— of employees, presumption of, see EVIDENCE, 122.

— evidence, generally, see EVIDENCE, 1-97.

— — — — — in condemnation proceedings, see EMINENT DOMAIN, 362.

— — — — — objections as to, see APPEAL, ETC., 94.

— experts, generally, see WITNESSES, 146-151.

— — — — — testing on cross-examination, see WITNESSES, 73.

- Of fellow-servants, see FELLOW-SERVANTS, IV.
 — jurors, sufficiency of objections to, see APPEAL, ETC., 93.
 — members of corporation as witnesses, see WITNESSES, 10.
 — plaintiff, in action against corporation, see WITNESSES, 9.
 — to prove value or contents of lost baggage, see BAGGAGE, 114.
 — wife, where husband is a nominal party, see WITNESSES, 21.
 — witnesses, see WITNESSES, 4-25.

COMPETING LINES.

See PARALLEL AND COMPETING LINES.

COMPETITION.

- As affecting rates, see INTERSTATE COMMERCE, 35.
 — relative charges for long and short hauls, see INTERSTATE COMMERCE, 114-118.
 Between rival roads, effect of, generally, see INTERSTATE COMMERCE, 63-65.
 Discrimination, when justified by, see DISCRIMINATION, 42-45.
 When justifies different rates of charges, see CHARGES, 34.

"COMPETITIVE STATIONS."

Meaning of, in contract, see CONTRACTS, 33.

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- Joinder of, in equity, see PARTIES TO ACTIONS, 18-20.
 Must come with clean hands, see EQUITY, 4.
 Necessity of performance by, see SPECIFIC PERFORMANCE, 7, 8.
 Who may be, in condemnation proceedings, see EMINENT DOMAIN, 253-256.

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- Amendment of, see ELEVATED RAILWAYS, 98;
 PLEADING, 143-166.
 Before interstate commerce commission, see INTERSTATE COMMERCE, 13, 151-155.
 For assault upon passenger, see CARRIAGE OF PASSENGERS, 539.
 — boycotting, sufficiency of, see BOYCOTTING, 1.
 — injunction, sufficiency of, see EMINENT DOMAIN, 1046.
 — injuries caused by derailment, see DERAILMENT, 2 (1).
 — trespass, in entry and construction of road, see EMINENT DOMAIN, 1067.
 Form, requisites, and sufficiency of, in actions, generally, see PLEADING, 7-38.

- In action for injuries caused by collision, see COLLISIONS, 10.
 — injury at crossings, see CROSSINGS, INJURIES, ETC., AT, 159, 227.
 — at station, see STATIONS AND DEPOTS, 131.
 — to child, see CHILDREN, INJURIES TO, 157.
 — passenger on street-car, see STREET RAILWAYS, 436.
 — plaintiff in the street, see STREET RAILWAYS, 484.
 — overcharge of fare, see TICKETS AND FARES, 131.
 — penalty under "contract labor law," see CONTRACT LABOR LAW, 2.
 — actions against carriers of live stock, see CARRIAGE OF LIVE STOCK, 138.
 — for injury to passengers, see CARRIAGE OF PASSENGERS, 537-553.
 — killing stock, see ANIMALS, INJURIES TO, 326-369.
 — loss of baggage, see BAGGAGE, 109, 110.
 — or damage to goods carried, see CARRIAGE OF MERCHANDISE, 723-733.
 — wrongful expulsion from train, see EJECTION OF PASSENGERS, 82-89.
 — on bonds, see BONDS, 56.
 — negotiable instruments, see BILLS, NOTES, AND CHECKS, 21.
 — condemnation proceedings, see EMINENT DOMAIN, 305-331.
 — ejectment, requisites and sufficiency of, see EJECTMENT, 25.
 — justices' court, requisites of, see ANIMALS, INJURIES TO, 615-625; JUSTICE OF THE PEACE, 7.
 — proceedings for dissolution, sufficiency of, see DISSOLUTION, 17.
 — to obtain right to cross another railroad, see CROSSING OF RAILROADS, 28.
 — suits founded on construction contracts, see CONSTRUCTION OF RAILWAYS, 106.
 Making more definite and certain, see also CARRIAGE OF MERCHANDISE, 731.
 Of pain and suffering, when *res gesta*, see EVIDENCE, 177.
 — unjust preference, jurisdiction to investigate, see RAILWAY COMMISSIONERS, 12.
 Sufficiency of allegation of negligence in, see NEGLIGENCE, 87-90.
 — in actions for causing death, see DEATH BY WRONGFUL ACT, 125-151.

COMPLETION.

- Of elevated railway, fixing time for, see ELEVATED RAILWAYS, 14.

Of government aided road, see CENTRAL PACIFIC R. Co., 2.

— railway, indemnity to the crown to secure, see INDEMNITY BONDS, 8.

— road, as condition precedent to donation, see MUNICIPAL AND LOCAL AID, 256.

— subscription to be paid upon, see MUNICIPAL AND LOCAL AID, 240.

When road is completed within act of congress, see LAND GRANT RAILROADS, 3.

COMPROMISE.

By agent, of claim for injury to live stock, see AGENCY, 60.

Estoppel by, see ESTOPPEL, 32.

Evidence of efforts to make, see EVIDENCE, 60.

Offers of, as evidence, see EVIDENCE, 221.

— evidence as to, in actions for loss of baggage, see BAGGAGE, 116.

Power of attorneys to make, see ATTORNEYS, 10.

— personal representatives to make, see EXECUTORS AND ADMINISTRATORS, 8.

With client, effect of, on attorney's lien, see ATTORNEYS, 19.

See also RELEASE.

1. Favored in law.—The law favors the compromise and settlement of disputed claims. *Mateer v. Missouri Pac. R. Co.*, 105 Mo. 320, 16 S. W. Rep. 839.

2. Validity.—Where an action is brought on an agreement of compromise for steers lost in transit, but it does not appear that the officers with whom the compromise was made had authority to do so, a demurrer to the evidence should be sustained. *Griffin v. Wabash, St. L. & P. R. Co.*, 22 Mo. App. 621.

Where, in an action against a company to recover damages for the non-performance of a contract to construct a fence along its right of way, the cause is continued until a subsequent term under a written agreement that the defendant shall by that time construct a fence of a certain quality and pay the costs of the action and the plaintiff's attorneys' fees, it is not error, upon the trial of the cause, to exclude the agreement and evidence that a fence was built, unless it is shown that there was a complete compliance with the agreement upon which the cause was continued, or that the plaintiff has accepted the fence so erected as a complete or partial compliance with the contract sued on. *Indiana, B. & W. R. Co. v.*

Adams, 112 Ind. 302, 11 West. Rep. 668, 14 N. E. Rep. 80.

3. Conclusiveness.—If a party has compromised his claim for damages, and afterwards uses up the amount received in liquidation of the claim, he cannot be heard to assert fraud and deceit as to the compromise, when he does not tender back the amount he has already received. *Stewart v. Houston & T. C. R. Co.*, 62 Tex. 246.—QUOTING *Newkirk v. Cone*, 19 Ill. 449.

4. Effect.—Where a petition is filed against a company for damages for trespass and for a right of way taken, and it embraces two causes of action, a compromise "of the cause pending" will embrace both causes of action; and upon payment of the amount agreed upon the company has a right to demand a deed for the right of way, and the court has jurisdiction to order the deed executed. *Robertson v. Central R. Co.*, 10 Am. & Eng. R. Cas. 420, 57 Iowa 376, 10 N. W. Rep. 728.

The compromise of an action by a railroad employé to recover damages for personal injuries is sufficient consideration to support an agreement by the company to employ the plaintiff. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298.

5. Who bound by.—A compromise entered into between the liquidator of the Clinton and Port Hudson railroad company and the state, a creditor and bondholder, under the authority of an act of the legislature, whereby the state agreed to take ten cents on the dollar, is not binding on the other creditors and bondholders of the corporation, and the liquidator cannot set up, as a bar to the right of other creditors to recover, that he has entered into a compromise with the state at ten cents on the dollar. *Clinton & P. H. R. Co. v. Lee*, 22 La. Ann. 287.

The fact that the state has seen proper to compromise her claim against the company with the stockholders, at ten cents on the dollar, furnishes no reason why the other creditors should be barred from collecting the whole amount of their claims. *Clinton & P. H. R. Co. v. Lee*, 22 La. Ann. 287.

6. What may be compromised.—A widow whose husband has been killed by another's wrongful act may compromise and settle the statutory right of action for damages that survives to her for the benefit of herself and the husband's next of kin,

either before or after she has brought suit thereon. She may likewise receive and receipt for the entire damages, and, upon payment to herself of the amount agreed upon, she may discharge the wrong-doer from all further liability either to herself or the husband's next of kin. *Holder v. Nashville, C. & St. L. R. Co.*, 92 Tenn. 141, 20 S. W. Rep. 537.

7. Proof of compromise—Evidence.

—When the agreement for the compromise of a suit was oral, and a judgment entered in pursuance thereof does not undertake to embody it, or even to recite it, one of the parties may, by parol evidence, show that obligations not embodied in the judgment were entered into by the other. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298.

The rule which excludes an offer to compromise a contemplated suit, when made under an express or implied agreement that the conversation shall be without prejudice, is founded in the policy that to admit it in evidence would tend to discourage the settlement of litigation. If the proposition be to pay a sum to buy peace, and it has not been accepted and become a contract, it will be deemed to have been made without prejudice, and is not admissible in evidence. *International & G. N. R. Co. v. Ragsdale*, 67 Tex. 24, 2 S. W. Rep. 515.—FOLLOWING Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527.

COMPULSORY EXAMINATION.

Of the person, see PHYSICAL EXAMINATION.

COMPULSORY NONSUIT.

For contributory negligence, when proper, see CONTRIBUTORY NEGLIGENCE, 88.

Generally, see TRIAL, V.

COMPULSORY PURCHASE.

Of land, under English statutes, see EMINENT DOMAIN, 1086-1209.

COMPUTATION.

Of damages for breach of construction contract, see CONSTRUCTION OF RAILWAYS, 118.

— to abutting owners, rules for, see ELEVATED RAILWAYS, 136-138.

— child for death of parent, see DEATH, ETC., 392.

Of damages to wife for death of husband, see DEATH, ETC., 394.

— interest, see INTEREST, 11-14.

— prospective damages for causing death, see DEATH, ETC., 410.

— time, under statutes of limitation, see LIMITATIONS OF ACTIONS, 65.

CONCEALMENT.

By shipper, of kind or value of goods, see CARRIAGE OF MERCHANDISE, 199-203, 444.

Of value or contents of baggage, effect of, see BAGGAGE, 88-90.

When limitation begins to run in cases of, see LIMITATIONS OF ACTIONS, 29, 70.

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Of law, must not be alleged in pleading, see ANIMALS, INJURIES TO, 330.

— witnesses, inadmissible, see EJECTION OF PASSENGERS, 92; EVIDENCE, 35.

— on evidence, see WITNESSES, 94.

Questions to witness calling for, see WITNESSES, 55.

CONCLUSIVENESS.

Of assessment by jury, under English Compulsory Purchase statutes, see EMINENT DOMAIN, 1187.

— awards, see ARBITRATION AND AWARD, 26.

— award of arbitrators under English and Canadian statutes, see EMINENT DOMAIN, 1175, 1263.

— carrier's receipt for goods, see CARRIAGE OF MERCHANDISE, 405.

— commissioners' decisions, see RAILWAY COMMISSIONERS, 25-28.

— compromise, see COMPROMISE, 3.

— decision of court below, see APPEAL, ETC., 14.

— decrees of foreclosure, see MORTGAGES, 211.

— engineer's award or decision, see CONSTRUCTION OF RAILWAYS, 58, 60, 70.

— expert testimony, see WITNESSES, 106.

— judgments, generally, see JUDGMENT, 14-31.

— in condemnation proceedings, see EMINENT DOMAIN, 848, 867, 880.

— prior condemnation proceedings, see EMINENT DOMAIN, 68.

— railway tickets, see TICKETS AND FARES 6.

— receipt, see RECEIPT, 1, 2.

— rulings in equity in subsequent action at law, see JUDGMENT, 27.

Of settlements between company and contractor, see CONSTRUCTION OF RAILWAYS, 38.

— verdict of jury to assess land damages, see EMINENT DOMAIN, 826, 867.

CONCURRENT JURISDICTION.

Of condemnation proceedings, see EMINENT DOMAIN, 246.

— federal and state courts, see FEDERAL COURTS, 12.

Precedence between courts of, see JURISDICTION, 9.

CONCURRENT NEGLIGENCE.

Effect of, generally, see CONTRIBUTORY NEGLIGENCE, 5.

Of plaintiff and another, when a defense, see IMPUTED NEGLIGENCE, 27; NEGLIGENCE, 86.

— two carriers, which liable, see CARRIAGE OF PASSENGERS, 535.

CONDEMNATION.

In general, see EMINENT DOMAIN.

Enjoining, see CROSSING OF RAILROADS, 72, 73; CROSSING OF STREETS AND HIGHWAYS, 74.

Limitations of time to begin, see LIMITATIONS OF ACTIONS, 47.

Of abutting easements, see ELEVATED RAILWAYS, 28-49.

— land for elevators, see ELEVATORS, 1.

— — private railroads, see PRIVATE RAILROADS, 1.

— — union depot, see UNION DEPOT COMPANIES, 3.

— railroad right of way for telegraph lines, see TELEGRAPH LINES, 2.

— right of way over public lands, see PUBLIC LANDS, X.

— — — through city streets, see STREETS AND HIGHWAYS, II.

— — to cross track of another road, see CROSSING OF RAILROADS, 3.

— turnpike, by railway company, see TURNPIKES, ETC., 2, 3.

CONDITIONAL.

Delivery. parol evidence to show, see EVIDENCE, 186.

Execution of instrument, parol evidence to show, see EVIDENCE, 188.

Sales, relative rights of mortgagee and conditional vendor of rolling stock, see MORTGAGES, 50-60.

— what are, and rights of the parties, see SALES, 9.

Subscriptions in aid of railways, see MUNICIPAL AND LOCAL AID, 224-243.

— to stock, see SUBSCRIPTIONS, V.

CONDITIONS.

As to prepayment of compensation, waiver of, see EMINENT DOMAIN, 419-423.

— — use of franchises, see FRANCHISES, 7.

Financial, of deceased, proof of, in action for causing death, see DEATH, ETC., 282, 286.

For identification of passenger, waiver of, see TICKETS AND FARES, 81.

Grants to company on, in Canada, see EMINENT DOMAIN, 1213.

Imposed by city, upon occupation of street, see STREET RAILWAYS, 90.

— — statute, on aid to railways, see MUNICIPAL AND LOCAL AID, 225.

— — voters, as to municipal subscriptions to railways, see MUNICIPAL AND LOCAL AID, 147.

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CONDUCTOR.

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On road owned by crown, liability of, to passenger injured, see **CARRIAGE OF PASSENGERS, 536.**

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1. Authority, generally.—A conductor is charged with the administration of the rules of the company for the regulation of persons traveling on its cars. *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

The conductor of a railroad train is not, perhaps, as supreme as the master of a ship, but on analogous principles he has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. *Atchison, T. & S. F. R. Co. v. Gants*, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608, 17 Pac. Rep. 54.—*QUOTING Hall v. Memphis & C. R. Co.*, 15 Fed. Rep. 61.

Under the statute which provided that the conductors of railway trains should be invested with police power while on duty on their respective trains, it was not intended to require companies to carry a force of police large enough to repel the attack of an outside mob. *Chicago & A. R. Co. v. Pillsbury*, (Ill.) 8 N. E. Rep. 803.

The conductor is recognized as the master of the train. The brakeman would seem restricted to the business indicated by the name applied to the service, and there does not appear any necessity for conferring upon a brakeman authority to keep trespassers from the train. The conductor has such power. *International & G. N. R. Co. v. Anderson*, 53 Am. & Eng. R. Cas. 59, 82 Tex. 516, 17 S. W. Rep. 1039.

A conductor is not a general agent of the road authorized to waive the terms of a written contract of carriage. *Cloud v. St. Louis, I. M. & S. R. Co.*, 14 Mo. App. 136.

The authority of the conductor as the representative of the carrier terminates when a safe alighting place is provided and the passenger has voluntarily left the train in safety. *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 221, 13 N. E. Rep. 122, 14 N. E. Rep. 352.

2. — to allow person to ride in freight or cattle car.—Railroad companies have the right to make a complete separation between their freight and passen-

ger business. Where this is done, the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and notice of this limited authority will be implied from the nature and apparent division of the business. *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382, 7 Am. Ry. Rep. 67.—*DISTINGUISHING Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 476; *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187. *REVIEWING Elkins v. Boston & M. R. Co.*, 23 N. H. 275.—*DISTINGUISHED IN Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796; *St. Joseph & W. R. Co. v. Wheeler*, 26 Am. & Eng. R. Cas. 173, 35 Kan. 185; *Blair v. Erie R. Co.*, 66 N. Y. 313; *Pool v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 332, 53 Wis. 657. *EXPLAINED IN Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 Am. & Eng. R. Cas. 249, 64 Wis. 447. *REVIEWED IN Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671; *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10; *Morris v. Brown*, 19 N. Y. S. R. 355; *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.

Where it is customary for some person to ride in the same car with horses, to care for them, it would seem to be within the general authority of the conductor of the train to grant permission to a person so to ride for that purpose. *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 Am. & Eng. R. Cas. 249, 64 Wis. 447, 24 N. W. Rep. 618, 54 Am. Rep. 634.—*EXPLAINING Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382.

3. — to carry passenger on construction train.—It being customary to carry passengers upon construction trains, persons having no notice of a contrary rule of the company had a right to assume that the conductor had authority to carry persons on such trains, and that the granting of permission by him fell within his general authority as manager of the train. *St. Joseph & W. R. Co. v. Wheeler*, 26 Am. & Eng. R. Cas. 173, 35 Kan. 185, 10 Pac. Rep. 461.

4. — to employ brakeman.—When one of the brakemen on a freight train becomes ill and unable to perform his duties the conductor of the train has, of necessity,

* Injury while attempting to board engine of freight train with consent of conductor. Conductor's authority, see 39 AM. & ENG. R. CAS. 417, *abstr.*

implied authority to employ another person to act as brakeman for the time being. *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764.—APPLIED IN *McDaniel v. Highland Ave. & B. R. Co.*, 90 Ala. 64. QUOTED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 22 Pac. Rep. 703.

And the company is liable to the person so employed for injuries received in the service while acting under the orders of the conductor; but where it appears that the person injured was in the employment of the company as a night watchman, was on the train, not in the discharge of any duties required by his employment, but for his own private purposes, and was injured while attempting to make a coupling on request of the conductor, these facts do not show an employment as brakeman by the conductor, and do not render the company liable for the injury. *Georgia Pac. R. Co. v. Propst*, 38 Am. & Eng. R. Cas. 11, 85 Ala. 203, 4 So. Rep. 711.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 41 Alb. L. J. 92, 22 Pac. Rep. 703.

While a conductor in charge of a train has implied authority, in a case of unforeseen emergency, to employ a brakeman or switchman, a mere direction or order given to a person on the train to do a single act, as to turn a single switch, no necessity or emergency being shown, does not establish an employment. *McDaniel v. Highland Ave. & B. R. Co.*, 90 Ala. 64, 8 So. Rep. 41.—APPLYING *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 85 Ala. 203.

The conductor of a train, the only brakeman of which leaves work while the train is en route, has authority to employ a substitute; and the person so employed is, for the time being, an employé of the railroad company. Where the conductor denies that he employed the substitute, it may be shown that he gave him money to buy his breakfast. *Fox v. Chicago, St. P. & K. C. R. Co.*, 53 Am. & Eng. R. Cas. 430, 86 Iowa 368, 53 N. W. Rep. 259.

5. — to rescind rule of company.*—Freight conductors are not authorized in their capacity as agents of the company to rescind rules made for the guidance of

brakemen in coupling cars. *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep. 204.

6. Liability to company, generally.—In an action to recover money held, under a special contract, as security for the faithful performance of duty as conductor, the plaintiff must show full performance of the contract on his part or a waiver by the defendant. *Fox v. Pullman Palace Car Co.*, 16 Mo. App. 122.

Where a conductor enters into a contract with his company, to the effect that he shall be liable to a fine of fifteen dollars, to be deducted from his wages, if he receives fares from passengers, the amount fixed is liquidated damages and is collectible, though an ordinary fare is but five cents; and the right to enforce the fine is not lost by retaining the conductor in the company's employ after discovering that he has received fares. *Birdsall v. Twenty-third St. R. Co.*, 8 Daly (N. Y.) 419.—FOLLOWED IN *Gallagher v. Christopher & T. St. R. Co.*, 14 Daly (N. Y.) 366, 13 N. Y. S. R. 80.

Provisions in a written contract, employing plaintiff as conductor of a street-car, to the effect that he should make a deposit as security for the faithful discharge of his duties, which should become the property of the company upon defalcation, and providing that a report of the company's detectives should be conclusive evidence of the matters stated therein, are binding on the conductor, who could not read and write, where the company uses no means to prevent him from ascertaining the contents of the agreement. *Rosen v. Dry Dock, E. B. & B. R. Co.*, 27 N. Y. Supp. 337, 7 Misc. 130.

7. — on bond for faithful performance of duty.—A railroad conductor gave bond with security to an express company, conditioned for the faithful discharge of his duties as express messenger, with a provision that it should not "be impaired by change of his place, position, or duties, or by his temporary absence from duty." Held, that a surety on his bond could not defend an action for the loss of a package of money by one who was acting temporarily during the absence of the conductor, on the ground that the conductor was absent. *Frink v. Southern Exp. Co.*, 82 Ga. 33, 8 S. E. Rep. 862, 3 L. R. A. 482.—REVIEWING *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 98.

Such conductor received a package of

* Regulation as to stoppage of trains; authority of conductor to waive, see note, 44 Am. & Eng. R. Cas. 293.

money and placed it in a small iron safe with an ordinary lock and key, and left it in a lonely place some seventy-five yards from the station, from about sundown until between nine and ten o'clock at night, while he was away for mere matters of pleasure. *Held*, that he and his bondsman were liable for the loss of the money, though he claimed that his only instruction when receiving the package was to place it in the safe and lock it and keep the key in his pocket. *Frink v. Southern Exp. Co.*, 82 Ga. 33, 8 S. E. Rep. 862, 3 L. R. A. 482.

The condition of this bond was, that the agent should account for all the money which might come into his possession or control by reason of his employment, and make good all loss or damage which might happen to such money while under his control for which he might be legally responsible, and indemnify and save harmless the express company from all liability on account of his fault or neglect. Therefore when money had been received by him and lost on account of his negligence, and a demand was made upon him and his sureties to pay it, in accordance with the bond, and they refused to do so, it became a debt due by him and his sureties to the plaintiff. When the demand was not complied with, and the agent and his sureties delayed the plaintiff by litigation from collecting its money, it was entitled to damages for such delay, and the law gives such damages, both as against the agent and his sureties, by way of interest from the date of the demand. The bond in this case stipulated for the sum of \$3000 only, and the value of the package lost was \$3000. It was error to instruct the jury that plaintiff was entitled to interest from the time the money was lost. The record does not show that any demand was ever made upon either. When no demand has been made, the plaintiff is entitled to interest only from the time the writ was served on the defendants. Interest having been calculated by the jury from the time the money was lost to the date of the verdict, it is directed that the interest found up to the service of the writ be written off, and that interest be calculated from the time of the service to the judgment. *Frink v. Southern Exp. Co.*, 82 Ga. 33, 8 S. E. Rep. 862, 3 L. R. A. 482.—QUOTING *Brainard v. Jones*, 18 N. Y. 35; *Lyon v. Clark*, 8 N. Y. 148.

8. — in assumpsit for not collecting fare.—A conductor was required to collect ten cents extra from passengers paying on the train; but he collected the regular fare and with the money purchased regular tickets and punched them in the usual way and turned them in to the company. This was done with the knowledge and consent of the superintendent, but with the understanding that it was to be concealed from the directors. *Held*, that the company might maintain assumpsit against the conductor for the extra ten cents on fares that he should have collected. *Concord R. Co. v. Clough*, 49 N. H. 257.

A railroad agent whose duty it was to sell tickets issued by the road, for his own profit, purchased joint tickets issued by other roads, under a contract with his road, entitling the holder to passage over his road, and sold these tickets to persons who would otherwise have bought tickets issued by his own road, and which he had for sale. The road derived a larger profit from the sale of its own tickets than from the sale of the joint tickets. *Held*, that the company could maintain assumpsit against the agent for the profits made in buying and selling the joint tickets, though it was done with the knowledge and consent of the superintendent of the road, but without any knowledge on the part of the directors. *Concord R. Co. v. Clough*, 49 N. H. 257.

9. — for damages paid by company to injured party.—Where the conductor of a freight train, in violation of the rules of the company, allows a person to travel thereon without a special permit, and such person is injured through the negligence of other servants of the company, the violation of the conductor's duty in so permitting the injured person to travel is, as in a question between the conductor and the company, the proximate cause of the injury, and the company is entitled to indemnity from the conductor against any liability to the injured person. *Memphis & C. R. Co. v. Greer*, 38 Am. & Eng. R. Cas. 248, 87 Tenn. 698, 11 S. W. Rep. 931.

10. Liability to third persons—Assault.—A railroad conductor who permits a passenger to travel on his train, taking with him stolen goods, known by the conductor to have been stolen, is not liable in an action by the owner of the goods therefor. *Randlette v. Judkins*, 23 Am. & Eng. R. Cas. 478, 77 Me. 114.

A conductor is liable for an assault if he forcibly ejects a passenger while the train is in motion. *State v. Kinney*, 34 Minn. 311, 25 N. W. Rep. 705.

11. Company's liability for acts of conductor.*—(1) *When liable*.—When a railroad conductor is engaged in the performance of his duty, the company will be held responsible for his acts, although he may not have been free from fault on his part, and may have acted beyond his duty. *Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. Cas. 254, 96 Ill. 162; *reversing 1 Ill. App. 520*.

Where a conductor is in charge of a train he is the agent of the company so far as concerns the rights of passengers in alighting from the train. *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 13 West. Rep. 319, 14 N. E. Rep. 572, 16 N. E. Rep. 197.

The conductor of a railway train has control of its movements, and represents the corporation; and persons boarding a car with his consent have a right to rely upon his assurance that it is safe to undertake so to do before the train moves. *Olson v. St. Paul & D. R. Co.*, 47 Am. & Eng. R. Cas. 573, 45 Minn. 536, 48 N. W. Rep. 445.

The whole power and authority of the corporation *pro hac vice* is vested in conductors (as to their relation to passengers), and as to passengers on board the cars they are to be considered the corporation itself, the corporation being responsible for the acts of these officers in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves if they were the owners of the road and train. *Randolph v. Hannibal & St. J. R. Co.*, 18 Mo. App. 609.—QUOTING *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450.

Railroad companies are responsible to passengers for the torts of the conductors when such torts are committed in connection with the business intrusted to conductors, and spring from, or grow immediately out of, such business. *Gasway v. Atlanta & W. P. R. Co.*, 58 Ga. 216, 16 Am. Ry. Rep. 99.

A company is liable for an indecent approach or assault by a conductor upon a female passenger. *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118.

* See also FELLOW-SERVANTS, II.
Liability of company for contract made by conductor, see note, 20 L. R. A. 695.

—QUOTED IN *Randolph v. Hannibal & St. J. R. Co.*, 18 Mo. App. 609; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399. REVIEWED IN *Brabbins v. Chicago & N. W. R. Co.*, 38 Wis. 289.

A passenger is entitled to recover damages from the company for insolent, abusive, insulting, and offensive words spoken to her by the conductor. *Bryan v. Chicago, R. I. & P. R. Co.*, 16 Am. & Eng. R. Cas. 335, 63 Iowa 464, 19 N. W. Rep. 295.—FOLLOWED IN *Lindsay v. Des Moines*, 68 Iowa 368.—*Louisville, N. O. & T. R. Co. v. Patterson*, 69 Miss. 421, 13 So. Rep. 697.

(2) — *and when not*.—A railroad company is not liable for a mistake of judgment on the part of a conductor, if he acts as an ordinarily prudent man would do under like circumstances. *Dunlavy v. Chicago, R. I. & P. R. Co.*, 21 Am. & Eng. R. Cas. 542, 66 Iowa 435, 23 N. W. Rep. 911.

Though the conductor wrongfully required a young woman to get off the train before reaching her destination, a rape by a male passenger, who also left the train at the station at which plaintiff was compelled to alight, and who decoyed her into a saloon under the pretense of conducting her to a hotel, is not the direct and immediate consequence of the conductor's wrongful act, where it appears that such station was not an inappropriate or unsafe place for a youthful and inexperienced female traveling alone to remain between trains. *Stra v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905.

The complaint charged that the conductor in expelling plaintiffs, a man and his wife, spoke "in a brusque, decided manner," and "very decidedly, rudely, and quickly" ordered them off the train, the wife at the time seeming to be in delicate health and resting her head on a pillow. *Held*, not such mistreatment as to render the company liable for the conductor's language. *Rose v. Wilmington & W. R. Co.*, 106 N. Car. 168, 11 S. E. Rep. 526.—DISTINGUISHING *Commonwealth v. Power*, 7 Metc. (Mass.) 596; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657.—DISTINGUISHED IN *Browne v. Raleigh & G. R. Co.*, 108 N. Car. 34.

12. What acts are within scope of authority.—A conductor is not acting outside of his authority in admitting on the cars all persons properly seeking admission as passengers, or in excluding all who do not come as passengers or are not fit to be admitted; and the company is liable for his

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Where a conductor has control over his train as to its starting or stopping, a person will have the right to act on his invitation to pass under a freight car when the train is obstructing the passway, unless he has reason to suppose it hazardous. *Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. Cas. 254, 96 Ill. 162; reversing 1 Ill. App. 520.

A conductor upon a branch road, or connecting road of the same railroad company, in collecting fares, taking up tickets, and giving information to the passengers on his own train, represents the company as to his own route, but does not represent the company in giving information as to the running and operation of the trains upon the main line with which he has no employment. *Atchison, T. & S. F. R. Co. v. Gants*, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608, 17 Pac. Rep. 54.—REVIEWING *International & G. N. R. Co. v. Gilbert*, 22 Am. & Eng. R. Cas. 405, 64 Tex. 536.

A conductor represents the company in the discharge of his functions; and being in the line of his duty in collecting the fare, or taking up tickets, the corporation is liable for any abuse of his authority, whether of omission or commission. *Southern Kan. R. Co. v. Rice*, 34 Am. & Eng. R. Cas. 316, 38 Kan. 382, 16 Pac. Rep. 817. *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277.

Where a conductor has entire charge of a train, and in its management, acted for and represented the defendant, it being a part of his duties to see that the persons did not ride upon it either with or without the payment of fare, his act in allowing a person to ride upon the train without the payment of fare, is within the scope of his employment. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.

Where a company is sued to recover a statutory penalty for exacting more than the usual fare, it cannot defend on the ground that the conductor in doing so is not the agent of the company. The conductor must be regarded as the agent of the company, and acting within the scope of his general authority. The company would be liable even if the conductor acted contrary to orders, or was mistaken as to the amount of fare. *Porter v. New York C. R. Co.*, 34

Barb. (N. Y.) 353.—APPROVING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.

13. Indemnity for obeying orders.

—The company is under an implied obligation to indemnify an innocent conductor for obeying its orders, where the act would have been lawful in respect to both, if the company really had the authority which it claimed. *Howe v. Buffalo, N. Y. & E. R. Co.*, 37 N. Y. 297; affirming 38 Barb. 124.

14. Right to property found in car.

—The title of the finder of a chattel who acts with fairness is superior to that of any other person but the owner. The conductor of a railroad car is entitled to money found by him in the car, no owner having appeared to claim the same after advertisement had been made. *Tatum v. Sharpless*, 6 Phila. (Pa.) 18.—REVIEWING *Mathews v. Harsell*, 1 E. D. Smith (N. Y.) 393; *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424.

15. Assistant conductor.—A dispute arose between a passenger and the conductor over a passenger ticket, which led to the passenger's arrest and a suit against the company for false arrest. It grew out of an assistant conductor having taken up the ticket without informing the regular conductor. The court charged, at the request of plaintiff, that the conductor was chargeable with the knowledge that his assistant conductor had received a ticket. *Held*, that the charge was correct. It was the duty of one conductor to keep the other informed as to tickets collected, so that demands might not be made twice of the same passenger. The implication of knowledge comes from the duty imposed of communicating it. *Toomey v. Delaware, L. & W. R. Co.*, 53 N. Y. S. R. 567, 4 Misc. (N. Y.) 392.

CONFEDERATE.

Army, liability of carrier for acts of, see CARRIAGE OF MERCHANDISE, 17.
Government, status of, see WAR, 1.
Money, payments in, see WAR, 3.

CONFESSION.

Entry of judgment by, see JUDGMENT, 4.

CONFESSION AND AVOIDANCE.

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Duty to receive cars of another company, see INTERSTATE COMMERCE, 101.

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See also CARRIAGE OF LIVE STOCK, 101-108.

1. What are connecting lines.—

(1) *Generally*.—A connecting line, in the sense of the Georgia act of 1874, is where any railroad at its terminus, or any intermediate point along its line, joins another, or where two railroads have the same terminus; and where a railroad is adjacent to another and capable of being joined to it by a switch, either at its terminus or anywhere along its line where they meet or converge, the right is given to make such connection, whether or not it be voluntarily granted. *Logan v. Central R. Co.*, 74 Ga. 684.

Two railroads form a continuous line when their tracks and rails join so that a train may pass from the tracks and rails of one directly upon those of the other. They form a connected line when this is done by means of an intervening or connecting road. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130; reversed in 24 N. J. Eq. 455.

(2) "Railroad connection."—"Railroad connection," without qualifying terms, in a statute means such a union of tracks as to admit the passage of cars from one road to the other, or such intersection of roads as to admit the convenient interchange of freight and passengers at the point of in-

tersection. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

tersection. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

Two roads intersecting, but of different gauge, so that cars could not pass from one to the other, but which permitted a convenient interchange of passengers and freight—held, "connected," within the meaning of a law providing for connecting roads. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

2. Right of one road to connect with another*—Statutes.—

(1) *Generally*.—A provision in a railroad charter, authorizing other roads to make connections therewith, contemplates a physical connection, and not a mere business connection for an interchange of traffic. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

—FOLLOWING *Shelbyville R. Co. v. Louisville, C. & L. R. Co.*, 82 Ky. 541; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 681, 4 Sup. Ct. Rep. 185.

(2) *Colorado*.—The provision in the constitution of Colorado that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," only implies a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other, and does not of itself imply the right of connecting business with business. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 16 Am. & Eng. R. Cas. 57, 110 U. S. 667, 4 Sup. Ct. Rep. 185; reversing 15 Fed. Rep. 650.

(3) *Illinois*.—Where a company built a side-track from its road connecting with a side-track of another company leading to a public warehouse, whereby it could reach such warehouse over a part of the track of such other company—held, that in view of the statutory provisions that every railroad shall permit connections to be made, there was no error in enjoining the removal of the track at the suit of the owners of the warehouse. *Heyt v. Chicago, B. & Q. R. Co.*, 93 Ill. 601.

(4) *Iowa*.—Under the Acts of the Iowa 20th Gen. Assembly, ch. 24, § 1, providing that intersecting railways shall, "when ordered by the railway commissioners," connect their tracks, it is within the sound

* Connecting lines; power of company to enter into contracts with, see note, 5 AM. & ENG. R. CAS. 92; 8 *Id.* 575.

discretion of the commissioners to order connections made as they deem best in the interest of commerce. *Smith v. Chicago, M. & St. P. R. Co.*, 86 Iowa 202, 53 N. W. Rep. 128.

(5) *Maine*.—Chapter 475 of the Maine Laws of 1860 authorized the Androscoggin R. Co. to change the gauge of their road, and the Androscoggin and K. R. Co., not having elected to connect their road with that of the former company until after that act was passed and accepted, can now do it only in subordination to the rights conferred on the Androscoggin R. Co. by it. *Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

(6) *New Jersey*.—A railroad constructed under the general railroad law of New Jersey may connect with another railroad at a point where there is neither town, city, nor village. *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566.—QUOTING Attorney-General v. Delaware & B. B. R. Co., 27 N. J. Eq. 645.

Both terminal points of a railroad, constructed for the purpose of forming a connection between existing roads, may be in the same town, city, or village. *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566.

(7) *New York*.—It seems that, under the provision of the New York General Railroad Act (§ 23, ch. 140, Laws of 1850), authorizing a corporation organized under it "to intersect, join, and unite its railroad with any other railway," upon the grounds of the company owning the road so intersected and requiring the latter company "to grant the facilities" needed for the purpose, the right so provided for is an interest in lands, and can only be created by a written instrument; a verbal agreement attempting to create it is void, under the statute of frauds. *Port Jervis, M. & N. Y. R. Co. v. New York, L. E. & W. R. Co.*, 52 Am. & Eng. R. Cas. 107, 132 N. Y. 439, 30 N. E. Rep. 855, 44 N. Y. S. R. 597; affirming 56 Hun 647, 32 N. Y. S. R. 359, 10 N. Y. Supp. 852.

The supplement to the charter of the Tioga R. Co., passed in 1835, authorizing the connection of its road "with the Chemung canal by railroad, canal, or slack-water navigation," authorizes it to make arrangements for a joint ownership for locomotives to run on both roads, where a connection by rail is made. *Olcott v. Tioga*

R. Co., 27 N. Y. 546, affirming 4 Barb. 179.

(8) *North Carolina*.—Under section 1957 of the North Carolina Code, providing that railroads shall unite in forming a physical connection, and, if they cannot agree, that commissioners are to be appointed to determine the place and manner of making such connection, one road cannot enter on the right of way of another for the purpose of connecting therewith, without previous agreement or condemnation proceedings. *Richmond & D. R. Co. v. Durham & N. R. Co.*, 40 Am. & Eng. R. Cas. 488, 104 N. Car. 658, 10 S. E. Rep. 659.—DISTINGUISHING *North Carolina R. Co. v. Carolina C. R. Co.*, 83 N. Car. 489; *Williamston & T. R. Co. v. Lattie*, 66 N. Car. 546.—FOLLOWED IN *Durham & N. R. Co. v. Richmond & D. R. Co.*, 104 N. Car. 673.

(9) *Pennsylvania*.—A railroad company chartered by the state of Pennsylvania cannot, on general principles, connect its road with a railroad which meets it at the state line unless such connection be plainly authorized by law, or unless it cannot be avoided without losing the advantages of what was clearly the best route. *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.

Such a connection is also in violation of the spirit, if not the letter, of the act of April 15, 1851, which forbids all connection by means of private railroads with any railroad authorized by the laws of New York or Ohio. *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.

(10) *Tennessee*.—The Tennessee Code, section 1118, providing that "all the railroads of the state have power to construct their roads so as to cross each other, if necessary, by the main tracks or branches, or to unite with each other as with branches," construed to authorize existing or future roads to unite their tracks for the purpose of transporting loaded cars. *Louisville & N. R. Co. v. State*, 9 Baxt. (Tenn.) 522.—FOLLOWED IN *Louisville & N. R. Co. v. Quinn*, 14 Lea (Tenn.) 65.

3. Respective rights and liabilities of the companies.*—(1) Generally.—Al-

* Connecting lines. Rights and liabilities, see note, 49 AM. & ENG. R. CAS. 108.

Statutory liability of connecting carriers in New York and Missouri, see note, 72 AM. DEC. 246.

Diversion of traffic among pool routes, see note, 23 AM. & ENG. R. CAS. 684.

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though the Pennsylvania R. Co. has the proprietary right to a certain middle link of the Junction R. Co., it is not permitted to so control the section of the road, of which it is the proprietor, as to exclude the Junction R. Co. from participation in its use as a part of a continuous line. *Lathrop v. Junction R. Co.*, 14 Phila. (Pa.) 438.

It must be treated in equity as having agreed to such reasonable use of the section owned by it as is necessary to effectuate the common object of those who furnished the means of constructing the Junction R. Co. as a continuous line; and, to that extent, to a modification of its proprietary rights. *Lathrop v. Junction R. Co.*, 14 Phila. (Pa.) 438.

The Pennsylvania R. Co. has the exclusive right to furnish the motive power over and upon that portion of the Junction R. Co. which is situated between the north side of Market and Thirty-fifth streets, in the city of Philadelphia. *Lathrop v. Junction R. Co.*, 14 Phila. (Pa.) 438.

The Milwaukee & N. Railroad Co., being authorized by legislative act to build a railroad from the city of Neenah, across Doty's Island, to the line of the Milwaukee & N. Railway Co., in the plaintiff city, it takes authority by subd. 6, section 1828, Wis. Rev. St., to operate such road in connection with the last-named company's road, notwithstanding any covenant of such last-named company with the plaintiff prohibiting such connection. *Menasha v. Milwaukee & N. R. Co.*, 5 Am. & Eng. R. Cas. 300, 52 Wis. 414, 9 N. W. Rep. 396.

A company which sells and issues tickets to passengers over its own lines of road and lines of road of other companies (known as through tickets) is liable for the sure and safe transportation of such passengers to the point of destination, notwithstanding there may be indorsed or printed on the tickets so sold and issued a notice that the company issuing and selling such tickets shall not be liable, except as to its own lines

of passengers, see note, 37 AM. & ENG. R. CAS. 32.

Duty and liability of the several companies to persons traveling on through-coupon tickets, see 20 AM. & ENG. R. CAS. 263, *abstr.*

Liability of company selling through ticket for injury to passenger on connecting line, see note, 1 AM. ST. REP. 200.

Effect of selling ticket to, or receiving goods for, destination beyond initial carrier's line, see note, 42 AM. REP. 664.

of road. *Central R. Co. v. Combs*, 18 Am. & Eng. R. Cas. 298, 70 Ga. 533, 48 Am. Rep. 582.

(2) *Under Maine Act 1854, ch. 93.*—The Me. St. of 1854, ch. 93, authorizing the appointment of commissioners to determine the respective rights and duties of connecting railroads, is constitutional. *Portland & O. C. R. Co. v. Grand Trunk R. Co.*, 46 Me. 69.

The Me. Act of 1854, ch. 93, relating to connecting railroads, being remedial only, is valid, and binding on existing corporations. *Portland & O. C. R. Co. v. Grand Trunk R. Co.*, 46 Me. 69.

(3) *Under Massachusetts Act 1845, ch. 191.*—Under Mass. Act of 1845, ch. 191, providing for the appointment of commissioners "to determine the rate of compensation to be paid by one railroad company entering upon the road of another for drawing its cars, passengers, and merchandise," such commissioners may fix the time for the running of trains, in the absence of an agreement by the parties, and may allow the company seeking the privilege to run special trains, and fix the time at which they shall be run and the stations at which they shall stop; but no such train, under the act, can be allowed to run within fifteen minutes of the schedule time of a regular passenger train; and the commissioners may further determine whether the cars so drawn shall be run in connection with the trains on the other road or independently. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.—FOLLOWED IN *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262.

The commissioners appointed under such act may include in their award a period before their appointment, if subsequent to the filing of the petition in court and not covered by agreement of the parties; and their award, when accepted by the court, will relate back to that time. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.

The award or report of such commissioners must be returned into court. *Boston & W. R. Corp. v. Western R. Co.*, 14 Gray (Mass.) 253.—FOLLOWED IN *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262.

An award of such commissioners is not invalidated by declaring that one railroad corporation, in case of the cars of another

not arriving within ten minutes after time at the junction of the two roads, shall provide and "be allowed for an independent train, to be taken as soon as it conveniently can be," and that frequent unreasonable want of punctuality in the arrival of such cars at the junction shall be compensated for in damages. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.

And it is no objection to an award of the commissioners that it declares that each railroad corporation shall indemnify the other against all losses happening through its own or its servants' fraud and gross negligence or want of skill. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.

(4) *Under English acts.*—Where a railway company, with whose line another company forms a junction, sues to recover the expense of erecting and maintaining signals and safety devices, as provided by Railways Clauses Act 1863, § 12, in order to recover it must prove that such expenses have been actually paid; proof that a liability has been incurred is not sufficient. *Carmarthen & C. R. Co. v. Manchester & M. R. Co.*, L. R. 8 C. P. 685, 42 L. J. C. P. 262.

A route is not unreasonable, within the meaning of the 11th section of the Regulation of Railways Act 1873, because the delivering company propose to hand over to the forwarding company long-distance competitive traffic at a junction but a few miles distant from its destination on the forwarding company's line, nor (where the delivering company's route between the two junctions is the shorter) because the forwarding company could receive the traffic at another junction farther distant from its destination and forward it thence by their own route. *Caledonian R. Co. v. North British R. Co.*, 3 Ry. & C. T. Cas. 403.

The special act of a railroad company enacted that "the H. Co. shall at all times afford to and for the G. Co. all needful accommodations, conveniences, and facilities at the station of the H. company at I. for and in respect of all traffic destined for or arriving from the railways of the G. company, including, so far as reasonably may be required, the carrying forward of through wagons and carriages in connection with the trains of the G. company, and convenient timing, number, and speed of trains. The payment for the accommodation and

conveniences at I. station provided by the H. company under this section shall be determined by agreement or, in case of difference, by arbitration." *Held*, that the forwarding of through wagons and carriages and the convenient timing, number, and speed of trains were facilities for carrying on the traffic of the respective companies, but not accommodation and conveniences for which payment is stipulated in the above section to be made; that the G. company were not liable to pay a proportion of the annual cost of working and other annual charges, and also of the interest on the capital expenditure on I. station, as claimed by the H. company under the above section. *Highland R. Co. v. Great North of Scotland R. Co.*, 7 Ry. & C. T. Cas. 90.

4. Interpretation of agreements between the companies.*—(1) *Generally.*—

Two companies entered into an agreement by which one, for a certain consideration, agreed to grant to the other the right to use certain portions of its track, together with terminal facilities for passengers, baggage, mail, and express goods at certain stations. *Held*, that the expenses incident to furnishing such facilities must be borne entirely by the lessor company. *Elmira Rolling Mill Co. v. Erie R. Co.*, 28 N. J. Eq. 400, 14 Am. Ry. Rep. 199.

Defendant company entered into a contract with plaintiff company, which was operating a new short-line road, to pay 15 per cent. on all freights received from plaintiff company until plaintiffs' road should reach a certain point, when such payment would cease. When sued for the 15 per cent. defendants showed that the road had never been completed to the designated point, and claimed that the contract was made under the false reports of plaintiffs' president, to the effect that the company had the means of extending the road to the designated point and that it would be made without delay. The evidence established the fact that the president said that he was

* Traffic contract between railroads. Right to rescind, see 45 AM. & ENG. R. CAS. 333, *abstr.*

Traffic agreement between companies construed with reference to repayment of money advanced, see 24 AM. & ENG. R. CAS. 78, *abstr.*

When associated carriers are liable as partners, see notes, 79 AM. DEC. 238, 55 AM. & ENG. R. CAS. 434.

Railway partnerships and fast-freight lines, see note, 21 AM. & ENG. R. CAS. 3.

dependent the extensions means. *Harper v. Co.*, (Ky.) 2

(2) *Parol agreement* its track on the purposes mere license, and although the valuable interest. *R. Co. v. Du Eng. R. Cas. Rep.* 659.

In an action by means of by defendant road with the defendant to restrain further appeared and connection between the companies the owner of the tracks, depot other company subsequently for such use; and asked per use of the road was granted to pay \$100 per defendant there after a date of ities could not would pay \$30 not having been ing notice to severed the tracks. *Held*, erly dismissed. *R. Co. v. New Am. & Eng. N. E. Rep.* 855 ing 56 Hun 61 Y. Supp. 852.

(3) *Partnership* railroad company upon one of the tracks as constitute a part make one road

dependent upon local subscriptions to make the extension and that he had no other means. *Held*, that the defense failed. *Harper v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 22 S. W. Rep. 849.

(2) *Parol agreement—License*.—A parol agreement to allow one company to extend its track on the right of way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel, although the licensee has entered and made valuable improvements. *Richmond & D. R. Co. v. Durham & N. R. Co.*, 40 Am. & Eng. R. Cas. 488, 104 N. Car. 658, 10 S. E. Rep. 659.

In an action to recover damages sustained by means of the alleged unlawful severance by defendant of the connection of its railroad with that of the plaintiff, to compel defendant to restore the connection, and to restrain further interference therewith, it appeared and was found that the original connection between the two roads was under a temporary parol agreement between the companies then owning them, by which the owner of plaintiff's road was permitted to make the connection and to use the tracks, depot, yard, and turntable of the other company without charge therefor; subsequently \$50 per month was charged for such use; when plaintiff took possession and asked permission of defendant to make use of the accustomed facilities, permission was granted upon plaintiff's agreement to pay \$100 per month, which was paid. Defendant thereafter notified plaintiff that, after a date specified, the use of such facilities could not be continued unless plaintiff would pay \$300 per month therefor, which, not having been paid, defendant, after giving notice to plaintiff to discontinue, itself severed the connection between the two tracks. *Held*, that the complaint was properly dismissed. *Port Jervis, M. & N. Y. R. Co. v. New York, L. E. & W. R. Co.*, 52 Am. & Eng. R. Cas. 107, 132 N. Y. 439, 30 N. E. Rep. 855, 44 N. Y. S. R. 597; *affirming* 56 Hun 647, 32 N. Y. S. R. 359, 10 N. Y. Supp. 852.

(3) *Partnership*.—A contract between two railroad companies conferring a license upon one company to run its trains over the tracks of the other, and limiting certain rights as to freight charges, does not constitute a partnership between them, nor make one road the agent of the other for

the purpose of receiving freight; and a shipper of freight under an agreement with one of the roads cannot recover damages for its loss because of an alleged violation of the agreement between the two companies. *St. Louis, A. & T. R. Co. v. Neel*, 55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963.

(4) *Cars burned*.—By agreement between the parties, connecting railway companies, the defendant was to receive the plaintiff's cars for delivery at a point on the defendant's line and to return them in as good condition as when received, ordinary wear and tear by use excepted. Both parties were to share the profits of the freight so carried, and defendant was to pay the plaintiff a fixed sum for the use of its cars. Without fault on the defendant's part certain of the plaintiff's cars were destroyed by fire on the defendant's line while being thus transported. *Held*, that the defendant was not liable. *St. Paul & S. C. R. Co. v. Minneapolis & St. L. R. Co.*, 26 Minn. 243, 37 Am. Rep. 404, 2 N. W. Rep. 700.

(5) *Change of gauge—Injunction*.—A contract between companies using the same gauge to transport passengers and freight continuously over both lines does not imply a contract on the part of either company that it will not change the gauge of its road. *Sussex R. Co. v. Morris & E. R. Co.*, 19 N. J. Eq. 13; *reversed in* 19 N. J. Eq. 574.

Where two companies agree to build a road from certain cities to connect with each other at a given place, and that the charges for transportation shall be regulated by both companies, and also the meeting of the cars and the through-freight cars, if one of the companies shall change its gauge so as to break up the connection contemplated, an injunction will be granted to prevent the change of gauge. *Columbus, P. & I. R. Co. v. Indianapolis & B. R. Co.*, 5 McLean (U. S.) 450.

Three existing roads entered into an agreement to build a line to unite their roads. One of the roads built a portion of the uniting line on its own ground and at its own expense. *Held*, that it was bound to allow the other two roads a reasonable use thereof, which might be enforced by injunction. *Lathrop v. Junction R. Co.*, 4 Fed. Rep. 41.

(6) *English cases*.—Where two companies enter into an agreement to make a new

junction between their respective lines, so that one of such companies may use the station on the line of the other, the effect of such agreement is to make the two lines one continuous line which the public have a right to use, and therefore also a third company working under arrangements with the companies owning the two lines. *Midland R. Co. v. Great Western R. Co.*, 42 L. J. Ch. 438, L. R. 8 Ch. 841, 21 W. R. 657, 28 L. T. 718.

The defendants carried goods from L. to the I. of W. by their own railway from L. to S. and thence by tramway and steamer. The plaintiffs were also in the habit of carrying goods from L. to the I. of W., using the defendants' line from L. to S. and thence conveying them by carts and steamer. The plaintiffs claimed to have their goods carried by the defendants from L. to S. at a sum equivalent to the defendants' through-charge from L. to the I. of W., less a fair charge for collection in L. and for carrying from S. station to the I. of W. *Held*, that they were not entitled to this, the delivery by the defendants beyond the limits of their line not being a delivery auxiliary or subsidiary to their business as carriers on their own line, but to their general business as common carriers, and therefore differing from a delivery in the immediate neighborhood of a station. *Baxendale v. South Western R. Co.*, 35 L. J. Ex. 108, 1 Ry. & C. T. Cas. 22.

The W. B. line commences at a point on the C. line, near Port G., and terminates at W. bay, and is worked by the C. Co. under an agreement entered into between them and the W. B. Co., and confirmed by the G. & W. B. Railway Act 1862. *Held*, that on a sound construction of the act and agreement the powers of a joint committee of the two companies therein provided do not extend to the regulation of the tolls and rates to be charged on through traffic from G. to stations on the W. B. line, but only to those to be charged on the W. B. railway. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 8 Scott. L. R. 634, 2 Ry. & C. T. Cas. 22.

To constitute an arrangement for "using" steam-vessels, within the meaning of § 11 of the Regulations of Railways Act 1873, the agreement between the railway and the owner of the steamboat must be definite, and contain an obligation on the part of the steamboat proprietor to ply between the specified ports. Where there was no such stipulation, and where stipulations as to the

time of arrival and departure of the boat, and to insure that the railway and steamer should form together part of a continuous line of communication, were not contained in the agreement, the arrangement was held to be not such a one as was contemplated by the section. *Caledonian R. Co. v. Greenock & W. B. R. Co.*, 4 Ry. & C. T. Cas. 70.

5. Validity of agreements between the companies.*—(1) Power to contract.

—There is no doubt of the power of two or more companies whose roads form a continuous line to enter into a joint arrangement for operating their roads as one line, and to become jointly liable for all money borrowed to be used in furtherance of the business of such line. *Chicago, P. & St. L. R. Co. v. Ayres*, 140 Ill. 644, 30 N. E. Rep. 687; affirming 39 Ill. App. 607.

Two companies whose roads form a continuous line may, by mutual agreement, appoint a common manager and run continuous trains. *State ex rel. v. Concord R. Corp.*, 13 Am. & Eng. R. Cas. 94, 59 N. H. 85.

A provision in a railroad charter, to the effect that the company may "make any lawful contract with any other railroad corporation in relation to the business of such road," authorizes the company to contract for the common use of a part of a road already constructed within the chartered limits of the other. *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468.

Under New York Act of 1839, ch. 218, providing that it shall be "lawful for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract," a domestic railroad company is authorized to lease or place the control of its road in the hands of a foreign connecting company. *Ogdensburg & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Pr. N. S. (N. Y.) 249.

(2) Assent—Consideration. — Two companies, prior to the legal tender act, leased a third road, agreeing to pay semi-annually therefor \$3 in coin for each share of capital stock of the leased road. After the passage of the legal tender act a ques-

* Constitutional and statutory provisions relating to combinations between railroads to prevent competition, construed, see note, 1 L. R. A. 849.

tion arose as to whether the rent could be paid in currency, and by vote of the directors of one of the lessor companies, and of the lessee company, such lessor company was authorized to pay its one half of said rent in currency at \$4 for each share of stock. *Held*, that these votes did not constitute an independent contract between the two companies passing them, so as to authorize the lessee company to maintain an action thereon, in the absence of any concurrence therein by the other lessor company. *Portland, S. & P. R. Co. v. Boston & M. R. Co.*, 101 *Mass.* 269.

Where a company has entered into a contract with another company, operating a new short line, to pay it 15 per cent. on all freights received from the short line, after the contract has been running for some four years and the company has received some \$67,000 in freights, it cannot resist payment of said 15 per cent. on the ground that the contract is without consideration. *Harper v. Cincinnati, N. O. & T. P. R. Co.*, (*Ky.*) 22 *S. W. Rep.* 849.

(3) *Illustrations*.—A contract entered into to make the gauge, by one of the parties, contrary to the law of the state, is not illegal, if it appear it was made in reference to an alteration of the act, and such alteration was procured before any part of the track was laid. *Columbus, P. & I. R. Co. v. Indianapolis & B. R. Co.*, 5 *McLean (U. S.)* 450.

Where a steamboat receives freight from a railroad company, under a contract therewith, and carries it to the consignees, and the officers collect the whole charges for transportation, the boat is liable to be attached, under section 2116 of the Iowa Code, in a suit by the railroad company to recover the amount due them under the contract. *Chicago, B. & Q. R. Co. v. The W. G. Woodsides*, 10 *Iowa* 465.

In a contract between companies owning connecting lines of railroads, for the continuous transportation of passengers and freight over both lines, it is lawful to agree upon a division of the fares, by which one company allows part of the fares earned on its line to the other company. Such contract is valid as to future extensions of the road, even as to such as may be authorized by future legislation. *Sussex R. Co. v. Morris & E. R. Co.*, 19 *N. J. Eq.* 13; *reversed in 19 N. J. Eq.* 574.—*DISTINGUISHING* *Salomons v. Laing*, 12 *Beav.* 339; *Munt v.*

Shrewsbury & C. R. Co., 13 *Beav.* 1. NOT FOLLOWING *Colman v. Eastern Counties R. Co.*, 10 *Beav.* 1. *REVIEWING* *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 17 *Q. B.* 652; *Hare v. London & N. W. R. Co.*, 2 *J. & H.* 80; *Midland R. Co. v. London & N. W. R. Co.*, *L. R.* 2 *Eq.* 524.

Two companies ran their roads jointly under an agreement which was construed to amount to a partnership. The court enjoined such operation of the roads as illegal. The directors thereupon, by agreement, chose a common manager and ran through trains. It was further agreed that each company should be exempt from liability for local risks on the other's road, but both remained jointly liable for through risks. All freights and tolls, whether realized from local or through business, continued to be placed in a common fund and were divided in a fixed proportion between the companies. *Held*, that the agreement was illegal in so far as the joint liability for through risks was concerned, and was also perhaps illegal as far as the joint collection of tolls and freights was concerned, but—*held*, that the directors, having acted in good faith in making the agreement, could be subjected to a nominal penalty only. *State ex rel. v. Concord R. Corp.*, 13 *Am. & Eng. R. Cas.* 94, 59 *N. H.* 85.

(4) — *against public policy*.—A company was chartered to construct and operate a road from a designated point to the navigable waters of a certain harbor, and afterward a steamboat company was organized to run vessels to the harbor, connecting with the railroad. Afterward the company agreed with another railroad company to divert its track about a mile from the harbor and connect with the other road. *Held*, that the contract was void as against public policy, and that a mandamus would issue to compel the company to run its cars to the harbor. *State v. Hartford & N. H. R. Co.*, 29 *Conn.* 538.—*DISTINGUISHED IN* *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 *Ohio St.* 544.

A contract between companies to discontinue a rival road beyond a certain point is against public policy and void; but a prior agreement between the owners of such road and another connecting road for a division of through fares, with a provision to deduct an additional sum from such through fares as a consideration for entering into such void contract, is not affected by the void

contract. *Hartford & N. H. R. Co. v. New York & N. H. R. Co.*, 3 Robt. (N. Y.) 411. —APPLIED IN *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650.

(5) — *insolvency of one company.*—Several companies entered into an agreement by which one of them was to build a certain connecting line, and the others to contribute to the expense in a certain proportion. The company building it was to operate it, the net earnings to be paid to the other companies until the cost of building was paid back, when the road should belong jointly to the several companies in proportion to the cost of building. A little later a further agreement was entered into by which two daily express trains were to be run over each road for a term of years. Soon after the road was built one of the companies failed, and the arrangement for through trains was abandoned, and the new road ceased to be used; but after some years the company building it repaired it and used it as its own track. *Held*, that the contract was not affected by such insolvency of one of the roads, and that the persons who succeeded to the franchise and property of the insolvent road might maintain a bill against the company constructing the road to require it to pay over the net earnings of the road as originally contracted. *Bartlette v. Norwich & W. R. Co.*, 33 Conn. 560.

(6) *Specific enforcement.*—Railroads may make a connection either by contract or by authority of a statute. If the connection be made by contract its continuance in certain cases will be enforced by a court of equity; but where such contract is discontinued by consent of the parties they cannot have the aid of a court of equity to enforce its performance. *Androscooggin & K. R. Co. v. Androscooggin R. Co.*, 52 Me. 417.

CONSENT.

By city, as owner of abutting property, to construction of elevated railway, see ELEVATED RAILWAYS, 17.
— stockholders, to consolidation—estoppel, see CONSOLIDATION, 13.
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Decree by, in railway foreclosure, see MORTGAGES, 212.
Jurisdiction cannot be conferred by, see JURISDICTION, 2.

Of abutting owners, see CABLE RAILWAYS, 4; ELEVATED RAILWAYS, 15, 16; RAPID TRANSIT ACTS, 6; STREET RAILWAYS, 102-115; UNDERGROUND RAILWAYS, 2.
— bondholders, that trustees sue to foreclose, see MORTGAGES, 179.
— carrier, to act of injured passenger, evidence of, see CARRIAGE OF PASSENGERS, 575.
— city, to change of motive power, see ELECTRIC RAILWAYS, 8.
— conductor, riding in baggage car with, see CARRIAGE OF PASSENGERS, 496.
— connecting carrier, necessary to bind it to contract of through carriage, see CARRIAGE OF MERCHANDISE, 601.
— highway commissioners to location of street railway, see STREET RAILWAYS, 65.
— husband to entry on wife's land, see HUSBAND AND WIFE, 1.
— landowner, as a defense to action for damages to land, see EMINENT DOMAIN, 998.
— local authorities, to construction of elevated railways, see ELEVATED RAILWAYS, 18.
— — — occupation of street by railway, see STREET RAILWAYS, 85-101; STREETS AND HIGHWAYS, II.
— owner, to entry on land, as a defense in ejectment, see EMINENT DOMAIN, 1016.
— — when bars action for trespass, see EMINENT DOMAIN, 1074.
— — — deprives him of right to enjoin construction of railway, see EMINENT DOMAIN, 1043.
— public authorities to construction of tunnels, see TUNNELS, 2.
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— — — under English statutes, see EMINENT DOMAIN, 1098.
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- Lack of, makes contract void, see CONTRACTS, 9, 50.
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- Liability of, for negligence in unloading, see CARRIAGE OF MERCHANDISE, 245.
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- Reasonable time to, for removal of goods after arrival, see CARRIAGE OF MERCHANDISE, 83-87, 206, 335, 339, 340.
- Release of right of action to, by consignor, see CARRIAGE OF MERCHANDISE, 714.
- Right of, to change destination of goods, see CARRIAGE OF MERCHANDISE, 263.
- Rights of, in cases of partial loss, see CARRIAGE OF MERCHANDISE, 113.
- Right of, to inspect C. O. D. goods before paying price, see CARRIAGE OF MERCHANDISE, 272.
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- deemed owner, see CARRIAGE OF MERCHANDISE, 713.
 - liable for charges, see CHARGES, 74.
 - may sue the carrier, see CARRIAGE OF MERCHANDISE, 710, 712.
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- Debts of consolidating company, when prior to mortgage, see MORTGAGES, 103.
- Effect of, as a defense to action on subscriptions, see SUBSCRIPTIONS TO STOCK, III.
- Jurisdiction in foreclosure as affected by, see MORTGAGES, 171.
- Municipal aid subscription after, effect of, see MUNICIPAL AND LOCAL AID, 206, 208.
- Of actions, see ACTIONS, 14.
- by husband and wife, see HUSBAND AND WIFE, 41.
- appeals, in condemnation proceedings, see EMINENT DOMAIN, 947.
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I. THE POWER, AND HOW EXERCISED.

1. *Necessity of, and Interpretation of the Statutes.*

1. The power to consolidate, generally.*—Under the statutes of Indiana railroad corporations may acquire by purchase, or consolidate with, other connecting or intersecting lines; and the organization of a railroad corporation, with a view of ultimately consolidating, upon equitable terms and in accordance with the provisions of the statute, with one already existing, is not against public policy. *Hill v. Nisbet*, 100 Ind. 341.

In New Jersey, the purchase by one railroad of a controlling interest in another is *ultra vires*, and not within a power granted to consolidate. *Elkins v. Camden & A. R. Co.*, 9 Am. & Eng. R. Cas. 590, 36 N. J. Eq. 5.

Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute. *In re Prospect Park & C. I. R. Co.*, 67 N. Y. 371, 15 Am. Ry. Rep. 102; *affirming 8 Hun* 30.

An agreement between two horse-railroad companies, for a transfer of the franchise of one, appeared to be a memorandum of the basis of an agreement fixing the most disputed questions only, rather than a memorandum of an actual agreement. *Held*, void for uncertainty. *Brooklyn C. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358.

Railway corporations cannot, without legislative permission, consolidate with each other, or sell, lease, or mortgage their property, and therefore the legislature may couple with the grant of those powers such conditions and limitations as it chooses to impose. *Frazier v. East Tenn., V. & G. R.*

* Consolidation of corporations generally, see monographic note, 79 AM. DEC. 422.

Consolidation, amalgamation, and merger of corporations, see notes, 2 L. R. A. 564; 13 Id. 780.

Authority conferred on railroads to consolidate, see note, 5 L. R. A. 726.

Co., 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537.—*APPROVING* Thomas v. West Jersey R. Co., 101 U. S. 71.

In Texas no inherent power exists to consolidate. A consolidation to be valid must have legislative assent. Consolidation is expressly prohibited, not only by statute (Rev. St. arts. 4246, 4247), but by the organic law. *Missouri Pac. R. Co. v. Owens, 1 Tex. App. (Civ. Cas.) 163.*

Companies will not be permitted, under the pretense of a lease, to enjoy the advantages without bearing the liabilities attached to such consolidation. *Missouri Pac. R. Co. v. Owens, 1 Tex. App. (Civ. Cas.) 163.*

2. Constitutional questions.*—Neb. Const. art. 11, § 3, prohibits any railroad corporation from consolidating its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation owning a parallel or competing line. The word "consolidate" is used in the constitution in the sense of join or unite. *State ex rel. v. Atchison & N. R. Co., 32 Am. & Eng. R. Cas. 388, 24 Neb. 143, 38 N. W. Rep. 43.*

Tex. Const. art. 10, § 5, provides that no railroad corporation shall consolidate with any other having a parallel or competing line. This is a restriction upon the power of railroads, and is not to be construed as a grant of authority to lease. *Central & M. R. Co. v. Morris, 28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.*

A statute conferring upon railroad corporations power to consolidate with others, coupling the grant with a condition or proviso that they shall not have power, before or after such consolidation, to make any mortgage or create any lien affecting a particular class of creditors, is not obnoxious to the constitutional provision requiring statutes to embrace but one subject, to be expressed in the title. *Frazier v. East Tenn., V. & G. R. Co., 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537.*

3. Power of legislature to authorize consolidation.†—The state has the same power to authorize several existing cor-

porations to associate themselves together and organize themselves into a new corporation as it has to incorporate individuals. *State Treasurer v. Auditor-General, 13 Am. & Eng. R. Cas. 296, 46 Mich. 224, 9 N. W. Rep. 258.*

The legislature may, when public necessity requires it, grant authority to consolidate existing connected railroad routes, if they provide a just compensation for the shares of such stockholders as dissent. *Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455.*

Where by statute the power of alteration or repeal is reserved to the legislature, the period of corporate existence may be extended, or a corporation may be authorized to consolidate with others, the consolidated company to hold all the property and effects of the former company for the purposes and uses of a railroad. *Beal v. New York C. & H. R. R. Co., 4 N. Y. S. R. 174.*—*QUOTING* Story v. New York El. R. Co., 90 N. Y. 172.

4. Construction of statutes relative to consolidation.—(1) *Acts of congress.*—Where lands are expressly granted to a railway company, its successors and assigns, by act of congress, which company afterwards consolidates with another, it may still hold the lands granted, being the successor or assign of the first-mentioned company. *United States v. Southern Pac. R. Co., 14 Savy. (U. S.) 620.*

(2) *Illinois.*—Under the act of the legislature of February 10, 1853, incorporating the Rockton and Freeport railroad company, said company was authorized, in event it should consolidate its stock with that of a corporation outside of this state, as it was empowered to do, to place the control of this consolidated stock under the control of the board of directors of the foreign company. *Racine & M. R. Co. v. Farmers' L. & T. Co., 49 Ill. 331.*

(3) *Kansas.*—Chapter 44, Laws 1865, relating to the consolidation of railroad corporations, considered and construed, with respect to the status of the consolidated company. *State ex rel. v. Nemaha County Com'rs, 10 Kan. 569.*

(4) *Maine.*—The special act of consolidation of 1856, ch. 651, is an act of incorporation, as well as of consolidation. *State v. Maine C. R. Co., 66 Me. 488, 19 Am. Ry. Rep. 323.*

(5) *Minnesota.*—The Milwaukee & St. P. .

* "Railroad" and "railway" as synonymous terms. Constitutional provision forbidding consolidation of "railroads" not applicable to street "railways," see 46 AM. & ENG. R. CAS. 229, *abstr.*

† Power of legislature to authorize consolidation, see note, 13 AM. & ENG. R. CAS. 304.

R. Co. is the lawful successor of the rights of way obtained by its predecessor, the Minnesota Central railroad company. *Secombe v. Milwaukee & St. P. R. Co.*, 2 Dill. (U. S.) 469.—FOLLOWING First Div. St. P. & P. R. Co. v. Parcher, 14 Minn. 297.

(6) *Nebraska*.—Section 89, ch. 16, Comp. St., authorizes the consolidation of two lines of railway only in cases where the two roads when so consolidated will form a continuous line, without break of gauge or interruption. *State ex rel. v. Atchison & N. R. Co.*, 32 Am. & Eng. R. Cas. 388, 24 Neb. 143, 38 N. W. Rep. 43.

(7) *New Hampshire*.—The statute of 1867, restraining the consolidation of rival lines, whereby competition would be destroyed, is not repealed by Gen. St. ch. 150, § 10; and an agreement to divide the income of two roads is within the prohibition of the statute. *Currier v. Concord R. Corp.*, 48 N. H. 321.

(8) *New Jersey*.—The act of March 17, 1870, granting certain powers and franchises in this state to the Erie railway company, in connection with other railroads therein mentioned, although expressed in broad terms, cannot be considered as allowing the company to possess and enjoy the franchises of any company with which it does not unite. *McGregor v. Erie R. Co.*, 35 N. J. L. 115. And see *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455; reversing 22 N. J. Eq. 130.

(9) *New Mexico*.—The Texas and Pacific railroad company is not authorized under the act of congress of March 3, 1871, §§ 4 to 6, to transfer its own land grants and franchises to another company, retaining merely an easement over the right of way. *Southern Pac. R. Co. v. Esquibel*, 36 Am. & Eng. R. Cas. 410, 4 N. Mex. 337, 20 Pac. Rep. 109.

(10) *New York*.—Railroad companies may consolidate when their lines "form a continuous line of railroad with each other;" i. e., when the line extends and continues in the same general direction, connecting two principal points. The term "continuous line" excludes the idea of a plurality of lines, and does not necessarily authorize the consolidation of non-competing roads which, not being parallel, touch or cross one another. *People v. Boston, H. T. & W. R. Co.*, 12 Abb. N. Cas. (N. Y.) 230. See also *Taylor v. Atlantic & G. W. R. Co.*, 57 How. Pr. (N. Y.) 26.

(11) *Ohio*.—Two railroad companies owning lines of railroad connected only by other

railroads which such companies hold by lease, are not authorized to become consolidated into one corporation, under Rev. St. § 3379. *State v. Vanderbilt*, 8 Am. & Eng. R. Cas. 657, 37 Ohio St. 590.

The lines of two companies, in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously," within the meaning of Rev. St. § 3379, and hence such companies cannot become consolidated under that section. *State v. Vanderbilt*, 8 Am. & Eng. R. Cas. 657, 37 Ohio St. 590.

(12) *Pennsylvania*.—The act of May 16, 1861 (P. L. 702), authorizes the consolidation of railroad companies only, and the attempted merger of a coal company is without warrant of law, and hence of no effect. The corporation did not, however, thereby forfeit its charter. *Commonwealth v. Pennsylvania & W. R. Co.*, 17 Phila. (Pa.) 609.

The act of May 16, 1861, authorizing the consolidation of railroads, has no application to passenger railways. *Philadelphia v. Thirteenth & F. St. Pass. R. Co.*, 8 Phila. (Pa.) 648.

(13) *South Carolina*.—"An act to promote the consolidation of the Greenville & Columbia R. R. Co.," provided in its 4th section for a waiver of the lien of the state on the Blue Ridge R. R. property, and in its 5th section for a like waiver of lien upon the property of the Greenville and Columbia R. R. property, and in its 7th section for the indorsement by the consolidated companies of the bonds of the two companies consolidating. The two companies not having consolidated—held, that the act never took effect. *Gibbes v. Greenville & C. R. Co.*, 4 Am. & Eng. R. Cas. 459, 13 So. Car. 228.

(14) *Tennessee*.—In the act of March 24, 1877, amending the law in relation to the consolidation of railways, the limitation upon the power of the company to execute a mortgage or lien affecting a particular class of creditors is not repealed by the act of March 15, 1881, empowering railroad companies to execute mortgages, and extending such power to all companies then existing. *Frazier v. East Tenn., V. & G. R. Co.*, 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537.

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(15) *Texas*.—A statute prohibiting a particular railway company from selling to, or consolidating with, any parallel or competing line is not in violation of any contract obligation with, or right vested in, another railway company authorized in general language by a previous statute to purchase or consolidate with any connecting company, there being, at the date of the passage of the prohibiting statute, no contract authorizing the consolidation of the two lines, the company prohibited from consolidating not being at that time in existence. *East Line & R. R. Co. v. Rushing*, 34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834. —QUOTED IN *Gulf, C. & S. F. R. Co. v. State*, 36 Am. & Eng. R. Cas. 481, 72 Tex. 404.

The act of March 10, 1875, recognizes the consolidation of the International R. Co. with the H. & G. U., and does not in any manner interfere with the charter of the latter road; but a clear distinction is made and observed between the two roads, and the ownership by the consolidated road of its property is recognized by the legislature to be derived from the two sources. *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. Rep. 730.

(16) *Canada*.—The act authorizing the union of two railway companies declared that any deed the companies executed under the act should be valid, to "all intents and purposes, in the same manner as if incorporated in the act." Held, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary, but did not give them legislative authority over the rights of other persons. *Cayley v. Cobourg, P. & M. R. & M. Co.*, 14 Grant's Ch. (U. C.) 571.

Under the special powers conferred on the Northern railway company of Canada, by 38 Vict. c. 65, § 61, and the similar powers of the Hamilton & North Western railway company, conferred on them by 35 Vict. c. 55, § 32, those companies are

authorized to combine their rolling stock and to work their lines jointly, as if they were one railway, under the management of a joint committee appointed by the boards of both companies, and to divide the gross revenue after deducting all expenses of working, maintenance, management, and compensation for damages in certain agreed proportions. *Campbell v. Northern R. Co.*, 26 Grant's Ch. (U. C.) 522. —REVIEWING *Winch v. Birkenhead & N. W. R. Co.*, 5 De G. & S. 579; *Hare v. London & N. W. R. Co.*, 2 J. & H. 80.

5. Consolidation under power given by charter.—Where in its charter a railway company is authorized to join stocks or consolidate with another company running in the same general direction, such company must have a route which constitutes a part of the line between the *termini* designated in the charter of the first-mentioned company. *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.

Where two corporations are empowered by their charters respectively to do all things necessary to construct and put in operation a railroad between certain places named in the charters, they have no right to unite and place both under the same management, nor to establish a steamboat line to run in connection with them; and no action can be sustained upon the notes of the consolidated companies given for the purchase of the steamboat. *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441. —DISTINGUISHED IN *Pittsburg, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 Am. & Eng. R. Cas. 213, 131 U. S. 371. FOLLOWED IN *Mackintosh v. Flint & P. M. R. Co.*, 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582; *St. Joseph v. Saville*, 39 Mo. 460. QUOTED AND DISTINGUISHED IN *Hutchinson v. Western & A. R. Co.*, 6 Heisk. (Tenn.) 634. REVIEWED IN *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57; *State ex rel. v. Com'rs of Hancock County*, 11 Ohio St. 183.

A power conferred on a railroad company by its charter to form a union or consolidate with any other company is a contract between the state and the corporation, and cannot be impaired by subsequent legislation. *Zimmer v. State*, 30 Ark. 677.

A clause in the original articles of association of an express company, prohibiting the union or consolidation of that company with

any other, without the consent of a majority of the stockholders, is not controlled by a clause contained in those articles, providing for an amendment of the original articles by a concurrent vote of two thirds of the executive committee and a majority of the trustees, so as to allow such officers to repeal the restrictions upon consolidation. Such authority to amend extends only to such amendments as are pertinent to the business and objects for which the association was organized. *Blatchford v. Ross*, 5 *Abb. Pr. N. S. (N. Y.)* 434.

Under the charter of the Cairo & Fulton R. Co. it had no power to consolidate with other companies after it was completed, as the authority to consolidate was only to "facilitate its early construction." But it did have such power under the act of July 23, 1868. *St. Louis, I. M. & S. R. Co. v. Berry*, 41 *Ark.* 509.

6. Consolidation of corporations of different states.—Two or more corporations may be consolidated either by the concurrent action of two or more states or by the action of one state alone, where one of the constituent corporations is a foreign one. *Bishop v. Brainerd*, 28 *Conn.* 289.—**EXPLAINING** *Farnum v. Blackstone Canal Corp.*, 1 *Sumn. (U. S.)* 46.

A general law of New York empowered railroad companies having continuous lines to consolidate. Two companies, one of which owned a road wholly within the state, and the other one partly in New York and partly in Connecticut, took measures for consolidation, but they did not at the time have a completed continuous track. The Connecticut legislature passed a resolution, to the effect that when the Connecticut road should be consolidated with any road in New York, pursuant to the laws of New York, the new company should have all the rights within Connecticut that the old company possessed there. *Held*: (1) that a subsequent statute of the New York legislature, recognizing the existence of the consolidated company, made valid and established the consolidation agreement; (2) that the legal existence of the new corporation having become established in New York, the requirements of the Connecticut statutes were satisfied; (3) that the new corporation could issue its bonds in exchange for those issued by the old company and secured by a mortgage upon its property; (4) that the consolidated company could issue bonds

both in New York and Connecticut to an amount necessary to enable it to complete the road, and could mortgage its property and franchises for the payment of such bonds. *Mead v. New York, H. & N. R. Co.*, 45 *Conn.* 199, 17 *Am. Ry. Rep.* 367.—**DISTINGUISHING** *Black River & U. R. Co. v. Barnard*, 31 *Barb. (N. Y.)* 258.

The general Mich. railroad law, in permitting the consolidation of railroad companies within the state with others beyond its boundaries, contemplates leaving the domestic company in its original position as to stocks and loans, and annexing to its capital and loans those additions which are made proportional to the original amounts. *Lake Shore & M. S. R. Co. v. People*, 46 *Mich.* 193, 9 *N. W. Rep.* 249.

While it is competent for the legislature, in an act providing for the consolidation of domestic corporations, to declare what shall be the status of the corporations availing themselves of its provisions, and also of the consolidated companies, it has no power to authorize the consolidation of domestic corporations with those of another state without the consent of the legislature of that state, in such manner as to vest, in case of such a consolidation, the franchises, rights, and property of the foreign corporation in the consolidated company, or to authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, or to confer any exclusive authority for their consolidation. *People v. New York, C. & St. L. R. Co.*, 129 *N. Y.* 474, 29 *N. E. Rep.* 959, 42 *N. Y. S. R.* 90; *reversing* 61 *Hun* 66, 39 *N. Y. S. R.* 725, 15 *N. Y. Supp.* 635.

The act of 1869 (ch. 917, N. Y. Laws of 1869), authorizing the consolidation of certain railroad companies, upon such a consolidation, regards the consolidated company as a new corporation; but where the proposed consolidation is of a domestic corporation and one of another state, the consent of the legislature of that state is requisite to its accomplishment. *People v. New York, C. & St. L. R. Co.*, 129 *N. Y.* 474, 29 *N. E. Rep.* 959, 42 *N. Y. S. R.* 90; *reversing* 61 *Hun* 66, 39 *N. Y. S. R.* 725, 15 *N. Y. Supp.* 635.

While, therefore, it seems, when two or more domestic corporations are so consolidated, the resulting entity may properly be said to be a corporation "incorporated by and under a general and special law of this

state," with stock corporations so subject when the corporation whose legal existence, the conclusion it is not likely, *York, C. & N. E. Rep.* 61 *Hun* 66, 39 *N. Y. S. R.* 725, 15 *N. Y. Supp.* 635.

7. Right to consolidate.—Companies have no power to consolidate without the express authority of the legislature. *Washington, B. & O. R. Co. v. Eng. R. Co.*, 356, 20 *Hun* 311, 23 *N. Y. S. R.* 725, 15 *N. Y. Supp.* 635.

8. Status of consolidated company.—The consolidated company serves the same purpose as the company consolidated. It is not a new corporation, but a continuation of the old one. *Bishop v. Brainerd*, 28 *Conn.* 289.

9. Effect of consolidation.—The consolidation of two corporations results in the creation of a new corporation. The consolidated company is a new entity, and its stockholders are not the same as the stockholders of the constituent corporations. *Bishop v. Brainerd*, 28 *Conn.* 289.

10. Consolidation of foreign corporations.—The consolidation of a domestic corporation with a foreign corporation is not permitted by the laws of this state. *Bishop v. Brainerd*, 28 *Conn.* 289.

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state," within the meaning of the "act to tax stock corporations for the privilege of incorporation" (ch. 143, Laws of 1886), and so subject to the tax imposed by said act, when the consolidation is of a domestic corporation with a corporation of another state, whose legislature has sanctioned such a consolidation, as the new corporation owes its existence, not to the state law alone, but to the concurrent legislation of the two states, it is not liable to such tax. *People v. New York, C. & St. L. R. Co.*, 129 N. Y. 474, 29 N. E. Rep. 959, 42 N. Y. S. R. 90; reversing 61 Hun 66, 39 N. Y. S. R. 725, 15 N. Y. Supp. 635.

7. Right of street railways to consolidate.—Two or more street-railway companies may consolidate under the provisions of the New York Act of 1875, ch. 108, notwithstanding the Act of 1869, ch. 917, § 7, expressly excludes street railways from the operation of the clause authorizing the consolidation of railroad companies. *In re Washington St. A. & P. R. Co.*, 40 Am. & Eng. R. Cas. 588, 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504; affirming 52 Hun 311, 23 N. Y. S. R. 444.

City passenger railways are included within the term "railroads," employed in the act of May 16, 1861, and the provisions of said act relating to merger apply to said railways. *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. St. 210.—QUOTED IN *Millvale v. Evergreen R. Co.*, 46 Am. & Eng. R. Cas. 219, 131 Pa. St. 1.

8. Statutes validating irregular consolidation.—Where the charter reserves the right of amendment a statute validating an unauthorized consolidation of the company with another company is effectual for that purpose, and will be deemed to be an amendment of the charter. *Bishop v. Brainerd*, 28 Conn. 289.

In such a case neither the assent of the stockholders nor any action by them or the directors is essential to effect the consolidation. *Bishop v. Brainerd*, 28 Conn. 289.

By the act of February 14, 1857, confirming the consolidation before then entered into between the Savannah Branch railroad company and the Racine and Mississippi railroad company, the corporate body which was organized in accordance with the act of consolidation became legal, notwithstanding such organization may have been irregular. *Mitchell v. Deeds*, 49 Ill. 416.

And where a party, prior to the passage

of the act of 1857, executed and delivered to the "Racine and Mississippi railroad company," the corporation organized under such act of consolidation, his promissory note, and which was afterwards, and before its maturity, assigned by the company, through its president—held, in an action upon such note by the assignee against the maker, that the defendant, by executing his note to the company, thereby admitted its corporate existence, and in order to avoid its payment for the want of a party with whom to contract, he must prove that no such body existed in fact. *Mitchell v. Deeds*, 49 Ill. 416.

The act of the Illinois legislature of Feb. 16, 1865, is a legislative recognition of the existence of the Chicago & G. E. R. Co. as consolidated with the Columbus, C. & I. C. R. Co. and others, of the name taken by the consolidated company, and its right to construct a railroad within the city of Chicago. *McAuley v. Columbus, C. & I. C. R. Co.*, 83 Ill. 348.

2. Proceedings to Effect Consolidation.

9. In general.*—In Michigan, an election of a board of directors of a consolidated corporation is by statute (Comp. L. 1857, § 1996) clearly made a condition precedent to its acquiring the rights and franchises of the original corporations. *Mansfield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 124. See also *Tuttle v. Michigan A. L. R. Co.*, 35 Mich. 247, 15 Am. Ry. Rep. 406.

Where the statute and the vote of the electors taken together authorize subscription to a railroad and the issue of bonds to a consolidated corporation, no formal order by the county court to do those acts is necessary. *Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. Rep. 18.

It was proposed to consolidate three railway companies, the funds necessary to be raised by subscription of the stockholders therein, and it was doubtful whether one of the companies could obtain the consent of the legislature. It was arranged that the other two should consolidate at all events, of which facts subscribers were aware. The first call for subscriptions stated that it was for the extension of one of the two roads

* Principles of the law of consolidation of railroad companies, see note, 8 AM. & ENG. R. CAS. 647.

which were to consolidate at all events, and "for other purposes." Thereafter the entire subscription was paid in, and a committee appointed to receive and disburse funds. *Held*, that an advance by this committee to the company, whose right to consolidate was doubtful, for the purpose of affecting such consolidation, was authorized, though the consent of the legislature to the entry by that company into the combination was never obtained. *Gould v. Soney*, 5 N. Y. Supp. 928.

10. Meetings of directors and stockholders.—Notice by the secretary of each railroad company of a meeting of its stockholders, to sanction the agreement of the directors of the two companies for consolidation, need only be published in the counties through which his company's road runs. *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. Rep. 671.

Where an agreement for the consolidation of two companies, under section 2445, Comp. Laws 1871, was dated prior to the meeting of the directors of one of said companies, at which its president was authorized to sign said agreement, but the record discloses that it was not signed and sealed by such president until after such meeting, the prior dating does not affect the validity of the agreement. *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. Rep. 671.

Where the record shows that a majority of the directors (being a quorum) were present at a meeting held to act upon the proposed consolidation with another company, and all voted to enter into the statutory agreement therefor, and the record fails to show the giving of any notice to the absent directors of the meeting, but it does not appear affirmatively that such notice was not given, the law will presume that the proper notice was given, and the burden of proof is upon those who deny the regularity of the meeting for want of notice, to prove that notice was not given. *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. Rep. 671.

Where the statute (Comp. Laws 1871, § 2445) does not require a notice to be given to the directors of a railroad company of a meeting of the board to act upon a proposed agreement for consolidation, and it is not shown that the articles of association or by-laws of the company provided for the manner of such notice, or that any should be given, a meeting of the majority of the directors, being a quorum, held without such

notice, and their unanimous vote in favor of executing the consolidation agreement, is valid. *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. Rep. 671.

Absence of evidence to show that each of the companies consolidated filed with the secretary of state a resolution passed by a majority of its stockholders, accepting the provisions of the statute permitting the consolidation, and absence of evidence of separate meetings of the stockholders, except so far as such meetings may be implied from the certified copy of the articles of agreement of consolidation filed in the secretary of state's office, will not render void a consolidation otherwise valid. *Leavenworth County v. Chicago, R. I. & P. R. Co.*, 22 Am. & Eng. R. Cas. 61, 25 Fed. Rep. 219.

11. Grounds of opposition—Rights of bondholders.—One who holds bonds in one of the companies consolidated, giving him the right to convert them at any time before maturity into certificates of capital stock, cannot, by the consolidation, be deprived of that privilege until he has had a fair opportunity, after notice of the contemplated consolidation, to effect such conversion. *Rosenkrans v. Lafayette, B. & M. R. Co.*, 16 Am. & Eng. R. Cas. 483, 18 Fed. Rep. 513.

Power given by statute to the holders of bonds issued by a certain railroad company, to vote in the election of directors of the company, must be confined to the express power given, and cannot be extended to entitle the bondholder to vote upon the consolidation of the company with another, under the New York act of 1869, in force at the time such bonds were authorized and issued, since such act does not contemplate the complete dissolution of the companies consolidated, but expressly provides that the old corporation shall continue in existence to preserve the rights of all creditors. *Hart v. Ogdensburg & L. C. R. Co.*, 23 N. Y. Supp. 639, 69 Hun (N. Y.) 378, 52 N. Y. L. R. 799.

The consolidation of two railroad companies forming a connecting line will not be enjoined at the instance of bondholders of one of them entitled to be paid from the income of the road, on the ground of impossibility of ascertaining the net earnings, since the consolidation will not confuse the data by which the net earnings of the respective roads are determined. *Hart v. Ogdensburg & L. C. R. Co.*, 23 N. Y. Supp.

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12. Rights of dissenting stockholders.—A legislature may empower railroads to consolidate, but it cannot compel a minority stockholder to transfer his stock because a majority of the stockholders have voted in favor of the consolidation. *Clearwater v. Meredith*, 1 *Wall.* (U. S.) 25.

Where the charters of the companies seeking consolidation do not provide therefor, the consent of all the stockholders must be obtained. In such a case one dissenting stockholder may have an injunction against the consolidation. *Mourey v. Indianapolis & C. R. Co.*, 4 *Biss.* (U. S.) 78. *International & G. N. R. Co. v. Bremond*, 4 *Am. & Eng. R. Cas.* 308, 53 *Tex.* 96.

Where the state by an act of the legislature authorizes two companies to consolidate, such consolidation, while not void, even if against the consent of a stockholder, discharges him from his subscription. *McCray v. Junction R. Co.*, 9 *Ind.* 358.—DISTINGUISHED IN *Bish v. Johnson*, 21 *Ind.* 299. FOLLOWED IN *Booe v. Junction R. Co.*, 10 *Ind.* 93; *Martin v. Junction R. Co.*, 12 *Ind.* 605; *Marks v. Junction R. Co.*, 13 *Ind.* 387.

Those stockholders in the old who do not enter the new corporation, are entitled to withdraw their shares, and may enjoin till they are secured. *State v. Bailey*, 16 *Ind.* 46.

A subscriber to the stock of a railroad company, in a suit against him to enforce the collection of assessments by a new company, formed by consolidation with another company of the company he contracted with, may question the validity of the consolidation proceedings, wherein he took no part, and is not precluded by the fact that such proceedings were sufficient to make the new company a corporation *de facto*. No change in the corporation, violating any of the substantial statutory conditions, can bind a dissenting stockholder. *Tuttle v. Michigan A. L. R. Co.*, 35 *Mich.* 247, 15 *Am. Ry. Rep.* 406.

In 1863 and 1869 the New Jersey Western railroad company, acting under legislative authority, constructed parts of a railroad in this state, and the complainants and others subscribed and paid for its stock. In 1870 it was consolidated with other railroads, built or to be built, by an act authorizing compensation to such stockholders of the New Jersey Western as were dissatisfied therewith. A mortgage, covering all the

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property of the consolidated roads, was given, and the legality of the consolidation recognized by subsequent legislation. Against some of the defendants there appeared to be some grounds for applying for relief. *Held*, that it could not be satisfactorily determined, on the statements of the bill, whether the complainants had, by acquiescence, lost their rights as stockholders; and the demurrer, being too general, was overruled. *Hoxsey v. New Jersey Midland R. Co.*, 33 *N. J. Eq.* 119.

13. Consenting stockholders estopped.—Where a consolidation is effected under an unauthorized amendment to the charter, stockholders consenting to the consolidation are estopped to question the amendment. *Deaderick v. Wilson*, 8 *Baxt. (Tenn.)* 108.

14. Proceedings not open to collateral attack.—After a railroad company has been merged by consolidation in another railroad company, and such new corporation is transacting and carrying on business, and is a *de facto* corporation, the existence of the corporation can only be attacked in a direct proceeding brought for that purpose. Such a matter will not be inquired into collaterally. *Chicago, K. & W. R. Co. v. Com'rs of Stafford County*, 36 *Kan.* 121, 12 *Pac. Rep.* 593.—DISTINGUISHING *State ex rel. v. Com'rs of Nemaha County*, 10 *Kan.* 569.—FOLLOWED IN *Southern Kan. & P. R. Co. v. Towner*, 41 *Kan.* 72, 21 *Pac. Rep.* 221.

Where several railway companies have entered into articles of agreement for consolidation, and have observed the forms of the statute in such organization, and filed the articles of agreement with the secretary of state, and the consolidated company has for a considerable time assumed to be and to act as a corporation, an inquiry into the invalidity or non-existence of the consolidation can only be brought by the proper prosecuting officer in the name of the state. *Atchison, T. & S. F. R. Co. v. Sumner County Com'rs*, 51 *Kan.* 617, 33 *Pac. Rep.* 312.

15. Construction and effect of articles of consolidation.—Where two companies of different states contract for the joint management by one of them of the business common to both of them, the receipts and expenses to be divided, this does not warrant the active company in purchasing, at the joint expense, the control of a

rival line, without the assent of the stockholders of the other company. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 42 Am. & Eng. R. Cas. 688, 136 U. S. 356, 10 Sup. Ct. Rep. 1004.

In California, under the act of 1861 and Civ. Code, § 473, the articles of consolidation constitute new articles of incorporation, and the persons therein named as directors are to act as directors until their successors are elected. *California Southern R. Co. v. Southern Pac. R. Co.*, 20 Am. & Eng. R. Cas. 309, 67 Cal. 59, 7 Pac. Rep. 123.

In a consolidation agreement between railroad companies, pursuant to which a committee was appointed to disburse a fund subscribed by stockholders in the construction of the road, so as to form a continuous line, "and for other purposes," the words quoted do not empower the committee to dispose of the funds in any manner they may see fit, but only for purposes of construction, completion, and equipment of the continuous line. *Gould v. Seney*, 31 N. Y. R. 729, 9 N. Y. Supp. 818; modifying 5 N. Y. Supp. 928.

14. Consolidation by purchase of stock of another corporation.—A railroad company having power to consolidate with connecting or intersecting lines may, under the statute, with a view to accomplishing such consolidation and carrying out the object for which it was created, purchase the stock of such other roads. *Hill v. Nisbet*, 100 Ind. 341. *Tod v. Kentucky U. Land Co.*, 57 Fed. Rep. 47.—**APPLYING** *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. Rep. 495.

One railroad corporation is not necessarily merged in another so as to make a debt of the former the debt of the latter, by reason of the fact that the first company was organized merely as a speculation and its stock sold out to the stockholders of the last company, both companies having the same officers. *St. Louis, W. & W. R. Co. v. Ritz*, 11 Am. & Eng. R. Cas. 35, 30 Kan. 30, 1 Pac. Rep. 27.

Where one company is authorized to acquire the property and franchises of another without consolidation with it, such a purchase, at execution sale, does not estop it from denying the fact of consolidation. *Gulf, C. & S. F. R. Co. v. Newell*, 38 Am. & Eng. R. Cas. 503, 73 Tex. 334, 11 S. W. Rep. 342.

Railroad companies were by legislative

authority authorized to consolidate their capital stock, and by a supplemental act one of them, which had then mortgaged its after-acquired property, was authorized, in lieu of consolidation of capital stock, to purchase the stock of the other company. The purchase, sale, and delivery of the stock was actually made for the purpose of consolidation, and an actual consolidation of the roads was made and completely recognized. *Held*, that the purchase, sale, and delivery of the capital stock was a consolidation in accordance with the provisions of the acts, and that the covenant for further assurance, as to such after-acquired property contained in the mortgage, would be specifically enforced. *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 398.

17. Certificate—Residence of directors of new company.—A certificate made by the directors of consolidating railroad companies, under Ohio Rev. St. § 3381, which fails to show any place of residence of the directors of the new company, is fatally defective. *State v. Vanderbilt*, 8 Am. & Eng. R. Cas. 657, 37 Ohio St. 590.

18. Recording and filing.—Where the statute requires the certificate of consolidation to be filed in the office of the secretary of state, it need not be recorded in the records of the town. *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 215, 52 Conn. 274.

The filing of a duplicate of the consolidation agreement in the office of the secretary of state, after being duly made and submitted to the stockholders and confirmed by them, is by the statute (Comp. L. 1857, § 1995) made a condition precedent to a merger of the original corporations, and there can be no valid action as a consolidated corporation until after that is done; and any attempted election of directors of the consolidated corporation before that, is without warrant and ineffectual. *Mansfield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 124.

A company formed by the consolidation of two or more corporations cannot, under Mich. Comp. Laws, § 2347, make valid assessments upon subscriptions to the stock of one of the original corporations before the consolidation papers are filed in the office of the secretary of state; the statute is the only source of the corporate existence of the consolidated company, and its condi-

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The provision of the Missouri act of 1870, that "before any railroad companies shall consolidate their roads under the provisions of this act they shall each file with the secretary of state a resolution accepting the provisions thereof," is merely directory; and where two railroads, which, when connected, form a continuous line, have complied with the other provisions of the act, the consolidation is valid, although they have failed to file the resolution with the secretary of state. *Leavenworth County Com'rs v. Chicago, R. I. & P. R. Co.*, 43 Am. & Eng. R. Cas. 485, 134 U. S. 688, 10 Sup. Ct. Rep. 708.

Where a statute leaves it optional with two companies to consolidate or not, and one company conveys to the other its property, rights, and franchises, failure to file with the secretary of state a certificate required by the act in case of consolidation will not affect the validity of the conveyance. *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228; reversing 3 Mo. App. 315.

Articles of consolidation of railroad corporations are not required to be recorded in the county clerk's office, but a duplicate of the agreement must be filed with the secretary of state. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171, 49 N. W. Rep. 1110.

After the consolidation of two railroads is completed by filing a certificate with the secretary of state, the new corporation thereby created can succeed to the rights, powers, and franchises of the original corporation only by operation of the statute, which provides for such succession only upon the election of the first board of directors of the new corporation; and such election is not authorized by the statute before consolidation has been consummated by filing the certificate. *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223, 13 Am. Ry. Rep. 341.—FOLLOWING *Shields v. State*, 26 Ohio St. 86.

Filing in the office of the secretary of the commonwealth the certificate of consolidation of certain railroad companies, under the act of March 24, 1865, constituted the one company thus created a legal corporation in Pennsylvania. *Commonwealth v. Atlantic & G. W. R. Co.*, 53 Pa. St. 9.

It being proved that the certificate was deposited with the secretary of the commonwealth in his office, the presumption is

that he filed the same of record, and that it remains of record there. *Commonwealth v. Atlantic & G. W. R. Co.*, 53 Pa. St. 9.

19. Payment of fee to secretary of state.—Section 148a, Ohio Rev. St., as amended Feb. 12, 1889 (86 Ohio Laws 33), requiring the payment of a fee to the secretary of state for the filing of articles of agreement of incorporation, and also of consolidation, proportioned to the authorized capital stock of the company, is a valid law, and applies to articles of agreement of consolidation between an Ohio company and a company or companies of another state, as well as to articles of consolidation between Ohio companies only. *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. Rep. 721.—QUOTING *Monroe Sav. Bank v. Rochester*, 37 N. Y. 365.

20. Proof of consolidation.—In a suit against a consolidated railway upon promissory notes given by one of the original companies, copies of the articles of consolidation on file in the office of the secretary of state, duly certified by the secretary, and authenticated by his seal of office, are competent evidence to prove the consolidation, the same as the original articles would be. *Columbus, C. & I. C. R. Co. v. Skidmore*, 69 Ill. 566.

Proof of a statute chartering a corporation under a particular name, and of other statutes authorizing the corporation to do particular acts, and the act of the railroad commissioners approving the consolidation of the corporation with another corporation, in pursuance of an authority conferred upon them by statute, will warrant a finding of the existence of the corporation, and of its ownership of property which it employs in exercising its franchise. *Commonwealth v. Carroll*, 145 Mass. 403, 14 N. E. Rep. 618.

The provision of the Missouri act of 1870, that "a certified copy of such articles of agreement (for consolidation) * * * shall be filed with the secretary of state when the consolidation shall be deemed duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof," makes such certified copy conclusive evidence of the validity of the consolidation in any collateral proceeding. *Leavenworth County Com'rs v. Chicago, R. I. & P. R. Co.*, 43 Am. & Eng. R. Cas. 485, 134 U. S. 688, 10 Sup. Ct. Rep. 708.

The oral testimony of the attorney of de

defendant railway company, given for the plaintiff, and to the effect that the defendant and another railroad corporation had been consolidated, is sufficient to establish such consolidation, in the absence of objection to its competency. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.—DISTINGUISHING *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122.

21. Amalgamation under English statutes.—Where an act of parliament amalgamating two railway companies has provided sufficient machinery by means of arbitration to settle the accounts between two classes of shareholders, the court will not interfere. *Yool v. Great Western R. Co.*, 39 L. J. Ch. 562, 18 W. R. 825, 22 L. T. 781.

Where by private act of parliament three railway companies are consolidated into one, but the act is not to take effect unless the commissioners of railways have certified that half the capital has been paid up, one who furnishes the company with oil for its carriages, under orders not under seal, may recover in an action for goods sold, without proof that the railway commissioners had certified. *Denton v. East Anglian R. Co.*, 3 C. & K. 16.

Where a subscriber's agreement of two railway companies empowered the respective directors to amalgamate the undertakings, and the directors of the two companies agree to amalgamate and to form a united company, and this agreement is carried into effect by resolutions made at board meetings, and by a deed executed by a competent number of directors of each company, the amalgamation was authorized and the powers were effectively exercised. *Cork & Y. R. Co. v. Paterson*, 18 C. B. 414.

Although the directors of two railway companies (most of the directors of the two companies being the same) possess the power of amalgamation, yet a resolution of the directors of one company, stating on what terms the holders of the stock of the other company should be entitled to certificates in the joint company, is not an exercise of such power. *Midland G. W. R. Co. v. Leech*, 3 H. L. Cas. 872.

Where a railway company, the directors of which have provisionally registered another company, having practically the same directors, applies in its own name to parliament for an act to make a railway, which such second company was authorized to

construct, and an act is passed upon this petition giving authority to make a part of such railway, and giving the directors power to raise the necessary sums by "contributions among themselves or by the admission of other parties," such act does not amalgamate the two companies. *Midland G. W. R. Co. v. Leech*, 3 H. L. Cas. 872.

II. EFFECT OF CONSOLIDATION.

1. In General.

22. Powers of the consolidated company, generally.*—All powers vested in the consolidating companies are conferred by the consolidation upon the new company, which takes the name of the consolidated company. *Robertson v. Rockford*, 21 Ill. 451.

23. How far a new corporation is created.†—Usually the effect of consolidation is to extinguish the old companies and constitute them one new company. *Ridgway v. Griswold*, 1 McCrary (U. S.) 151.

Corporations can only consolidate with the consent of the legislature; and when a consolidation is thus effected it amounts to the surrender of the old charters and the formation of a new corporation out of such portions of the old as enter into the new. *State v. Bailey*, 16 Ind. 46.—REVIEWING *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42.—*McMahon v. Morrison*, 16 Ind. 172. *State ex rel. v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290. *Cheraw & S. R. Co. v. Com'rs of Anson*, 17 Am. & Eng. R. Cas. 431, 88 N. Car. 519. *Shields v. Ohio*, 95 U. S. 319.—DISTINGUISHED IN *State v. Nashville, C. & St. L. R. Co.*, 12 Lea (Tenn.) 583. QUOTED IN *Ruggles v. People*, 91 Ill. 256.

By the act of August, 1872, consolidating the Macon & Western Railroad Co. with the Central R. & Banking Co., a new corporation was formed having the same privileges and immunities secured to these companies by their former charters, but subject to the right of the state to withdraw or modify the new franchise granted. *Central R. & B. Co. v. State*, 54 Ga. 401.—DISTINGUISHING *Mechanics' Bank v. Heard*, 37 Ga. 401.

* Consolidation of corporations, and its effect, see notes, 3 AM. & ENG. R. CAS. 572, 3 L. R. A. 435.

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The origin and the new ownership of all other properties held by companies, and the liabilities, panies, and disposed by law

Consolidation does not of necessity dissolve the old companies and create a new one. Whether this takes place depends upon the intent of the legislature as manifested in the statute permitting the consolidation. *Central R. & B. Co. v. Georgia*, 92 U. S. 665.—FOLLOWED IN *Southwestern R. Co. v. Georgia*, 92 U. S. 676.

The legal effect of an agreement for consolidation and of the statutes authorizing and ratifying it is a judicial question for the court to determine; and "in a litigation involving the nature and obligations of an institution like this railroad company [Selma, Rome, and Dalton], and in which the interests concerned, public and private, are so many, various, and important, it is not within the province of counsel or their clients to determine by agreement among themselves the relations, rights, and duties which the law makes consequent upon the acts and transactions set forth and established." *Meyer v. Johnston*, 8 Am. & Eng. R. Cas. 584, 64 Ala. 603.

The legal effect of the consolidation of these railroad companies being determined by the provisions of the contract between them and of the several statutes authorizing and ratifying it, subsequent acts on the part of the board of directors of the consolidated company, or conveyances executed by them, indicating an opinion by them that they were acting for a new corporation, cannot affect the identity of the corporation or the legal rights and liabilities resulting from that identity. *Meyer v. Johnston*, 8 Am. & Eng. R. Cas. 584, 64 Ala. 603.

24. How far old companies cease to exist.—The legal effect of a consolidation of railroad companies is to extinguish the constituent companies and to create a new corporation, with the property, liabilities, and stockholders of the old companies which pass out of existence. *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509. *Meyer v. Johnston*, 8 Am. & Eng. R. Cas. 584, 64 Ala. 603.

The original companies become extinct and the new company succeeds to the ownership of the two roads, together with all other property, effects, rights, and franchises held or enjoyed by either of the old companies, and also becomes subject to all the liabilities and burdens of such old companies, and each of them, which are imposed by law. *People ex rel. v. Louisville*

& N. R. Co., 120 Ill. 48, 10 N. E. Rep. 657. *Ohio & M. R. Co. v. People*, 123 Ill. 467, 14 N. E. Rep. 874.

After consolidation a bill by a stockholder in one of the old companies, upon the theory that he is still a stockholder in such company, is not maintainable. *Ridgway v. Griswold*, 1 McCrary (U. S.) 151.

Where there is a consolidation of two railroads by authority of law, if there is nothing to the contrary, the courts will presume that the franchises and privileges of each continue to exist with respect to the individual roads consolidated. *Green County v. Conness*, 15 Am. & Eng. R. Cas. 613, 109 U. S. 104, 3 Sup. Ct. Rep. 69.

A consolidation act directed the companies to unite their stock, rights, privileges, property, and franchises in such a way that each shareholder in one of the old companies should be entitled to an equal number of shares of the consolidated company, the new company to assume all contracts of the old, and its capital not to exceed the aggregate capital of the former corporations. *Held*, that this consolidation was not a surrender of the charters of the old companies, nor did it extinguish them or create a new company; that the consolidated company acquired all rights and immunities conferred upon each of the old companies by its original charter. *Central R. & B. Co. v. Georgia*, 92 U. S. 665.—APPLIED IN *Citizens' St. R. Co. v. Memphis*, 53 Fed. Rep. 715. REVIEWED IN *Henderson v. Central Pass. R. Co.*, 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358.

Upon the creation of the consolidated corporation the constituent corporations of the different states do not necessarily cease to exist, although they lie dormant, and their property, rights, powers, and franchises are possessed and exercised by the new consolidated corporations. *Ohio & M. R. Co. v. People*, 123 Ill. 467, 14 N. E. Rep. 874.

A consolidation is effected where, by the act of union, several companies are "merged in and constituted one body corporate," under the name of one of them, all the companies being continued in existence. *Powell v. North Mo. R. Co.*, 42 Mo. 63.

Where, by the express terms of the statute and consolidation agreement, one of two corporations is extinguished and the other only continued in existence, it is not a case of mere consolidation or amalgama-

tion. *Powell v. North Mo. R. Co.*, 42 Mo. 63.

25. Continuance of old companies under new name.—The legislature may require, as a condition of the consolidation of two railroad companies, that the old companies shall not cease to exist, but that the new company shall be the old companies with a different name. *Day v. Worcester, N. & R. R. Co.*, 46 Am. & Eng. R. Cas. 324, 151 Mass. 302, 23 N. E. Rep. 824.

The words "consolidate," "consolidation," as used in statutes authorizing and ratifying the union or combination of several railroad corporations into one, have not acquired a recognized judicial construction which imports that all the companies are dissolved and merged into one new company; on the contrary, the terms are equally applicable to a union of two or more companies in such a way that one of them is continued in existence, though under a new name, and with enlarged powers, while the others are merged in and absorbed by it; and when the statute authorizes the companies to unite and consolidate "to such an extent, and upon such terms, as may be agreed on by and with the company or companies entering into agreement with them," the character of the consolidation is determined by the stipulations of the agreement. *Meyer v. Johnston*, 8 Am. & Eng. R. Cas. 584, 64 Ala. 603.—QUOTING *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457. REVIEWING *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42.

Where two existing corporations unite and form what is called a consolidated company, technically it may be conceded that the consolidated company is a new corporation, but as regards the business of the old companies and the rights of their respective creditors, such consolidation must be regarded as a mere continuation of the old company under the new name. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574.

26. Effect as between the companies consolidated and the new company.—After consolidation, the new company becomes liable to perform the duties required of the railroad companies so consolidated, and if no part of the franchise is reserved to either of the old companies, they will not be liable to the public for the performance of duties devolving upon the new company. *Peoria & R. I. R. Co. v.*

Coal Valley Mining Co., 68 Ill. 489, 2 Am. Ry. Rep. 295.

Where an illegal contract of consolidation between railroad companies having competing lines has been executed, and defendant has derived all the benefits arising from the contract, its illegality is no defense to a bill in equity for an accounting and a return of the consideration to the plaintiff company, whose property and equipments pass to the defendant under such contract. *Manchester & L. R. Co. v. Concord R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 359, 20 Atl. Rep. 383, 9 L. R. A. 689.

Where two companies are amalgamated, the new company is the same as the two old ones with additional powers, and the amalgamation of the companies does not affect the responsibilities of the surety on the bond of an employé of one of the original companies. *London & B. R. Co. v. Goodwin*, 6 Railw. Cas. 177, 3 Ex. 736, 18 L. J. Ex. 337. See s. c., 3 Ex. 320, 18 L. J. Ex. 174. *Eastern Union R. Co. v. Cochrane*, 9 Ex. 197, 7 Railw. Cas. 792, 23 L. J. Ex. 61.

Where it was agreed, upon the consolidation of two railway companies, that a corporation which owned one of the roads so consolidated, and which had rolling stock and motive power of its own, should carry coal over a certain part of the road, to a certain amount, without charge, and that the new company should pay the coal company 50 cents per ton for all coal transported by any party except the coal company, it not appearing that the coal company was under any legal obligation to the public to carry coal and passengers after the consolidation—*held*, that a court of equity would not enforce the stipulation prohibiting the new company from carrying coal except on paying 50 cents per ton, it being the duty of the new company under the law to carry all freights, and the court not having the power to transfer that duty to another. *Peoria & R. I. R. Co. v. Coal Valley Mining Co.*, 68 Ill. 489, 2 Am. Ry. Rep. 295.

27. Effect on construction contracts.—Where a contract between a railway company and certain contractors stipulated that differences should be referred to T., "if and so long as he should continue to be the company's chief engineer," and such company is afterwards consolidated with another under an act

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directing all contracts to be proceeded with as if the act had not been passed, T. is the proper referee in case of disputes, although he was not the "principal engineer" of the amalgamated company, but continued to be the engineer of a portion of the railroad. *In re Wansbeck R. Co., L. R. 1 C. P. 269, 12 Jur. N. S. 746.*

28. Effect on exemptions from taxation.*—Where two corporations are consolidated, one of which has an exemption from taxation over and above a certain per cent. and the other has no exemption, the legislature is without power to increase the rate of taxation as to the first corporation after the consolidation, but may tax the other one up to the legal maximum rate. But where the purpose and effect of the consolidating act is to provide for a merger of the taxable corporation into the one having the exemption, the consolidated corporation will hold the franchises of the taxable company, subject to taxation. *Central R. & B. Co. v. Georgia, 92 U. S. 665.*—APPROVED AND REFERRED TO IN *State ex rel. v. Keokuk & W. R. Co., 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 299.* DISTINGUISHED IN *Maine C. R. Co. v. Maine, 96 U. S. 499.* FOLLOWED IN *Tennessee v. Whitworth, 117 U. S. 139.*

Where two roads are consolidated, one of which has an exemption from taxation, in such a way as to extinguish the old company and form a new one, the exemption, in one of the old charters, from taxation does not pass to the new company. *Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. Rep. 592.*

A grant of all the "rights and privileges" of one railroad company to its successor includes immunity from taxation which the former had enjoyed under its charter, notwithstanding the use of the words "rights, privileges, immunities, or exemptions" in the state constitution, as if an immunity was something different from a right or privilege. *Louisville & N. R. Co. v. Gaines, 2 Ellipp. (U. S.) 621, 3 Fed. Rep. 266.*—QUOTING *Memphis & C. R. Co. v. Gaines, 97 U. S. 711.* REVIEWING *Morgan v. Louisiana, 93 U. S. 223.*

A statute providing that "all rights" as to a line of railway which "are and have

been legally vested" in one corporation shall pass to another corporation upon a sale by one to the other, passes a right of exemption from taxation, where such right exists in the vendor company at the time of sale. *Atlantic & G. R. Co. v. Allen, 15 Fla. 637.*

Although the corporate rights and privileges formerly belonging to the Baltimore and Susquehanna railroad company were, by the express terms of the Md. act of 1854, ch. 250, vested in the consolidated company, and the provisions of the act of 1827, ch. 72, incorporating the original company, were to that extent embodied in, and reenacted by, said act of 1854, yet the rights and privileges thus conferred became new and special grants to the consolidated company, dating from the period when the said act of 1854 went into operation. The Northern Central railway company was created a new corporation by virtue of the act of 1854, and it was under that act alone that it derived all its franchises, rights, and immunities. As the Maryland constitution of 1850 was in force when the act of 1854—under which the latter was incorporated—went into effect, the legislature had the right to repeal or revoke the exemption from taxation claimed under said act. *State v. Northern C. R. Co., 44 Md. 131.*

The Natchez, J. & C. R. Co. was authorized by the act of Feb. 19, 1890, Laws, p. 675, "to sell absolutely all or any part of its railroad and other property, together with all franchises, powers, and immunities;" and by the second section of said act was authorized to consolidate with the Louisville, N. O. & T. R. Co., under the latter name. *Held*, the latter company, by its purchase or consolidation, acquired the franchises, rights, powers, privileges, and immunities each company had before, and the affidavit required to secure exemption from taxation on what was the Natchez, J. & C. R. Co. could be made by the corresponding officer of the consolidated company. *Natchez, J. & C. R. Co. v. Lambert, 70 Miss. 779, 13 So. Rep. 33.*

Upon such purchase or consolidation, the remote contingency on which the said exemption from taxation should be lost—namely, if the earnings should exceed eight per cent.—was intended by the legislature either to be waived by the state or to become applicable whenever the annual earnings of the Natchez, J. & C. R. Co., as a

* Effect of consolidation on exemption from taxation, see note, 17 AM. & ENG. R. CAS. 436; 41 Id. 702, *abstr.*

component part of the Louisville, N. O. & T. R. Co., should amount to eight per cent. *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. Rep. 33.

The consolidation of the rights, privileges, franchises, and properties of two or more railroad companies into one, where there is no provision of the statute or constitution to the contrary, leaves the different portions of the road, so formed into one, subject to the same rules of taxation that existed before the consolidation. That part of the new line which was exempt will continue to be exempt, and that part which was subject to taxation will continue subject to taxation. *State ex rel. v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.—APPROVING Philadelphia & W. R. Co. v. Maryland, 10 How. (U. S.) 376; Tomlinson v. Branch, 15 Wall. (U. S.) 460; Central R. & B. Co. v. Georgia, 92 U. S. 665; Chesapeake & O. R. Co. v. Virginia, 94 U. S. 718. REVIEWING Atlantic & G. R. Co. v. Georgia, 98 U. S. 359.—DISTINGUISHED IN Evans v. Interstate R. T. R. Co., 106 Mo. 594.

A new corporation by consolidation being created after the adoption of the constitution of 1865, the legislature had no power to grant it immunity from taxation; and an exemption from taxation enjoyed by the consolidating company before the consolidation did not and could not pass to the new one. *State ex rel. v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

Land used by the prosecutors for the necessary purposes of the railroad company are exempt, although the title is in the Delaware and Raritan canal company, for by the act of Feb. 15, 1831, which consolidates these companies, there is an absolute community of interest between them, and so far as taxation is concerned, it matters not to which company the estate may have been conveyed. *State v. Woodruff*, 36 N. J. L. 94, 12 Am. Ry. Rep. 424.

When the Delaware and Raritan canal company, the Camden and Amboy railroad company, and the New Jersey railroad and transportation company were consolidated into one corporation by the name of the United railroad and canal company, by the New Jersey acts of 1867 and 1872, each of these corporations had an irrevocable contract with the state, on the subject of taxation, which was embodied in the con-

solidating act. *State v. Com'r Railroad Taxation*, 37 N. J. L. 240.

When two corporations are consolidated into one by act of the legislature, an exemption from taxation contained in the charter of one of such corporations will not, by such consolidation, be extended to the property of the other, whose charter contained no such exemption, which by consolidation became joint property; and in the absence of a clear expression of intent to the contrary, the property of each of the united corporations will be held, after such consolidation, with the same privileges and burdens as originally attached thereto. *State v. Com'r Railroad Taxation*, 37 N. J. L. 240.

The consolidation of a railroad not exempt from taxation with one which is exempt, does not extend the exemption to the property of the former, in the absence of clear, unmistakable provisions to that effect in the law authorizing the consolidation. *Wilmington & W. R. Co. v. Alsbrook*, 110 N. Car. 137, 437, 14 S. E. Rep. 652, 1007.—REVIEWING *Wilmington & W. R. Co. v. Reid*, 13 Wall. (U. S.) 264.

20. Effect on pending suits.—The validity of a judgment against two consolidated companies is not affected by the dissolution of the consolidation after such judgment is rendered, but the judgment creditor is entitled to execution thereon. *Ketcham v. Madison, I. & P. R. Co.*, 20 Ind. 260.

Where an action is commenced against a railroad company, and pending the suit such company consolidates with other companies, and the consolidated company is substituted as defendant, the substituted defendant has the right to treat the pleadings filed by the original defendant as its own, and to avail itself of the rulings made and exceptions reserved by the original defendant prior to the substitution. *Louisville, E. & St. L. Con. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. Rep. 881.

Where a railroad company is consolidated with other railroad companies under a new name, it ceases to exist as a corporation; and an action brought by or against such railroad company before its consolidation cannot afterwards be prosecuted by or against it or in its original name. *Kansas, O. & T. R. Co. v. Smith*, 40 Kan. 192, 19 Pac. Rep. 636. *Selma, R. & D. R. Co. v. Harbin*, 40 Ga. 706.

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Suits begun before consolidation may be prosecuted thereafter by or against either of the companies consolidated. *Shackelford v. Mississippi C. R. Co.*, 52 Miss. 159.

The consolidation of a corporation with another does not abate a suit pending at the time of such consolidation. *Evans v. Interstate R. T. R. Co.*, 106 Mo. 594, 17 S. W. Rep. 489.—DISTINGUISHING *Indianola R. Co. v. Fryer*, 11 Am. & Eng. R. Cas. 325, 56 Tex. 609; *State v. Keokuk & W. R. Co.*, 99 Mo. 30.

When a defendant railway company is consolidated with another railroad company, the new or consolidated corporation may be substituted on motion of the plaintiff in the place of the original defendant without the issue of process against it. *Kinton v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.

Where an action had been commenced against the M. S. & N. I. R. R. Co. and its officers upon a contract with the company, which company was consolidated with others into the L. S. & M. S. R. Co., and where the report of a referee had been made directing judgment for the amount claimed, and restraining defendant from making any dividends until the amount was paid, a subsequent order, substituting the consolidated company and its officers as defendants, was error, as it made them liable upon the original contracts and subjected them and all the funds and property of the consolidated company to the restraint adjudged against the old company. *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 363, 4 Am. Ry. Rep. 388.

An act of union or consolidation of a defendant corporation with three other corporations, under a law which continued all its liabilities, is not such a dissolution of the corporation as will abate an action commenced before the consolidation was effected. *Baltimore & S. R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 348.

A union of two corporations under such an act of assembly, without any special provision to perpetuate their separate liability, is not equivalent to the death of either of them, nor can they discharge their liabilities in so summary a manner. *Baltimore & S. R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 348.

30. Effect on rights of bondholders.—A railroad consisting of two corporations united by consolidation, is liable on

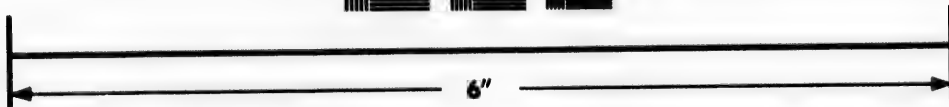
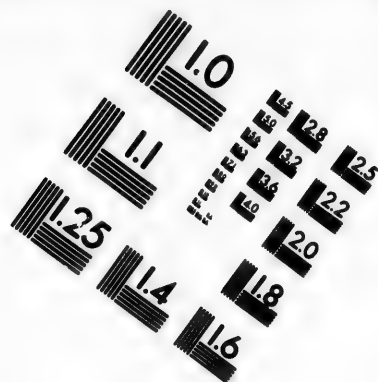
a contract of one of the old companies to exchange stock for bonds, where the act providing for the consolidation makes the new company liable for "all the obligations, debts, and liabilities" and "all claims and contracts" of the old companies. The new corporation is bound to deliver its stock for the bonds of the old company, or to pay the damages occasioned by a refusal. *Day v. Worcester, N. & R. R. Co.*, 46 Am. & Eng. R. Cas. 324, 151 Mass. 302, 23 N. E. Rep. 824.—FOLLOWING *Hancock Mut. L. Ins. Co. v. Worcester, N. & R. R. Co.*, 149 Mass. 214.

A railroad corporation is not relieved from liability on its mortgage bonds by reason of its consolidation with another corporation. *Gale v. Troy & B. R. Co.*, 51 Hun (N. Y.) 470, 21 N. Y. S. R. 702, 4 N. Y. Supp. 295; *affirming* 2 N. Y. Supp. 354, 17 N. Y. S. R. 970.

Where two or more railroad corporations are consolidated under the act of 1869 (ch. 917, Laws of 1869), the bonded indebtedness of either, although secured by mortgage upon its property and franchises, attaches to, and may be enforced against, the new corporation; the excepting of mortgages from the liabilities which, by the terms of the act (§ 5), are made to attach to the new corporation does not also except the bonds or the debt to which the mortgage is a collateral security, and the bondholder is not confined, in the collection of his bond, to the enforcement of the security. *Polhemus v. Fitchburg R. Co.*, 46 Am. & Eng. R. Cas. 330, 123 N. Y. 502, 26 N. E. Rep. 31, 34 N. Y. S. R. 420; *affirming* 50 Hun 397, 21 N. Y. S. R. 117, 3 N. Y. Supp. 327.

The words "except mortgages," simply confine the property lien created by a mortgage to the property owned prior to the consolidation by the company giving it; and the theory of the act is that the new corporation represents each of the old ones in its claims and liabilities, save as to the liabilities created by mortgage, and as to those the properties acquired by the new corporation remain affected only as they were affected before the consolidation. *Polhemus v. Fitchburg R. Co.*, 46 Am. & Eng. R. Cas. 330, 123 N. Y. 502, 26 N. E. Rep. 31, 34 N. Y. S. R. 420; *affirming* 50 Hun 397, 21 N. Y. S. R. 117, 3 N. Y. Supp. 327.

B. was the holder of bonds of the Y. &



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C. railroad, convertible into stock. The company was afterwards consolidated with three other companies, the act of consolidation providing that the property of each company should remain liable for the debts and liabilities of such company unless assumed by the new company. The articles of consolidation provided that all the property, etc., of each company should be vested in the new company, and the debts and liabilities of each be declared to be the debts and liabilities of the consolidated company. B. was cognizant of the terms of consolidation, assented thereto, and took an active part in effecting the same. At the time of the consolidation the stockholders in the Y. & C. company surrendered their stock for stock in the consolidated company at the rate of two for one. B. did not elect to convert his bonds into stock, but held them for nine years and then demanded that the consolidated company convert them, with the money due them, into the stock of the Y. & C. company. This the consolidated company declined to do, but offered to convert the bonds into its own stock, dollar for dollar. B. sued for damages for the refusal, and it was held that the obligation to convert the bonds into stock did not continue after the consolidation had been effected; that by the consolidation the Y. & C. company ceased to exist as a separate corporation, so far as respected its power to issue certificates of stock; and that B., having elected not to have his bonds converted at that time, when it was practicable, and having participated in the arrangement by which such conversion became impossible afterwards, was bound thereby. *Tagart v. Northern C. R. Co.*, 29 Md. 557.

Where a railroad company agreed to give its bonds in consideration of certain moneys to be paid in instalments, and afterwards, by legislative authority, becoming amalgamated with two other companies, tendered the bonds of the consolidated incorporation and brought suit for money—held, that such suit would not lie, the consideration offered not being that agreed for. *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322.

In 1862 the Toledo and Wabash railway company, formed by the consolidation of a road in Ohio with one in Indiana, issued \$600,000 of convertible equipment bonds, payable in 1883, and bearing interest at the rate of seven per cent., payable semi-annually. It operated its road until 1865, when

it was consolidated with certain roads in Illinois, it being stipulated in the agreement of consolidation that the equipment bonds should be "protected" by the new company at their maturity. In 1873 the last-named company, continuing to own and operate its road, issued bonds amounting to \$5,000,000, secured by a mortgage upon all its property. Under proceedings begun in 1875, for the foreclosure of this mortgage, in the courts of Ohio, Indiana, and Illinois, the road was sold in 1877 to one Ellis and two others, it being especially provided in the decree that the sale should be made "without prejudice to any claim which may be made by the holders" of the above-named equipment bonds. Held, that under the statute of Ohio in force at the time of the consolidation (1 Swan & C. 327), and the stipulation in the agreement that the equipment bonds should be protected by the new company, the holders of those bonds acquired the right to require the property of the company that issued them to be applied to their payment; and, the consolidation and the agreement being matter of public record, the right is available against all persons deriving title from the consolidated company. *Compton v. Wabash, St. L. & P. R. Co.*, 33 Am. & Eng. R. Cas. 56, 45 Ohio St. 592, 16 N. E. Rep. 110, 18 N. E. Rep. 380.—DISAPPROVING *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587.

31. Effect on rights of original promoters.—Under 16 Vict. c. 43, § 5, and 18 Vict. c. 33, mere promoters of a railroad who take no stock have no standing in court to attack a subsequent consolidation or to compel the consolidated company to pay expenses for preliminary plans, surveys, etc., incurred by them. None but stockholders are entitled to this remedy. *Municipal Council of Peterborough & Victoria v. Grand Trunk R. Co.*, 18 U. C. Q. B. 220.

32. Effect on special privileges conferred by charter.—Where two roads consolidate by authority of law, in the absence of anything to the contrary, it will be presumed that each continues in the enjoyment of the franchises and privileges that it had before consolidation. *Green County v. Conness*, 109 U. S. 104, 3 Sup. Ct. Rep. 69.—FOLLOWING *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Branch v. Charleston*, 92 U. S. 677.

Where, by consolidation, two or more

railroad companies form a new or consolidated company, the latter, unless restricted by the law under which the consolidation takes place, succeeds to all the rights, privileges, immunities, and franchises of the several companies forming it. *Zimmer v. State*, 30 Ark. 677. *Lewis v. Clarendon*, 5 Dill. (U. S.) 329. *State ex rel. v. Greene County* 54 Mo. 540.—REVIEWING *Philadelphia & W. R. Co. v. Maryland*, 10 How. (U. S.) 376; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.—APPROVED IN *Scotland County v. Thomas*, 94 U. S. 682.

Where two railroad companies are consolidated, pursuant to a statute which vests in the new corporation all the powers, rights, and franchises of the old ones, the new corporation may lawfully use a patented axle-box which both the old ones were licensed to use. *Lightner v. Boston & A. R. Co.*, 1 Low. (U. S.) 338.

Under Alabama Code, § 1583, only such consolidated corporations as belong to the class authorized by statute possess the powers, rights, and franchises of the constituent corporations merged in them. *Georgia Pac. R. Co. v. Gaines*, 44 Am. & Eng. R. Cas. 1, 88 Ala. 377, 7 So. Rep. 382.

Such rights, powers, and franchises are conferred upon the consolidated company only when the lines of the consolidated roads admit the passage of freight and passenger cars over two or more of them continuously without break or interruption. *Georgia Pac. R. Co. v. Wilks*, 38 Am. & Eng. R. Cas. 665, 86 Ala. 478, 6 So. Rep. 34.—FOLLOWED IN *Georgia Pac. R. Co. v. Gaines*, 44 Am. & Eng. R. Cas. 1, 88 Ala. 377, 7 So. Rep. 382.

A provision in the charter of a railroad company, exempting its officers, agents, and servants from military and road duty, and serving on juries, was not a mere personal privilege conferred upon the class of persons described, but constituted a valuable right in the company, to which another company, formed by consolidation between it and a third company, would succeed. *Zimmer v. State*, 30 Ark. 677.

Where two or more corporations are consolidated and the statute provides that the new corporation shall "have the powers, privileges, and immunities possessed by each of the corporations," the new corporation will have only such privileges, powers, and immunities as were possessed by the constituent corporation having the fewest

privileges, powers, and immunities, and which were common to all of them. *State v. Maine C. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323.—QUOTING *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492.

There may be separate consent given for the consolidation of corporations separately created; but when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges. *Chicago & N. W. R. Co. v. Auditor-General*, 53 Mich. 79, 18 N. W. Rep. 586.

Special privileges conferred on a railroad company by a private charter, granted under the Ohio constitution of 1802, do not so inhere in the road constructed under such charter as necessarily to pass to any corporation which may have acquired, under subsequent legislation, the right to operate the same. *Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384.—FOLLOWED IN *Cincinnati, W. & B. R. Co. v. Hoffhines*, 40 Am. & Eng. R. Cas. 221, 46 Ohio St. 643, 22 N. E. Rep. 871.

Certain street-railway companies, organized at a time when the Tennessee constitution did not reserve the right to alter or amend charters, became consolidated after the constitution of 1870 took effect, containing such reservation. *Held*, that rights granted in the original charters were not subject to repeal, and that neither the state nor city could prohibit the consolidated company from occupying the street under the original charter power. *Citizens' St. R. Co. v. Memphis*, 53 Fed. Rep. 715.—APPLYING *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Central R. & B. Co. v. Georgia*, 92 U. S. 665. REFERRING TO *St. Louis, I. M. & S. R. Co. v. Berry*, 111 U. S. 465, 5 Sup. Ct. Rep. 529; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. Rep. 193; *Maine C. R. Co. v. Maine*, 96 U. S. 499; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359.

The defendant, who was a section-hand on the N., C. & St. L. R. Co., was assigned to plaintiff, who was a road overseer, to work the public roads. On being summoned by the plaintiff, the defendant refused to work, and alleged as an excuse that the railroad upon which he worked was originally the Nashville and Northwestern railroad company, the charter of which exempted the

president, directors, clerks, agents, officers, and servants from road duty. *Held*, that defendant was exempt, under the charter, from road duty, and that notwithstanding the consolidation of the Nashville and Northwestern railroad with the Nashville, Chattanooga and St. Louis, it not appearing that the charter of the latter had been repealed, the new company took the old road burthened with the restrictions as well as protected by the terms and conditions of its charter. *Hawkins v. Small*, 9 Am. & Eng. R. Cas. 432, 7 Baxt. (Tenn.) 193.

33. Effect on subscriptions to stock or bonds.—A railway company composed of two companies properly amalgamated may maintain an action for calls against a shareholder of either company. *Cork & Y. R. Co. v. Paterson*, 18 C. B. 414.

Consolidation of corporations without consent of the stockholders releases non-consenting stockholders from subscriptions. *Booe v. Junction R. Co.*, 10 Ind. 93.—FOLLOWING *McCray v. Junction R. Co.*, 9 Ind. 358.—DISTINGUISHED IN *Bish v. Johnson*, 21 Ind. 299.

The mere consolidation of one railroad company with another company since the taking effect of the act of March 1, 1870, authorizing the consolidation of such companies, will not discharge or release a non-assenting subscriber of stock. *Atchison, C. & P. R. Co. v. Com'rs of Phillips County*, 4 Am. & Eng. R. Cas. 326, 25 Kan. 261.

Under an act authorizing the consolidation of two companies, which provides that "the corporation so established shall * * * be subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject," and "all claims and contracts * * * against either corporation may be enforced by suit or action, to be commenced and prosecuted against the corporation to be established under this act," whether the holder of bonds of one of the corporations, which are convertible into its stock, is entitled to demand shares in the new company or not, he is entitled to recover damages from the new company for a refusal to deliver to him stock either in the new company or the old. *Hancock Mut. L. Ins. Co. v. Worcester, N. & R. R. Co.*, 39 Am. & Eng. R. Cas. 227, 149 Mass. 214, 21 N. E. Rep. 364.—FOLLOWED IN *Day v. Worcester, N. & R. R. Co.*, 46 Am. & Eng. R. Cas. 324, 151 Mass. 302.

In an action by a consolidated corporation to recover assessments upon a subscription to the capital stock of one of the original corporations, on the ground of a right by succession under the statute, it is essential to a recovery that a consolidation conforming to the statute be proved. *Mansfield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 124.

Under the Missouri act to authorize the consolidation of railroad companies in that state with companies in adjoining states, the consolidated company is entitled to the same privilege under the laws of Missouri that the Missouri corporation was entitled to at the time of the consolidation, including the privilege of a subscription to stock. *Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. Rep. 18.—CRITICISING *Harshman v. Bates County*, 92 U. S. 569; *Bates County v. Winters*, 97 U. S. 83. FOLLOWING *Scotland County v. Thomas*, 94 U. S. 682; *East Lincoln v. Davenport*, 94 U. S. 801; *Wilson v. Salamanca*, 99 U. S. 499; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *New Buffalo Tp. v. Cambria Iron Co.*, 105 U. S. 73; *Bates County v. Winters*, 112 U. S. 325.

Under the railroad consolidation act of April 10, 1856 (53 Ohio L. 113), corporations, parties to an agreement to consolidate, continue in the full enjoyment of their powers and franchises respectively, and may accept subscriptions to their capital stock at any time before consolidation is consummated by filing the agreement of consolidation with the secretary of state, and such subscriptions are to be construed with reference to the consolidation statutes in force, and subscribers are bound thereby as if the statutes were a part of the contract of subscription. *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223, 13 Am. Ky. Rep. 341.

A person who becomes a subscriber to railroad stock during the progress of consolidation with another company is to be regarded as a stockholder, within the meaning of section 10 of the Ohio statute. *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223, 13 Am. Ky. Rep. 341.

A new consolidated company, in an action for money due on subscriptions to the capital stock of the original corporations, must show that it has succeeded to the rights of its predecessors upon an election

of a board of its own directors. *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223, 13 Am. Ry. Rep. 341.

Where railroad companies consolidate under the Ohio act of 1856, the new corporation thereby created may perform the conditions named in subscriptions to the capital stock of the original companies, and it may also, by performance of the conditions, accept a continuing conditional offer to subscribe such stock. *Mansfield, C. & L. M. R. Co. v. Stout*, 26 Ohio St. 241, 13 Am. Ry. Rep. 361.

Where a general requisition is duly made by a railroad company during the pendency of consolidation proceedings, under the Ohio act of 1856, for the payment of subscriptions to its capital stock in monthly instalments, and the consolidation becomes complete before all the instalments are due, such requisition will continue in force for the benefit of the consolidated company, provided an officer authorized to receive such payments be continued at the place named in the call. Such requisition applies to conditional subscriptions as soon as the condition is performed, and to subsequent subscriptions made before consolidation is complete, as well as to subscriptions absolute at the date of the call. *Mansfield, C. & L. M. R. Co. v. Stout*, 26 Ohio St. 241, 13 Am. Ry. Rep. 361.

Under the first section of the Ohio act of 1856, as amended May 6, 1869, it is a condition precedent to the right to enter into a joint agreement for consolidation that the lines of road of the contracting corporations be first made, or be in process of construction; and a conditional subscriber, who had no knowledge of the progress of consolidation, and in no way contributed thereto, may, in an action by the new company as successor to the old, to recover the amount of his subscription, dispute the corporate existence of the plaintiff on the ground that, at the date of the agreement to consolidate, the road of the company, to whose stock he so subscribed, was neither made nor in process of construction. *Mansfield, C. & L. M. R. Co. v. Stout*, 26 Ohio St. 241, 13 Am. Ry. Rep. 361.—DISTINGUISHED IN *Toledo, C. & St. L. R. Co. v. Hinsdale*, 45 Ohio St. 535.

By force of the articles of consolidation and the acts of assembly the subscriptions to the stock of one of the prior companies enure to the benefit of the consolidated

company, so as to become assets in its hands for the payment of its debts; and the subscribers thereof become liable to the creditors to the amount of their unpaid subscriptions. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 23 Atl. Rep. 53.

Such subscribers, it seems, were not released by a certain contract between the consolidated company and an improvement company, made immediately after the consolidation, whereby the latter company was to construct the railroad in consideration of paid-up capital stock, etc., no portion of the road ever having been constructed thereunder. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 23 Atl. Rep. 53.

Plaintiff bought certain shares of railroad stock, with the guaranty of the company that by a fixed date in the future it should be at par. Before the time had elapsed, and by consent of the plaintiff, the company consolidated with another, which had the effect of dissolving the old corporation and forming a new one, with the same stockholders, and which rendered worthless, in fact destroyed, the old stock. Held, that plaintiff could not recover on the guaranty. *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

The legislature passed an act authorizing the consolidation of two railroad companies, under their charters. After the act took effect, A. subscribed to the stock of one of them. After the consolidation A. was succeeded by the new company for the amount of his stock. Held, that he was liable, and this whether the consolidation took place with his knowledge and consent or not. *Sparrow v. Evansville & C. R. Co.*, 7 Ind. 369.

34. Effect on municipal aid subscriptions.*—Where, prior to consolidation, a township under statutory power voted to issue bonds for the stock of one of the companies, and after consolidation such bonds were issued to the consolidated company, reciting a due and legal consolidation, the defense that the consolidation was void is not open in an action on the bonds by a bona-fide holder for value. *Washburn v. Cass County*, 3 Dill. (U. S.) 251.—FOLLOWING. *Nugent v. Super's of Putnam County*, 19 Wall. (U. S.) 241.

Where a company accepts a subscription

* Consolidation, change of name, etc., as affecting power of municipal corporations to issue bonds in aid of railroads, see note, 5 L. R. A. 728.

or donation from a county upon conditions imposed by the vote, and by its contract with the county board, and afterwards consolidates with other companies under articles requiring the new company to perform such conditions, such original company, and each of the new companies which, by means of the consolidation, succeed to the ownership of the original road, will thereby become bound to perform all the conditions so imposed by the contract with the county and by the vote of the people. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657.

All the powers, rights, franchises, and immunities to which the several companies were entitled pass to the new or consolidated company, including a donation made by a town to one of the companies so consolidated. *Niantic Sav. Bank v. Douglas*, 5 Ill. App. 579.

Where an appropriation is lawfully granted a railroad company by a township it will, upon consolidation of the company with another, pass to and vest in the consolidated company. *Scott v. Hansker*, 94 Ind. 1. — DISTINGUISHED IN *Com'rs of Hamilton County v. State*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64.—*Lewis v. Clarendon*, 5 Dill. (U. S.) 329. *Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. Rep. 18.

The privilege to have subscriptions made to it by county courts without the sanction of a popular vote does not pass to the consolidated company, after the taking effect of the Missouri constitution of 1865. *Wagner v. Meety*, 69 Mo. 150. *State ex rel. v. Garroulle*, 67 Mo. 445.—REVIEWING *Harshman v. Bates County*, 92 U. S. 569; *Philadelphia & W. R. Co. v. Maryland*, 10 How. (U. S.) 376; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Nugent v. Super's of Putnam County*, 19 Wall. (U. S.) 241; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676.—*Harshman v. Bates County*, 3 Dill. (U. S.) 150.

A consolidated railroad company assigned a donation note given to one of the corporations merged in the consolidation, on which the assignees brought suit. *Held*, that, unless the consolidated company was shown to be the legally created successor of the company to whom the note was given, it had no concern with its individual contracts with third persons; and if so identified, it can only have or give to its

assignees a right to recover by proof that all conditions of recovery have been complied with. *Brown v. Dibble*, 30 Am. & Eng. R. Cas. 241, 65 Mich. 520, 32 N. W. Rep. 656.

35. Effect on title to lands.*—Where land is conveyed in fee-simple to a railroad company, and afterwards the company is consolidated with another, and further consolidations take place from time to time, the new companies formed by the successive consolidations succeed to said real estate. *Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. Rep. 560.

Where, prior to the consolidation of two railroad companies, one of them conveys certain lands by warranty deed with mineral reservations, after which the lands are certified to the state of Michigan in aid of the construction of the road of the other company, and the two companies are consolidated under a new name, pursuant to the statute, and the state patents the lands to the new company, which conveys the mineral reservations, the patentee and its grantees are bound by the deed given by the first company. *Deer Lake Co. v. Michigan L. & I. Co.*, 89 Mich. 180, 50 N. W. Rep. 807; former appeal, 83 Mich. 11.

The interest in land acquired by a company under a sealed instrument granting it permission to enter and lay its track within the designated route may be transferred to another railroad company into which the original shall merge, or consolidate with others, by legislative authority. *New Jersey & Midland R. Co. v. Van Syckle*, 37 N. J. L. 496.

Land taken for a railroad built under a charter granted for a certain period, the legislature reserving the right to extend the same, does not revert to the original owner where, by consolidation, another railroad company acquires the road, even after the expiration of the term of the original charter. *Terry v. New York C. & H. R. R. Co.*, 67 How. Pr. (N. Y.) 439.—FOLLOWED IN *Beal v. New York C. & H. R. R. Co.*, 3 How. Pr. N. S. (N. Y.) 329.

A., as stockholder of a certain railroad, had an interest in its right of way at the time of its consolidation with another which assumed its debts and assets and

* Consolidation of railroads as affecting title to lands, see 46 AM. & ENG. R. CAS. 588, *abstr.*

paid A. partly in money and partly in notes for his interest. *Held*, in an action on the notes, that he was not entitled to a vendor's lien on the right of way. *Cross v. Burlington & S. W. R. Co.*, 8 *Am. & Eng. R. Cas.* 263, 58 *Iowa* 62, 12 *N. W. Rep.* 71.

Articles of amalgamation and consolidation incorporating the consolidated company, containing a grant as follows—The said Central Pacific R. Co. "hereby sells, assigns, transfers, grants, bargains, releases, and conveys" to the said consolidated company "all its property, real, personal, and mixed," and "all rights, privileges, and franchises," etc., convey the lands granted to the former company by the government under the act of July 1, 1862. *Tarpey v. Deseret Salt Co.*, 5 *Utah* 494, 17 *Pac. Rep.* 631.—QUOTING *Natoma W. & M. Co. v. Clarkin*, 14 *Cal.* 544.

36. Power of new company to acquire and dispose of lands.*—A consolidated railroad company may execute a mortgage upon all the consolidated property which will be paramount to the unsecured indebtedness of the constituent companies. *Tysen v. Wabash R. Co.*, 13 *Am. & Eng. R. Cas.* 134, 11 *Biss. (U. S.)* 510, 15 *Fed. Rep.* 763.

A deed to a corporation conveying land, "to be used by it for railroad purposes," conditioned that "if work is not commenced on said road in two years, then said property is to revert to" the grantor, the name of the grantee being that borne by the railway company formed by the consolidation of three different companies, and also that previously borne by one of the companies entering into such consolidation, is presumptively a conveyance to the consolidated company and not to the original company which bore the same name, it appearing inferentially from the verdict that prior to the signing and delivery of the deed the latter company had, by reason of such consolidation, been superseded by the new company, and therefore did not, in fact, longer exist. This being so, the court correctly construed the deed as being conditional, not upon the commencement of the work in Georgia within two years after the date of its execution, but upon the commencement of the work anywhere on the line of the consolidated company's railway; and rightly *held*, that the construction

and operation of a part of the line situated in North Carolina would satisfy this condition. *Lester v. Georgia, C. & N. R. Co.*, 90 *Ga.* 802, 17 *S. E. Rep.* 113.

By the fifth section of the act ratifying the consolidation of the Alabama and Florida railroad company and the Mobile and Great Northern railroad company, under the name of the Mobile and Montgomery railroad company, the new company was authorized to issue bonds, secured by mortgage or deed of trust "on the road, franchises, and property of said company;" while the sixth section, after declaring that the consolidation "shall in no way affect the rights of the creditors of said (original) companies, and their separate existence shall be continued as to all the rights and remedies of creditors," further provided that the new company "may dispose of any property, real or personal, held by each of said (original) companies, and make and execute titles for the same." *Held*, that this power of sale was confined to such property as was not needed for operating the road—surplus lands and probably personal effects not in present use nor required for use on the road—releasing such property only from the charge or encumbrance of existing debts and permitting it to be utilized. *Spence v. Mobile & M. R. Co.*, 79 *Ala.* 576.—REVIEWING *Montgomery & W. P. R. Co. v. Branch*, 59 *Ala.* 139.

Where two or more railroad corporations consolidate their stock and franchises into one company, under the provisions of the statutes of Nebraska, the consolidated company thus formed becomes a body corporate, pursuant to and in accordance with the laws of this state, and is entitled to acquire property for the use of the corporation under the law of eminent domain. *Trester v. Missouri Pac. R. Co.*, 33 *Neb.* 171, 49 *N. W. Rep.* 1110.—FOLLOWING *State v. Missouri Pac. R. Co.*, 25 *Neb.* 164; *State v. Chicago, B. & Q. R. Co.*, 25 *Neb.* 156.

37. Effect of consolidation of roads lying in different states.*—(1) *In general*.—When two corporations of different

* Effect of consolidation of railroad companies of different states, see note, 16 *AM. & ENG. R. CAS.* 490.

Consolidated interstate corporation as domestic corporation of one of the states, see note, 15 *L. R. A.* 82.

Privileges and obligations under state statutes of corporations created by consolidation of a domestic and foreign corporation, see note, 15 *L. R. A.* 84.

* Power of consolidated companies to acquire lands, see note, 44 *AM. & ENG. R. CAS.* 5.

states become, by the co-operating legislation of those states, a consolidated corporation, such consolidated corporation, when acting in its corporate capacity in either of the states, acts under the authority of the charter of that state, and the legislation of the other state has no operation beyond its territorial limits. *Pittsburgh & S. L. R. Co. v. Rothschild, (Pa.)* 26 *Am. & Eng. R. Cas.* 50, 4 *Atl. Rep.* 385.

The power of a railroad company to begin proceedings for the condemnation of lands in Michigan is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same state as the original company. *Toledo, A. & G. T. R. Co. v. Dunlap*, 5 *Am. & Eng. R. Cas.* 378, 47 *Mich.* 456, 11 *N. W. Rep.* 271.—APPROVED IN *Denver & R. G. W. R. Co. v. Stancliff*, 4 *Utah* 117.

The legislature of another state authorized a corporation, owning a railroad there and consolidated with a corporation owning a railroad in this commonwealth, to extend its line of road and increase its capital stock for the purpose. At that time it was lawful both there and here, and it has remained lawful there, for any corporation to issue new stock to its shareholders at par, without regard to its market value. A statute was then passed here, prohibiting any such consolidated corporation from extending its railroads or increasing its capital stock without previous consent of the legislature of this state, but providing that nothing therein contained should be construed to prohibit that particular corporation from extending its road under the authority granted by said other state; and afterwards, on the same day, another statute was passed here, providing that any railroad corporation, authorized to increase its capital stock, should sell the new shares by auction, if the market value of its shares exceeded their par value. *Held*, that the corporation in question, under the authority granted by said other state, might increase its capital stock without further permission of the legislature of this state, and might lawfully issue the new stock at par to its shareholders. *Attorney-General v. Boston & M. R. Co.*, 109 *Mass.* 99.

On the consolidation of railway companies in two or more states, authorized by the laws of the states creating them, a new corporation will be created, having in each

state all the powers, rights, and franchises that the constituent companies had in the same state, but not in one state the powers, etc., of the constituent company in the other state. The new corporation will stand in each state as the original corporation had previously stood in the same state. *Ohio & M. R. Co. v. People*, 123 *Ill.* 467, 14 *N. E. Rep.* 874.—QUOTING *Quincy R. Bridge Co. v. Adams County*, 88 *Ill.* 615.

Where corporations, created respectively by the laws of Wisconsin and Illinois, consolidate, but in making the contract of consolidation they fail to pursue the terms of their charters, and subsequently, by legislative act of this state, such contract is confirmed, the corporate existence of the corporation named in the act is thereby recognized as a corporation of this state, and a mortgage subsequently made in the corporate name of all the corporations (they being the same in both states, and managed by a common board of directors), upon the property of the corporation of this state, is a valid mortgage of the latter corporation. *Racine & M. R. Co. v. Farmers' L. & T. Co.*, 49 *Ill.* 331.

Where, after the consolidation of two corporations, the corporation thereby created, afterwards consolidated with another Illinois corporation, the name of which was subsequently changed, by legislative act, to the same name as that of the former corporation, and the whole managed by a common board of directors, and a mortgage was made covering the entire road in Illinois owned by the Illinois corporation—*held*, that notwithstanding the consolidated contract with this third corporation may have been illegal, that fact could not affect the validity of the mortgage as to that portion of the property mortgaged, and not owned by such third corporation at the time of the consolidation. *Racine & M. R. Co. v. Farmers' L. & T. Co.*, 49 *Ill.* 331.

And in a suit to foreclose such mortgage, the question as to the validity of such consolidation contract cannot be raised by the mortgagor corporation. Having mortgaged the property, it will not be permitted to deny its own title. *Racine & M. R. Co. v. Farmers' L. & T. Co.*, 49 *Ill.* 331.

Where continuous lines of road, passing through different states, are consolidated by legislative authority, although the consolidated company must, from the very na-

ture of a corporation, be regarded as a distinct entity in each state, yet the objects of consolidation would be very liable to be defeated, unless the entire line should be placed under one board of directors. The principle that a single corporation cannot be created by the joint legislation of two states, while an irresistible inference from the established law in regard to corporate bodies, is nevertheless a technical and abstract principle; and when adjoining states authorize consolidations, and the consolidated lines are placed under a common board, with a common name and seal, such board will naturally act as if the consolidated lines made but one company, and, when their contracts assume that form, the courts must, for the protection of the public, and to enforce good faith, hold that the contract is to be construed as made by the corporation of each state in which the subject-matter of the corporation lies, *Racine & M. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331.

The validity and the effect of a consolidation of three railroad companies, and of bonds and a mortgage made by the new company—determined, with reference to the circumstances of a particular case, where the consolidated company had been indirectly recognized by subsequent legislative acts. *Racine & M. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331.

In the conduct of its corporate business the consolidated corporation acts as a unit—as one corporation and not three; and, in the absence of a statutory provision to the contrary, it may transact its corporate business in one state for all, and the contracts it enters into and the liabilities it incurs in one state are binding upon it in all the states, and may be enforced against it in any one of them, when the action is transitory. *Fitzgerald v. Missouri Pac. R. Co.*, 50 Am. & Eng. R. Cas. 622, 45 Fed. Rep. 812.

Where two railroads chartered in different states are consolidated under the laws of both states, so far as each state has control over the charter it grants, the corporations remain different and separate, but they are identical in so far that they may represent each other in suit by or against either. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 16 Am. & Eng. R. Cas. 488, 19 Fed. Rep. 804.—FOLLOWING *Horne v. Boston &*

M. R. Co., 18 Fed. Rep. 50.—FOLLOWED IN *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. Rep. 609.

As respects any one state, a corporation originally of that state is the sole representative of the other corporations consolidated with it. *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.*, 10 Biss. (U. S.) 122, 5 Fed. Rep. 19.

A railroad corporation created by the laws of one state is, as to that state, a corporation existing under the laws of that state only, though it be consolidated with a like corporation created under the laws of another state. *Muller v. Dows*, 94 U. S. 444.—FOLLOWED IN *Loneragan v. Illinois C. R. Co.*, 55 Fed. Rep. 550.

Where corporations of two states are consolidated on terms which require the consolidated company, when operating in one of those states, to be subject to its laws, such state can legislate for the company within its limits, just as it could have done if no consolidation had taken place. *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 16 Am. Ry. Rep. 413.

(2) *Citizenship—Domestic or foreign.*—A corporation formed by a consolidation of a domestic and foreign corporation, pursuant to Minn. Laws 1881, ch. 94, is a domestic corporation. *In re St. Paul & N. P. R. Co.*, 28 Am. & Eng. R. Cas. 255, 36 Minn. 85, 30 N. W. Rep. 432.

The constitutional provision that "a majority of the directors of any railroad corporation now incorporated or hereafter to be incorporated by the laws of this state shall be citizens and residents of this state," has no application to a railway corporation formed prior to the adoption of the constitution, by the consolidation of a railway company in this state with one of another state, by the consent of each of such states. Such a corporation exists under the laws of the two states, and cannot be said to be incorporated solely under the laws of either. *Ohio & M. R. Co. v. People*, 123 Ill. 467, 14 N. E. Rep. 874.

An Arkansas corporation, owning a line of railroad in Arkansas, consolidated with a Missouri corporation, owning a line of railroad in Missouri. By the consolidation the consolidated company became the owner of the road in both states, but in Arkansas it is to be regarded as an Arkansas corporation, and in Missouri as a Mis-

souri corporation. *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 42 *Am. & Eng. R. Cas.* 26, 41 *Fed. Rep.* 551.

A consolidated corporation, which bears the same name in three states, and has one board of directors and the same shareholders, and operates the road as one entire line, and is designed to accomplish the same purposes, and exercises the same general corporate powers and functions in all the states, is not the same corporation in each state. While it is a unit and acts as a whole, in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of the three states. Like all corporations it must have a legal dwelling place, and it dwells in three states, and is a separate and single entity in each. It is, in effect, a corporate trinity, having no citizenship of its own distinct from its constituent members, but a citizenship identical with each. *Fitzgerald v. Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

A corporation formed by consolidation of corporations of two states, legislation of both states authorizing the consolidation, is a corporation of each state. *Burger v. Grand Rapids & I. R. Co.*, 20 *Am. & Eng. R. Cas.* 607, 22 *Fed. Rep.* 561.—QUOTING *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65; *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 297.

The C., B. & Q. R. Co. was a corporation organized under the laws of the state of Illinois and of the state of Iowa, and operating a railroad from the city of Chicago, in Illinois, to a point on the Missouri river, in Iowa, opposite the city of Plattsmouth, in Nebraska; and the B. & M. R. R. Co., in Nebraska, was a corporation organized under and by virtue of the laws of that state, operating a railroad from the city of Plattsmouth to Kearney. These two corporations consolidated their stock and franchises into one corporation or joint-stock company, to be known as the "C., B. & Q. R. Co.," under the provisions of section 114, ch. 16, Comp. St. 1887. *Held*, that by virtue of such consolidation, and the compliance with the laws of this state, the corporation created thereby became a body corporate pursuant to and in accordance with the laws of this state, and was therefore not a foreign corporation. *State ex rel. v. Chicago, B. & Q. R. Co.*, 36 *Am. & Eng. R. Cas.* 504, 25 *Neb.* 156, 41 *N. W. Rep.* 125.—FOLLOWED

IN *Trester v. Missouri Pac. R. Co.*, 33 *Neb.* 171; *State v. Missouri Pac. R. Co.*, 25 *Neb.* 164; *State ex rel. v. Chicago, St. P., M. & O. R. Co.*, 25 *Neb.* 165.

(3) *As respects suits in federal courts.*—Corporations of different states consolidated to operate one entire line of road are not prevented, by subsequent consolidation, from suing each other in the federal courts. *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, 9 *Biss. (U. S.)* 144.—QUOTING *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65.—DISTINGUISHED IN *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.*, 10 *Biss. (U. S.)* 122, 5 *Fed. Rep.* 19. FOLLOWED IN *Colglazier v. Louisville, N. A. & C. R. Co.*, 20 *Am. & Eng. R. Cas.* 611, 22 *Fed. Rep.* 568.

In such a suit the court will conclusively regard all the shareholders as citizens of the state which created the corporation. *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, 9 *Biss. (U. S.)* 144.

The same persons organized a railroad corporation both in New Hampshire and Massachusetts, and subsequently, by legislative permission, the two united, "the franchises, privileges, and property to be held by the stockholders in each corporation in proportion to the number of shares therein." *Held*, that this did not extinguish the existence of the New Hampshire corporation as a citizen of that state, within the meaning of the federal law providing for suits in the U. S. courts between citizens of different states. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 42 *Am. & Eng. R. Cas.* 688, 136 *U. S.* 356, 10 *Sup. Ct. Rep.* 1004.—FOLLOWED IN *Paul v. Baltimore & O. & C. R. Co.*, 44 *Fed. Rep.* 513; *Phinizz v. Augusta & K. R. Co.*, 56 *Fed. Rep.* 273; *Conn v. Chicago, B. & Q. R. Co.*, 50 *Am. & Eng. R. Cas.* 640, 48 *Fed. Rep.* 177.

(4) *As respects removal of suits to federal courts.*—When a corporation created by the laws of one state becomes consolidated with corporations of other states, and changes its name, and is sued by the new name, in a court of the state of its creation, by a corporation of the same state, another one of the consolidated corporations created by another state cannot go into the state court and have the cause removed to the federal court. *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.*, 10 *Biss. (U. S.)* 122, 5 *Fed. Rep.* 19.—DISTINGUISHING *St. Louis,*

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A. & T. H. R. Co. v. Indianapolis & St. L. R. Co., 9 Biss. (U. S.) 144; Chicago & N. W. R. Co. v. Chicago & P. R. Co., 6 Biss. (U. S.) 219.—FOLLOWED IN *Colglazier v. Louisville, N. A. & C. R. Co.*, 20 Am. & Eng. R. Cas. 611, 22 Fed. Rep. 568.

Notwithstanding consolidation each corporation remains the corporation of the state of its creation, and where the consolidated company is sued in a state court, it cannot remove the suit to the United States circuit court on the ground that it is a citizen of the other state, even though the consolidation was had under the laws of such other state. *Paul v. Baltimore & O. & C. R. Co.*, 44 Fed. Rep. 513.—FOLLOWING *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. Rep. 1004. QUOTING *Muller v. Dows*, 94 U. S. 444; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (U. S.) 271.—*Fitzgerald v. Missouri Pac. R. Co.*, 50 Am. & Eng. R. Cas. 622, 45 Fed. Rep. 812.—DISTINGUISHED IN *Conn v. Chicago, B. & Q. R. Co.*, 50 Am. & Eng. R. Cas. 640, 48 Fed. Rep. 177.

(5) *As respects taxation.*—When a corporation is formed under our laws by the consolidation of other corporations, one of which was incorporated under the laws of this state and the others in other states, the new company is to be considered as "incorporated under the laws of this state," within the meaning of the last clause of § 1 of the revenue act of March 30, 1872, and the capital stock of such corporation in this state is subject to taxation here. *Ohio & M. R. Co. v. Weber*, 5 Am. & Eng. R. Cas. 101, 96 Ill. 443.

A consolidated railroad company formed by the consolidation of two or more companies in different states, having a capital stock which is a unit, and only one set of stockholders, who have an interest as such, in all its property everywhere, and a single board of directors, will have its domicile in each state, and its stockholders, directors, and officers may, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in either of the states, though in relation to either state the consolidated company will be a separate corporation, governed by the laws of that state as to its property therein, and subject to taxation in conformity with the laws of such state, and to all the police powers of the state in respect to its property and franchise within such state. *Ohio*

& M. R. Co. v. People, 123 Ill. 467, 14 N. E. Rep. 874.

38. Effect of amalgamation of Canadian roads.—The act of union or amalgamation by which the Grand Trunk railway company of Canada was formed has had the effect of transferring the right of property of the different companies united to the new company so formed, and was an absolute mutation, having the effect of an exchange in so far as the shares assigned to the shareholders were concerned and being a sale in so far as regards the payment of £75,000 to the St. L. and A. R. Co. *Kierszkowski v. La Compagnie, etc.*, 10 Low. Can. 47.

The seignior is entitled to claim *lods et ventes* upon that portion of the £75,000 which, upon appraisal, will be found to represent the value of the lands situate in the seignior of the plaintiff (appellant), and assigned to the new company, the respondent. *Kierszkowski v. La Compagnie, etc.*, 10 Low. Can. 47.

In appraising such lands, the value of the buildings, fences, rails, and other improvements of a permanent character must be taken in account. *Kierszkowski v. La Compagnie, etc.*, 10 Low. Can. 47.

39. Constructive notice of consolidation.—The holders of mortgage bonds of a consolidated railroad company, who purchase the property at a regular mortgage sale, are chargeable with notice of everything contained in the act of incorporation which created the company with which they are dealing. *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 5 So. Rep. 138.—REVIEWING *Spence v. Mobile & M. R. Co.*, 79 Ala. 576.

If a railway company, without parliamentary sanction, and even if liable to be restrained by equity on application of its own stockholders, as a matter of fact under the authority of a vote of the shareholders take possession by arrangement of a wholly independent line, and work it with their own funds, and their own officers, and make payments from day to day by check on their ordinary bankers, with whom their own proper account is kept, the bankers are not bound to inquire into the purpose for which each check is drawn, or, even with knowledge of what was going on, to be debarred the right of recovering a general balance on an overdrawn account because the moneys sought to be recovered went, in fact, to the

maintenance of the other line. *Commercial Bank v. Great Western R. Co.*, 22 U. C. Q. B. 233.

2. Liabilities of the New Company.

40. Status of new company.*—(1)

In general.—Where a new corporation is formed by amalgamation, under the authority of the state, of two or more corporations into one, it succeeds to all the rights and faculties of the several components, and is subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected. *Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524. *Tysen v. Wabash R. Co.*, 13 Am. & Eng. R. Cas. 134, 11 Biss. (U.S.) 510, 15 Fed. Rep. 763. *Dewey v. Toledo, A. A. & N. M. R. Co.*, 50 Am. & Eng. R. Cas. 607, 91 Mich. 351, 51 N. W. Rep. 1063.

After one railroad company has consolidated with another, as allowed by their respective charters, and authorized and confirmed by legislative acts conferring all rights, powers, and privileges belonging to either on the new company thus formed, all liabilities of either can thenceforward only be enforced against, and in the name of, the consolidated company. *Indianola R. Co. v. Fryer*, 11 Am. & Eng. R. Cas. 324, 56 Tex. 609.—DISTINGUISHING *Railroad Co. v. Georgia*, 98 U. S. 366, n.—DISTINGUISHED IN *Evans v. Interstate R. T. R. Co.*, 106 Mo. 594.

A consolidated corporation is chargeable with notice of a contract for the sale of land made by one of its constituent companies entered on its corporate books. *McAlpine v. Union Pac. R. Co.*, 20 Am. & Eng. R. Cas. 586, 23 Fed. Rep. 168; affirmed in 129 U. S. 305.—DISTINGUISHING *Whipple v. Union Pac. R. Co.*, 28 Kan. 474.

The consolidated company is solely liable for damages caused by the acts committed subsequent to the consolidation, though done on property formerly belonging to one of the consolidated companies. *Day v. New Orleans Pac. R. Co.*, 37 La. Ann. 131.—FOLLOWING *Hotard v. Texas & P. R. Co.*, 36 La. Ann. 450.

* New corporations created by consolidation of existing ones. When succeed to rights, powers, and duties of old corporations, see note, 2 L. R. A. 565.

Liability of railroads consolidating, see notes, 30 AM. & ENG. R. CAS. 153; 20 Id. 589; 3 L. R. A. 437.

An amalgamated company, which has taken land referred to in an agreement between a landowner and the projectors of one of the original companies, and has paid the stipulated price and has claimed the benefit of the agreement, is bound by it. *Lindsey v. Great Northern R. Co.*, 10 Hare 665, 17 Jur. 522, 22 L. J. Ch. 995.

The consolidation of several corporations into one creates a new corporation, the rights of which are dependent on the laws governing corporations at the time of the consolidation, and on the act authorizing it. *Charlotte, C. & A. R. Co. v. Gibbs*, 31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49.

A railroad company formed by the consolidation of two other companies after the South Carolina constitution of 1868, providing that the laws for the formation of corporations may from time to time be altered and repealed, is subject to the provisions of an act subsequently passed requiring it to contribute toward the salary of railroad commissioners. *Charlotte, C. & A. R. Co. v. Gibbs*, 31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49.—QUOTING *Hoge v. Richmond & D. R. Co.*, 99 U. S. 348. REVIEWING *Columbia & G. R. Co. v. Gibbs*, 24 So. Car. 60.

Several railroad companies carrying on business of carriers for hire under the name of an association, are liable as trustees to the holder of a judgment against the association for breach of duty in transporting his goods. *Clarkson v. Erie & N. S. Dispatch*, 6 Ill. App. 284.

A railroad company which purchases the property and franchises of another company pursuant to Act No. 10, Laws of 1889, holds subject to all the duties and obligations prescribed by the general railroad laws of the state. *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150, 53 N. W. Rep. 216.

A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement. *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

(2) *Illustrations.*—Where a railroad company was bound by a grant of a right of way over certain streets through a city to permit all other railroad companies to run their cars over its line within the city, an-

other corporation which has succeeded to its rights by consolidation is not charged with such burden as to a part of its line subsequently added thereto. *Chicago, St. P. & K. C. R. Co. v. Kansas City, St. J. & C. B. R. Co.*, 38 *Fed. Rep.* 58.—REVIEWING Pullman Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 6 Sup. Ct. Rep. 194.

A railroad corporation which had executed a mortgage of its road, united with two other railroad corporations in organizing a new corporation, under the authority of an act of the legislature. This act vested the property of the three former corporations, subject to all liens and encumbrances then existing upon it, in the new corporation, and provided that the first corporation should not by such union be relieved from any liability or obligation under which it then was, and that "when the several corporations shall, in conformity to the requirements of the statute, become one, all the franchises, property, power, and privileges now enjoyed by, and all the restrictions, liabilities, and obligations conferred upon, said two corporations by virtue of their respective charters shall appertain to said united corporation, in the same manner as if contained or acquired under an original charter." *Held*: (1) that this statute did not require the new corporation to assume the liabilities of the former corporations; but the new corporation, having become the owner of the franchise and property of the first corporation, might become purchasers of its outstanding bonds, and hold them like any other creditor, or pay and extinguish them for the relief of the mortgaged property; (2) that the directors of the new corporation had authority, without a vote of the stockholders, to pay and cancel as many of the outstanding obligations of the first corporation as they thought fit; (3) that the new corporation could not prove the amount of the interest coupons attached to the bonds in their hands against the mortgaged property, so as to relieve it to that extent from liability under the mortgage; (4) that bonds of the first corporation, bought by the new corporation, and afterwards reissued for the benefit of this corporation to holders for a valuable consideration, had not been extinguished, but should be allowed as a claim against the property covered by the mortgage; (5) that the bondholders were not entitled to interest upon the interest coupons

attached to the bonds. *Shaw v. Norfolk County R. Co.*, 16 *Gray (Mass.)* 407.

As successor of the A. M. & O. R. Co. the N. W. R. Co. is subject to the section of the former's charter which provides that it shall be subject to all the laws of this state, whereof the act of 1853, prescribing what rates of toll shall be charged for transportation, is one, notwithstanding any provision in the charter granted in 1848 to its predecessor the L. & T. R. Co., giving it the power to regulate until a certain event, which has never occurred. *Norfolk & W. R. Co. v. Pendleton*, 88 *Va.* 350, 13 *S. E. Rep.* 709.—FOLLOWING *Norfolk & W. R. Co. v. Pendleton*, 86 *Va.* 1004.

By the act of consolidation (Laws 1853, ch. 76) the interest and rights of property of the Utica & Schenectady R. R. Co. became vested in the N. Y. Central R. R. Co., and thereafter the latter was the proper representative of the former, in matters connected with leases, to which the former was a party. *New York C. R. Co. v. Saratoga & S. R. Co.*, 39 *Barb. (N. Y.)* 289.

Under the act of March 3, 1882, Laws, p. 1011, and the act of March 15, 1884, amendatory thereof, Laws, p. 936, which authorized the Memphis & V. R. Co. to consolidate with any other railroad company incorporated under the laws of Mississippi, the Louisville, N. O. & T. R. Co., by the consolidation of said company with others, including New Orleans, B. R. V. & M. R. Co., succeeded to the property of the latter company. *Louisville, N. O. & T. R. Co. v. Blythe*, 69 *Miss.* 939, 11 *So. Rep.* 111.

By its purchase, on Feb. 5, 1872, of the property, "privileges, rights, and franchises" of the North Missouri R. R., under the Missouri act of March 24, 1870 (Adj. Sess. Laws 1870, 90, 91, § 21), the Missouri, Kansas & Texas R. R. assumed the obligations and liabilities imposed and obtained the rights conferred on the former company by the charter amendment of Feb. 18, 1865 (Sess. Laws 1865, 89, §§ 1, 2), and was not subject to the corporation damage law. (Wagn. Stat. 310, 311, § 43.) The legislature, by the corporation law, did not attempt to repeal the charter of the North Missouri R. R. company. *Daniels v. St. Louis, K. C. & N. R. Co.*, 62 *Mo.* 43.—QUOTING *Pennsylvania R. Co. v. Sly*, 65 *Pa. St.* 209; *Campbell v. Marietta & C. R. Co.*, 23 *Ohio St.* 188.—DISTINGUISHED IN *West End N. G. R. Co. v. Dameron*, 4 *Mo. App.* 414; *Henry v. Wabash*

Western R. Co., 44 Mo. App. 100. FOLLOWED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 30 Fed. Rep. 344.

Where a railway company, under legal obligation to maintain a depot for passengers and freight within the limits of a town, and to stop all its passenger trains at such depot, whether express or otherwise, for the purpose of letting off and taking on passengers, consolidates with another company owing no such duty, the new company thereby formed becomes bound to assume and discharge such duty. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657.

41. Relation of officers of new, to creditors of old, company.—The officers of the new company, so far as the trust devolves upon them of managing the property formerly of the old company, occupy in relation to its creditors the position of successors to the officers of the old company, and are bound by all proceedings had against them; but as to the properties formerly of the other companies they are successors to the officers of those companies, against whom such creditors have no right of action upon their original contracts. *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 363, 4 Am. Ry. Rep. 388.—APPROVED IN *Bailey v. New York C. & H. R. R. Co.*, 22 Wall. (U. S.) 604.

42. When liable for debts of constituent companies.*—A corporation, formed by the consolidation of several companies, having vested in it the property formerly of the constituent companies, is liable in equity for their debts to the value at least of the property so received. A remedy at law is not exclusive in such a case. *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264, 13 Fed. Rep. 522.

Where a consolidated company becomes, by virtue of the consolidation, liable for the debts of the companies composing it, the creditor's remedy is complete at law, and a court of equity will not assume jurisdiction to enforce it. *Arbuckle v. Illinois Midland R. Co.*, 81 Ill. 429.

A transferee of a corporate franchise and property, with notice that the transfer is made with intent to avoid the payment of

the transferor's debts, cannot avoid liability to creditors of the transferor. *Blair v. St. Louis, H. & K. R. Co.*, 22 Fed. Rep. 36.

Where persons purchase a railroad, receiving a deed, but leave part of the purchase money unpaid and are then incorporated by the legislature, the company so formed is not discharged from the payment of the balance of the purchase money by its consolidation with another company. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691.

A statute making a consolidated railroad company liable to the creditors of the former companies creates such liability on a covenant by one of the consolidated companies, when subsequently broken, although no breach had occurred at the time of the consolidation. *Mobile & M. R. Co. v. Gilmer*, 85 La. 422, 5 So. Rep. 138.—REVIEWING *Spence v. Mobile & M. R. Co.*, 79 Ala. 576.

Where one railroad succeeds to all the property and franchises of a former company, under an act of the legislature, providing, *inter alia*, it shall pay all "just dues for work and labor done" for the former company—held, it is liable for a judgment against the former company for work and labor. *St. Louis, A. & T. H. R. Co. v. Miller*, 43 Ill. 199.

The Illinois act of 1867, which provides that, in case of consolidation of railroad companies, the consolidated company shall be liable for all debts of each company entering into the arrangement, is not retrospective, but applies only to companies which might consolidate after its passage. *Hatcher v. Toledo, W. & W. R. Co.*, 62 Ill. 477.

A party delivered ties in pursuance of a contract with parties constructing a railroad, a portion of which were estimated and paid for by the contractors, and the company, when the consolidated company took and used the unestimated ties. Held, that such consolidated company, even though guilty of a tort, was liable to the owner for the ties thus appropriated. *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378.

The debts of two railroad corporations may be enforced against a new corporation into which the two have become consolidated, the same as if no consolidation had been made. *Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465.—DISTINGUISHING *Evansville v. Evansville Gaslight Co.*, 26 Ind. 447.

* Effect of consolidation on debts of company, see note, 13 AM. & ENG. R. CAS. 138.

Consolidated company succeeds to rights and obligations of its constituents, see note, 5 L. R. A. 796.

Where two railroad corporations have been consolidated, the consolidated company is liable for the debts of each of the original companies. *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37.

A consolidated corporation which succeeds to all the property and rights of the corporations merged in it, under statutory provisions which operate practically to dissolve the old corporations into the new, but make no express declarations that it shall assume or become liable for the debts and obligations of the original companies, is liable for all their valid debts and liabilities. *Louisville, N. A. & C. R. Co. v. Boney*, 39 Am. & Eng. R. Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3 L. R. A. 435.

By the consolidation of the New York Central and the Hudson river railroad the consolidated company assumed all the obligations of the old companies, except mortgages; therefore an internal revenue tax levied on one of the companies before consolidation was chargeable to the consolidated company. *Bailey v. New York C. & H. R. R. Co.*, 22 Wall. (U. S.) 604, 11 Am. Ry. Rep. 121.—APPROVING *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 366.

The consolidation of the Indianola railroad company under the name and style of the "Gulf, Western Texas and Pacific railway company," by virtue of an act passed August 4, 1870, renders the consolidated company liable for all the valid contracts and liabilities of the two companies consolidated. *Indianola v. Indianola R. Co.*, 2 Tex. Unrep. Cas. 337.

The Chesapeake and Ohio R. Co. is the Virginia Central R. Co. under another name, and is liable upon any contract, or for the negligence, of the Virginia Central R. Co. *Wilson v. Chesapeake & O. R. Co.*, 21 Gratt. (Va.) 654.

Part of the consideration for the right of way of the Belleville & N. H. R. Co. over plaintiff's land was that the company should construct a cattle-pass under the railway, for the use of the plaintiff. The company refused to construct the pass, and the plaintiff, on the 30th April, 1880, filed a bill against them to enforce the agreement, and on the 13th November a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, by 42 Vict. c. 53 and 570, the Belleville & N. H. R. Co. and defendants were authorized to enter into an agreement for amalga-

mation, subject to the ratification of the shareholders of said companies, and on the 29th June, 1880, an agreement was entered into for the amalgamation of the two companies under defendant's name, which was on the same day ratified and approved of by the respective shareholders. The plaintiff had no notice or knowledge of the deed of amalgamation, or of its contents. On the 4th March, 1881, the act 44 Vict. c. 640 was passed, by § 1 of which the said deed of amalgamation was declared legal and valid. The decree not having been carried out, the plaintiff brought this action against the defendants to enforce it. *Held*, that there was no complete amalgamation of the two companies until the passing of 44 Vict. c. 640, so that the Belleville and North Hastings railway company had not ceased to exist when the decree was made, which was therefore legal and valid; and that the plaintiff was entitled to maintain this action to enforce it against the defendants. *Farney v. Grand Junction R. Co.*, 4 Ont. 232.

43. When not so liable.—Where several corporations of different states were consolidated, it being agreed that the debts of the several companies should be protected by the consolidated company, bonds not a lien before do not become a lien after the consolidation, even though their exchange could have been compelled by the holders for bonds of the consolidated company, no offer of such exchange having been made. *Wabash, St. L. & P. R. Co. v. Ham*, 26 Am. & Eng. R. Cas. 66, 114 U. S. 587, 5 Sup. Ct. Rep. 1081.—DISAPPROVED IN *Compton v. Wabash, St. L. & P. R. Co.*, 33 Am. & Eng. R. Cas. 56, 45 Ohio St. 592. QUOTED IN *Richardson v. Green*, 43 Am. & Eng. R. Cas. 380, 133 U. S. 30.

If one corporation in any lawful mode becomes the owner of the property and franchises of another it will hold the same free from the debts of the latter, which were not prior liens thereon, unless an obligation to pay them is expressly assumed. *Bruffett v. Great Western R. Co.*, 25 Ill. 353.

To render a consolidated company liable for the debts of the original companies, proof must be made that there was a consolidation in fact; the courts cannot take judicial notice thereof in such a case. *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

A consolidation made under agreement, pursuant to N. Y. Laws of 1869, ch. 917,

does not impose upon the consolidated company a liability for unpaid interest on bonds issued by one of the constituent companies. (Learned, J., dissenting.) *James v. Fitchburg R. Co.*, 20 N. Y. S. R. 168, 50 Hun 310, 3 N. Y. Supp. 165.

A railroad was authorized by its charter to mortgage its road, property, and income, but not its franchise, under which the trustees sold the same to certain parties, who organized a new company under the old name. Subsequently a special act of the legislature was passed authorizing the president of the old company to transfer the corporate franchise to the purchasers, which he did, and the old corporation ceased to exist. *Held*, that the purchasers at the trustees' sale, having acquired a valid title to the property of the corporation without liability for any of its debts which were not a prior lien, their rights could not be taken away or impaired by subsequent legislation; and having consolidated with another company prior to the act of 1867, the consolidated company was not liable for the debts of the first-named corporation. *Hatcher v. Toledo, W. & W. R. Co.*, 62 Ill. 477.

In a suit against the St. Louis, Alton and Terre Haute railroad company, promissory notes purporting to have been executed by the Terre Haute, Alton and St. Louis railroad company are not admissible as evidence of indebtedness, without proof that the two companies are the same, known by different names, or that the company sued is liable for the indebtedness of the company executing the notes. The fact that the company sued was authorized by law to purchase the road of the company giving the notes, upon condition that it should pay the debts of the latter, will not be sufficient to make defendant company liable. *Desmond v. St. Louis, A. & T. H. R. Co.*, 77 Ill. 631.

A. brought suit against the W. R. R. Co. Pending his suit the W. contracted with the H. R. R. Co., and the latter company caused the sale of the property of the former company under a deed of trust given in connection with the contract, and bought in the property at the sale. Afterwards, by an act of the legislature, the roads were merged, the former being made a part of the latter. A. made the latter road a defendant in his pending suit, and sought to make it liable for the debt due him. *Held*, that the act of merger having been passed because the sale had divested the W. of its

property and franchises, the sanction of the legislature being necessary to enable the purchasing road to operate the road purchased, and the consolidation of the roads, therefore, not resting on agreement, the consolidated company could be made liable only for liabilities of the W. created under its contract with the H., and that the act of merger affected the rights neither of creditors nor stockholders. *Houston & T. C. R. Co. v. Shirley*, 4 Am. & Eng. R. Cas. 443, 54 Tex. 125.

The claim having been made that the contract aforesaid was *ultra vires* and the acquisition of the property illegal—*held*, that the transaction being consummated, it could be impeached, if at all, only by the state. *Houston & T. C. R. Co. v. Shirley*, 4 Am. & Eng. R. Cas. 443, 54 Tex. 125.

44. Assumption of debts of original company.—Where, upon the consolidation and merger of two companies, the rights and properties of the old companies are transferred to the new, which assumes their liabilities, the new company stands in the place of the old ones and may then enforce their rights and be subjected to their liabilities. *Miller v. Lancaster*, 5 Coldw. (Tenn.) 514.

Where a railway company subsequently consolidated with another company, under a new name, transferred its property to the new company, subject to all charges, liens, and equities to which it was before subject, such new company is under obligation to complete a valid existing contract for the conveyance of land. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. Rep. 286; *affirming* 23 Fed. Rep. 168.

Where, as a consideration for the consolidation, the consolidated company agrees to "protect" the holders of certain unsecured equipment bonds issued by one of the constituent companies, the holders of such bonds acquire an equitable lien for their payment upon the property of the consolidated company. *Tysen v. Wabash R. Co.*, 13 Am. & Eng. R. Cas. 134, 11 Biss. (U. S.) 510, 15 Fed. Rep. 763.

Where, by the consolidation of two railroad companies, another is created, which, by the terms of consolidation, acquires all of the property and franchises, and assumes all of the debts and liabilities of the two of which it is formed, and which become extinct by its creation, it takes such property subject to the debts of the origi-

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nal companies, and burdened with all liens upon it which were valid against those companies, and will not be permitted to aver ignorance of an unrecorded mortgage previously executed by one of the original companies. *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 8 Am. & Eng. R. Cas. 575, 58 Miss. 846.—REVIEWED IN *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364.

The consolidated company is the successor of the old companies so far as their creditors are concerned, but it is a new and independent company in respect to the properties of the old companies, and such creditors' claim against the consolidated company is by virtue of its assumption of the obligations of the old companies and not upon the original contracts made by them. *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 363, 4 Am. Ry. Rep. 388.

Where an act provides that corporations consolidated under it shall assume as a condition of the right the payment of the liabilities of the several corporations which are absorbed in the new corporation, each holder of coupons in either of the corporations so absorbed is at liberty to maintain an action directly upon contract against the new corporation, by reason of its having absorbed the one which issued the bonds. *Rosenbaum v. Union Pac. R. Co.*, 2 How. Pr. N. S. (N. Y.) 45; *affirmed* (?) 100 N. Y. 617, *mem.*

In the case of a voluntary consolidation of roads, the rule is that the consolidated corporation is held to have assumed the liabilities of its constituents. It is deemed the same as each of its constituents, and may be sued for their debts the same as if no change had occurred. *Gulf, C. & S. F. R. Co. v. Hutcheson*, 3 Tex. App. (Civ. Cas.) 120.

A statute authorized two companies to unite into one by either a complete or a partial union, and either of joint or separate, or absolute or limited liabilities to third parties. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies. *Held*, that the new company thereby assumed all the liabilities of the old company to third persons. *Cayley v. Cobourg, P. & M. R. & M. Co.*, 14 Grant's Ch. (U. C.) 371.

Where the articles of consolidation of

two railway companies provided that the new company should assume the debts and liabilities of the old companies, and should assume and carry out all their unexecuted contracts, and the act of the legislature, ratifying and confirming the consolidation, saved the rights and remedies of creditors—*held*, that a person performing labor under a contract with one of the old companies might maintain an action against the new company to recover whatever sum was due him under his contract. *Western Union R. Co. v. Smith*, 75 Ill. 496.

45. Liability of new company for injuries to adjoining owners.—

Where a company constructed a bridge across a stream and leased its road to another company, which, while operating the same, built a new bridge at the same place, after which these two companies consolidated, with a different name—*held*, that the new company was liable to a riparian owner above, whose land was overflowed in consequence of an obstruction of the stream by drift, etc., caused by the bridge, and that no notice to abate the nuisance was necessary to the action. *Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524.—APPLIED IN *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127.

Where a collier company is amalgamated with a railway company under a statute providing that all its assets, debts, liabilities, and engagements are transferred to the railway company, whatever liability the colliery company is under for damages in respect of breaking into the mines of another company at the time of the amalgamation is transferred to the railway company. *Ecclesiastical Com'rs for England v. North Eastern R. Co.*, 47 L. J. Ch. D. 20.

46. Liability for torts or negligence of original companies.—

Where the act consolidating two companies provides that it "shall in no way affect the right of the creditors of said companies," an action at law will lie against the new company for personal injuries caused by the negligence or wrongful act of one of the old companies. *Warren v. Mobile & M. R. Co.*, 49 Ala. 582.

Where a consolidated railroad company assumes the debts and liabilities of the originally separate companies, it becomes liable for claims for injuries by the negligence of those companies. *St. Louis & S. F. R. Co. v. Marker*, 41 Ark. 542.

The Central Railroad and Banking com-

pany, by consolidating with the Macon and Western railroad company, under Ga. Acts 1872, p. 351, became liable for an injury occasioned by a breach of duty by the former company towards a person rightfully upon one of its trains. *Coggin v. Central R. Co.*, 62 Ga. 685.

A corporation into which consolidated railroad companies become merged becomes liable for the obligations of the original companies, and in an action against the consolidated company for the negligence of one of the original companies the complaint need not allege an express assumption of such liability. *Cleveland, C., C. & St. L. R. Co. v. Prewitt*, 54 Am. & Eng. R. Cas. 198, 134 Ind. 557, 33 N. E. Rep. 367.

A consolidated railway company, created under the Md. Act of 1890, ch. 553, is liable for the death of an employé occurring before the consolidation, in all cases where the individual company would have been liable. *State v. Baltimore & L. R. Co.*, 77 Md. 489, 26 Atl. Rep. 865.

Identity of corporation, and not of name, determines the liability of a railroad company for a trespass. *De Lissa v. Missouri Pac. R. Co.*, 36 Mo. App. 706.

A company which has made an ineffectual attempt to consolidate is liable for injuries to passengers caused by the negligence of those operating the road, by virtue of the attempted consolidation. *Latham v. Boston, H. T. & W. R. Co.*, 38 Hun (N. Y.) 265.

The Texas & P. R. Co. was liable for damages caused by the Southern P. R. Co. prior to the 21st of March, 1872, the date when the consolidation of said companies was effected, in pursuance of legislative enactments. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319.—FOLLOWING *Stephenson v. Texas & P. R. Co.*, 42 Tex. 162.

Where, upon the consolidation of three companies, it was expressly agreed that each company should continue to exist for the purpose of liquidating its claims and debts; that the consolidated company should not be liable for the debts of the constituent companies, but that their property transferred to it should continue to be so liable—*held*, that the holder of an unliquidated claim for injuries against one of the constituent companies could not bring suit upon it against the consolidated company until he should have caused his claim to become a liquidated one and have the

liability of the company thereon ascertained. *Whipple v. Union Pac. R. Co.*, 8 Am. & Eng. R. Cas. 651, 28 Kan. 474.—DISTINGUISHED IN *McAlpine v. Union Pac. R. Co.*, 20 Am. & Eng. R. Cas. 586, 23 Fed. Rep. 168, *Rutten v. Union Pac. R. Co.*, 12 Am. & Eng. R. Cas. 374, 17 Fed. Rep. 480.

Under the Mass. St. of 1874, ch. 55, providing that, on the purchase of the franchise and property of the Middleborough and Taunton railroad corporation by the Old Colony railroad company, the latter was to "be subject to all the duties, liabilities, obligations, and restrictions to which" the former "may be subject"—*held*, that thereupon the latter became directly liable in an action of tort for damage occasioned by the prior neglect of the former corporation. *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397.

47. Suits against new company—Parties and pleading.—Where a railroad company, after the execution of promissory notes, is consolidated with another company, and the company thus formed assumes a new name, the company may be sued by the new name thus assumed; and it will be estopped from denying the name by which it is sued. *Columbus, C. & I. R. Co. v. Skidmore*, 69 Ill. 566. *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. (Civ. Cas.) 163.

Where two or more railroad corporations are consolidated, and the new corporation thus formed assumes the debts and obligations of the original companies, the directors or other officers of the new organization are not necessary or proper parties to an action brought by a holder of preferred and guaranteed stock of one of the old companies to enforce an alleged contract made by it to pay specified dividends upon said stock. *Chase v. Vanderbilt*, 62 N. Y. 307, 12 Am. Ry. Rep. 141; *affirming* 5 J. & S. 334.

If the plaintiff has a cause of action, it is against the new corporation alone, and its official representatives are not necessary parties to a determination thereof, or for the purpose of giving any relief to which the plaintiff may be entitled. Whatever judgment is obtained is obligatory as well upon its officers as upon the corporation. *Chase v. Vanderbilt*, 62 N. Y. 307, 12 Am. Ry. Rep. 141; *affirming* 5 J. & S. 334.—EXPLAINING *Thompson v. Erie R. Co.*, 45 N. Y. 468.

Where one railroad succeeds to the prop-

erty and franchises of another, on condition that it pay the debts of the former company, in an action against the existing company to enforce a judgment against the former company, it is not necessary to aver or prove any consideration. It is enough if it appear that the judgment is for a debt the existing company was bound to pay. Nor is it necessary to aver an offer to transfer the judgment upon payment by the present company. *St. Louis, A. & T. H. R. Co. v. Miller*, 43 Ill. 199.

Where a recovery is sought from a consolidated railroad company for a cause of action which originally accrued, if at all, against one of its constituents, the declaration must show against what company it arose and aver such facts as will subject the new company to liability upon it. *Marquette, H. & O. R. Co. v. Langton*, 32 Mich. 251.

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— consolidation of railways, see CONSOLIDATION, 2, 3.

— fence laws, see FENCES, 1-6.

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— relative to bridges, see BRIDGES, ETC., 1.

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I. DUTY TO CONSTRUCT AND LIABILITY FOR DEFECTS

1. **Duty to construct—Compelling construction.**—The funds of a railway company incorporated by parliament must be applied for the purposes directed, and

for no other. *East Anglian R. Co. v. Eastern Counties R. Co.*, 16 Jur. 249, 21 L. J. C. P. 23, 7 Railw. Cas. 150, 11 C. B. 775.

If a railway company cannot raise the funds it will not be compelled by mandamus to execute certain works required by the board of trade—as a bridge to carry its track over a highway. *In re Bristol & N. S. R. Co.*, 37 L. T. 527.

The court of chancery, independently of the question whether it has jurisdiction, will not interfere in questions of compelling railway companies to construct accommodation works where such questions are by statute placed in the hands of justices. *Hood v. North Eastern R. Co.*, L. R. 11 Eq. 116, 40 L. J. Ch. 17, 23 L. T. 433, 19 W. R. 266.

Statutes by which it is made lawful for a railway company to construct a line of railway and a mandatory act authorizing a deviation line and extending time for the exercise of its powers do not cast upon the company the duty of making the railway. *York & N. M. R. Co. v. Queen*, 7 Railw. Cas. 459, 1 El. & Bl. 858, 17 Jur. 690, 22 L. J. Q. B. 225.

A railway company which has exercised some of its statutory powers and has constructed a part of its authorized line is not bound to build the entire road. *York & N. M. R. Co. v. Queen*, 7 Railw. Cas. 459, 1 El. & Bl. 858, 17 Jur. 690, 22 L. J. Q. B. 225.

—**OVERRULING** *Queen v. Lancashire & Y. R. Co.*, 7 Railw. Cas. 266, 1 El. & Bl. 228, 17 Jur. 62, 22 L. J. Q. B. 57.

Where a railway company is authorized to construct a road 56 miles long it cannot make only 4 miles and abandon the rest. *Cohen v. Wilkinson*, 12 Beav. 125, 13 Jur. 641, 18 L. J. Ch. 378.

The fact that a company, lawfully organized to construct a certain specified line of railroad, fraudulently intends to build but part of such line, is no ground for enjoining the construction of that part. *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80, 18 Am. Ry. Rep. 136.

2. Statutory regulations.—Maine Act of 1853, ch. 41, prescribing generally how railroad corporations shall proceed in the location of tracks, is applicable to a company incorporated in 1833, although its provisions in that respect are dissimilar to those in the act of incorporation. *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34.

A corporation, who have been authorized

to construct a railroad, and are afterwards authorized by statute to make it in sections of five miles each, provided that they shall not commence the construction of any portion of their road within a certain distance of one of its terminations until all the stock is subscribed for by responsible persons and a certain portion thereof actually paid in, are not obliged to have their stock subscribed for and the specified amount paid in, as a condition precedent to constructing their whole road not in sections. *Boston & P. R. Corp. v. Midland R. Co.*, 1 Gray (Mass.) 340.

The court will not enter into the question whether the reasons given by the inspector of the board of trade, why the opening of a railway will be attended with danger to the public by reason of the incompleteness of its works (5 & 6 Vict. c. 55, § 6), do not show on their face that he has come to the wrong conclusion. The board of trade has exclusive jurisdiction in the matter. *Attorney-General v. Great Western R. Co.*, L. R. 4 Ch. D. 735, 46 L. J. Ch. App. 192, 25 W. R. 330, 35 L. T. 921; *affirming* 35 L. T. 302, 24 W. R. 1015.

The Launceston and South Devon Railway Act 1862, § 34, enacts that "if at any time it shall be made to appear to the board of trade to be requisite for the public service, the company shall, on the requisition of that board, lay down or permit to be laid down, on all or any part of the railway hereby authorized, an additional rail or rails for the passage of engines and carriages adapted to the narrow gauge over the same." *Held*, that "public service" did not mean government service merely, but included any service which would supply wants felt by the public, or which the public might reasonably be desirous of having on its own behalf. The commissioners being of opinion that it was requisite for the public service that the line should be narrow-gauged between Launceston and Lidford Junction, advised the board of trade to require the South Devon railway company, the owners of the line, to elect either to lay down an additional rail themselves between those places, or permit it to be laid down. *In re Launceston*, 3 Ry. & C. T. Cas. 137.

3. Time within which to construct.—Cal. Civ. Code, § 468, providing that a railroad corporation must begin the construction of its road within two years after filing its articles of incorporation, and

must every year thereafter build and operate at least five miles of its road, until the road is fully completed, and upon its failure so to do for the period of one year its right to extend its road beyond the point then completed is forfeited, applies to the main road provided for in the company's articles of incorporation, and not to a switch or side-track which the company may find necessary for the proper conduct of business and the convenience of the public after the road has been put in operation. *Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. Rep. 676.

Acquiring the right of way or letting contracts for the construction of a railroad is not "a commencing of work upon the railroad," within the meaning of a statute requiring that work shall be commenced, in good faith, within a prescribed time. *State v. Wheadon*, 39 Ind. 520.

The failure of a railroad company to commence or complete its road within the time prescribed by its charter is a breach of a duty owed to the state, and does not entitle a private citizen, after the road has been completed for a number of years, to recover possession of land taken for a right of way. *Cincinnati, H. & I. R. Co. v. Clifford*, 33 Am. & Eng. R. Cas. 81, 113 Ind. 460, 15 N. E. Rep. 524, 13 West. Rep. 384.

A limitation of the time for completing a railroad does not restrict the right to build branches over the right of way acquired before the expiration of the period. *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228; *reversing* 3 Mo. App. 315.—FOLLOWED IN *Hovelman v. Kansas City Horse R. Co.*, 20 Am. & Eng. R. Cas. 17, 79 Mo. 632.

The commencement of a railroad, within the meaning of N. J. general railroad law (Rev., p. 934, § 34), is the actual commencement of the work of constructing the road. *State v. Bergen Neck R. Co.*, 53 N. J. L. 108, 20 Atl. Rep. 762.

The work on the road of the defendant company was commenced in December, 1885, and the time for completing it expired in December, 1887, bringing the case within the act of 1887 (Pamph. L., p. 65), by force of which the time for completion was extended to December, 1889. The time was again extended for two years by the act of 1889 (Pamph. L., p. 135). The fact that the act of 1889 applies only to railroads organized under the general railroad law does not specialize it. Railroads organized under

the general law are a class by themselves, and therefore the law is a general law. *State v. Bergen Neck R. Co.*, 53 N. J. L. 108, 20 All. Rep. 762.

Defendant company was chartered in 1870 to build a railroad. Some two years afterward it mortgaged its franchise and property, which mortgage was foreclosed in 1876 and the road passed into the hands of purchasers. The road had never been constructed. The N. Y. Act of 1850, ch. 140, as amended in 1870, ch. 775, provides that the corporate existence of a railroad company shall cease if it does not begin the construction of its road and expend ten per cent. of its capital within five years, or put its road in operation in ten years. The company sued to recover the amount of a subscription to its stock, but more than the ten years had elapsed before the trial. *Held*, that the company's corporate existence had ceased, and it was not extended by the Act of 1879, ch. 350, providing for the extension of time for two years, under certain circumstances, as the latter clause of the act provides that it shall not "have the effect to revive any corporation whose corporate power has been forfeited from any cause." The foreclosure and sale worked a forfeiture of the company's right to thereafter build and operate the road. *Sodus Bay & C. R. Co. v. Lapham*, 6 N. Y. S. R. 159, 43 Hun 314.—FOLLOWING *Sodus Bay & C. R. Co. v. Hamlin*, 24 Hun 390.

Texas act of March 10, 1875, providing that defendant road should forfeit its land grant if it failed to build forty miles of road per year, or eighty miles every two years, as to the portion of the road not so built, operates as a repeal of its original act of August 5, 1870, so far as relates to the extent and cause of forfeiture. *State v. International & G. N. R. Co.*, 57 Tex. 534.

By the terms of Texas act of March 10, 1875, it is provided that the defendant company should forfeit its right to lands granted upon that portion of its road which it failed to construct, if it failed to build forty miles of road each year, or eighty miles every two years. *Held*, that by a failure to build the road at the rate of eighty miles every two years, the company forfeited the right to the land grant as to that part of the road not so built, but no further; but lands once forfeited as to any portion of the road, not completed at the prescribed rate, could not be reclaimed by

a rapid construction thereafter, so as to complete the whole road within the required time. *State v. International & G. N. R. Co.*, 57 Tex. 534.

The plaintiffs were empowered by their act of incorporation to construct a railway in sections between the River S. S. M. on the west and G. on the east, and such railway was by the twenty-third section of their act to be commenced within three years, and to be completed within six years from March 4th, 1881. In the years 1881 and 1882 they surveyed, located, and filed plans from the River S. S. M. easterly to S. R., about one third of the entire length of the road, and did some work thereon of the character of "construction," such as grading, blasting, and chopping. Little more was done by them from 1882 to 1886 owing to financial reasons, but with no intention of abandoning the road. The defendants, who had constructed a line of railway as far west as A., proceeded in December, 1886, to continue the construction of their line westerly from A. to the River S. S. M., and in doing so used the line which plaintiffs had located. *Held*, on the evidence, that the work done by the plaintiffs was a *bona fide* commencement of their railway within the three years required by their act. *Ontario & S. St. M. R. Co. v. Canadian Pac. R. Co.*, 14 Ont. 432.

As the plaintiffs were authorized to construct their railway in sections, they were not bound before commencing work to file plans of their whole line. *Ontario & S. St. M. R. Co. v. Canadian Pac. R. Co.*, 14 Ont. 432.

By the general railway act, Rev. St. Ont. ch. 165, which was by the plaintiffs' special act incorporated therein, except as varied by the latter, ten per cent. of the capital of the railway was, by sub-sec. 5 of section 36, required to be expended within three years, and the railway was to be completed within ten years of the passing of the special act, in default of which the corporate existence of the company ceased; and by section 4 of the special act, sections 4 to 36 thereof, inclusive, were to apply to all railways authorized to be constructed by any special act of the province, and to be construed therewith as forming one act. *Held*, that section 4 of the general act did not apply to the plaintiffs, and that section 23 of their special act must be read in substitution for sub-sec. 5 of section 36, requiring the expenditure of ten per

cent. of the capital within the three years. *Ontario & S. St. M. R. Co. v. Canadian Pac. R. Co.*, 14 Ont. 432.

4. Care and skill required in construction.—A railroad company is bound to use the highest care in constructing its road. *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.

The safety of human life requires that a very high degree of skill and diligence shall be exercised in the construction of railroads to be operated by the dangerous agency of steam. *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701.

Where a corporation, either by donation or compulsory purchase, enters upon a right of way and proceeds under its charter to construct its road, it should exercise due care and skill in its work and have a proper regard for the interests of others, and if it does not use such care, it will be liable for the consequences. *Gilbert v. Savannah, G. & N. A. R. Co.*, 69 Ga. 396.

A railroad company is not only bound to build its railroads and structures according to good railroading, in respect to its own interests, but must take care that the interests of others are observed. *Chicago & A. R. Co. v. Henneberry*, 42 Ill. App. 126.

A railroad company is bound to bring to the construction of its works a degree of engineering skill that will permit no negligent and improper construction. *Ohio & M. R. Co. v. Thillman*, 43 Ill. App. 78.—QUOTING *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112.

In an action to recover damages sustained by reason of the negligent construction of a railroad over the plaintiff's farm, the fact that the road is built as railroads usually are in such locations is no defense. *Van Orsdol v. Burlington, C. R. & N. R. Co.*, 56 Iowa 470, 9 N. W. Rep. 379.—DISTINGUISHED IN *Drake v. Chicago, R. I. & P. R. Co.*, 17 Am. & Eng. R. Cas. 45, 63 Iowa 302.

A railway company, in the construction of its railway, did not use any blocking or other protection between the main rails of its tracks and the guard-rails. Whether this was negligence or not in the abstract, and whether the question is one of fact for the jury or one of law for the court, not decided. *Rush v. Missouri Pac. R. Co.*, 28 Am. & Eng. R. Cas. 484, 36 Kan. 129, 12 Pac. Rep. 582.

3 D. R. D.—8.

A railroad company, in enforcing its right of way over the lands of others and in constructing its road, should leave the adjoining lands and fields which it crosses in the same condition as regards the facilities of cultivation and as concerns the utility of those lands to their owners as they were before the entry of the company. *Payne v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 164, 58 Am. Rep. 174.

A railway company must so build its roadbed as not to impair the drainage of the land over which it passes, and must construct necessary cattle-guards and crossings, under penalty of paying damages for injuries caused by its omissions. *Heath v. Texas & P. R. Co.*, 37 La. Ann. 728.

In the construction of their roadbed, track, and culverts, railroad companies are held to that degree of care and foresight which will avoid such dangers as can be reasonably foreseen or ascertained by competent and skilful engineers, as liable to result from rainfalls and freshets incident to the particular section of country through which they are constructed. *Libby v. Maine C. R. Co.*, 85 Me. 34, 26 Atl. Rep. 943.

A railway company is bound to construct its works in such a manner as to be capable of resisting all violence of weather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur. *Great Western R. Co. v. Faucett*, 1 Moore P. C. C. N. S. 101, 9 Jur. N. S. 339, 11 W. R. 444, 8 L. T. 31.—QUESTIONED IN *Czech v. General S. Nav. Co.*, L. R. 3 C. P. 14, 17 L. T. 246.

Where a right of way is granted, "with right to use such additional land as may be necessary for the construction and maintenance" of the road, the company is bound only to use ordinary care in constructing its road; and the necessity for taking additional land is to be determined by ordinary care. *Gulf, C. & S. F. R. Co. v. Richards*, 83 Tex. 203, 18 S. W. Rep. 611.

5. Lateral support of adjacent land.—Where a landowner grants a right of way to a railroad company, and it is necessary to make cuts through the land in constructing the road, the company is not bound to build retaining-walls to prevent the falling of the banks. *Hortsmann v. Covington & L. R. Co.*, 18 B. Mon. (Ky.) 218.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

A railway company authorized to under-

pin or strengthen buildings on lands adjoining its line may make a wall of concrete to separate a building, part of the thickness of which is under the building and part on the company's land, the whole wall forming the retaining-wall of the cutting in which the line was located. *Stevens v. Metropolitan Dist. R. Co.*, *L. R. 29 Ch. D. 60*, *54 L. J. Ch. D. 737*, *52 L. T. 832*, *33 W. R. 531*.

6. Duty to construct watering-places for cattle.—Where a statute requires a railway company to make watering-places for cattle, where, by means of its road, the cattle are deprived of access to their ancient watering-places, the company is not relieved of its duty by agreeing with a landowner to pay him a certain sum for the special damages occasioned to his estate by the construction of its road. *Reg. v. York & N. M. R. Co.*, *3 Railw. Cas. 764*; *s. c. nom. York & N. M. R. Co. v. Milner*, *15 L. J. Q. B. 378*.

A writ of mandamus ordering a railway company to construct watering-places for cattle as required by statute is bad if it orders the company to do more than the statute requires, namely, to make a pond in each of the portions of the closes, there being nothing to show that one watering-place would not have been sufficient for all. *Reg. v. York & N. M. R. Co.*, *3 Railw. Cas. 764*; *s. c. nom. York & N. M. R. Co. v. Milner*, *15 L. J. Q. B. 378*.

7. Change of gauge.—A railroad company, not specially restricted by its charter as to the gauge of its track, may change its gauge or the character of its rails at any time, provided that it keeps within the limits of its chartered rights. *Milvale v. Evergreen R. Co.*, *46 Am. & Eng. R. Cas. 219*, *131 Pa. St. 1*, *18 All. Rep. 993*.

The power granted to a railroad company to "farm out" its road authorizes a lease; and where no gauge is prescribed the lessees are authorized to change the gauge of the road. *State v. Richmond & D. R. Co.*, *72 N. Car. 634*.

Neither the map nor certificate of location of a railroad stated the gauge or width between the rails, but the articles of association declared the purpose of the company to be to construct a road of the standard gauge, which term is held to be sufficiently definite, as that gauge in Michigan is so universally known that courts and every one else will take notice of its width. *Bay*

City B. L. R. Co. v. Hitchcock, *90 Mich. 533*, *51 N. W. Rep. 808*.

A map of a proposed railroad on which the centre line of the track is designated by a colored line indicates with reasonable certainty the location of the line, and hence the space to be occupied by the standard-gauge road proposed to be laid along the line so designated. *Bay City B. L. R. Co. v. Hitchcock*, *90 Mich. 533*, *51 N. W. Rep. 808*.

8. Crossing of rivers — Obstructing navigation.—If a railroad company be chartered between designated termini, which requires it to cross an existing canal, it may construct the road over the canal, but it must be so constructed as not to obstruct or impair the navigation thereof. If it does, the railroad company will be liable for the damages caused thereby. *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, *11 Leigh (Va.) 43*.

Where a railway company constructed its line across a river and was sued by a vessel owner prevented thereby from navigating that part of the river, the company was not (under its plea) bound to show that all notices required by the acts for the purchase of such part of the river from the owners of the bed of it had been given and all other things done which were requisite to vest that part of the bed of the river in the company. *Abraham v. Great Northern R. Co.*, *16 Q. B. 586*, *15 Jur. 855*, *20 L. J. Q. B. 322*.

The first clause of section 16 of the Railways Clauses Act 1845 includes navigable rivers as well as rivers not navigable; and the railway company is authorized by such section to construct its line upon the bed of the navigable part of the river. *Abraham v. Great Northern R. Co.*, *16 Q. B. 586*, *15 Jur. 855*, *20 L. J. Q. B. 322*.

Bridge contractors were engaged to build a railroad bridge across navigable waters, and upon completion of the bridge were to remove the piles and other things used in the construction which might interfere with navigation. The company dismissed the contractors after piles were driven and before the bridge was completed, and itself cut the piles off a little below the surface of the water, and a vessel was injured by running on them. *Held*, that it was only the duty of the contractors to remove the piles upon completion of the bridge, and they having been dismissed before its completion, the

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railroad company was liable for the injury to the vessel. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. Towboat Co.*, 23 *How. (U. S.)* 209.

The action in such case cannot be defeated because the vessel, at the time of the accident, was being propelled on Sunday, contrary to the state law.* *Philadelphia, W. & B. R. Co. v. Philadelphia & H. Towboat Co.*, 23 *How. (U. S.)* 209.—APPROVED IN *Baldwin v. Barney*, 12 *R. I.* 392. DISAPPROVED IN *Stanton v. Metropolitan R. Co.*, 14 *Allen (Mass.)* 485. DISTINGUISHED IN *Bucher v. Cheshire R. Co.*, 34 *Am. & Eng. R. Cas.* 389, 125 *U. S.* 555. FOLLOWED IN *Carroll v. Staten Island R. Co.*, 58 *N. Y.* 126. QUOTED AND DISAPPROVED IN *Landers v. Staten Island R. Co.*, 13 *Abb. Pr. N. S. (N. Y.)* 338. QUOTED IN *Commonwealth v. Louisville & N. R. Co.*, 80 *Ky.* 291.

9. Liability for defective construction, generally.†—Where a railroad company is chartered with the usual powers, the mode of constructing the road is left to the judgment of the company. Whether it will make a solid embankment at a particular place or not is left to the judgment of its engineers, and an individual cannot insist upon a trestle. It is bound to construct its road in a careful and skilful manner, having due regard for the interest of the public as well as to others who may be affected; but when this is done the company is not liable to an individual, though there may have been an error of judgment in the manner of construction. *Hodge v. Lehigh Valley R. Co.*, 39 *Fed. Rep.* 449.

All damages arising from not building a railroad in a proper and skilful manner are continuing damages, and may be sued for and recovered by a grantee of premises, against a railroad company or other person or company, for continuing the improperly constructed structure after such grantee acquires title. *Chicago & A. R. Co. v. Henneberry*, 42 *Ill. App.* 126.

Where a railroad corporation is formed the construction of the road will, in the absence of any showing to the contrary, be presumed to be done by the corporation, and it will be responsible for injuries resulting from negligence in such construction. *Solomon R. Co. v. Jones*, 15 *Am. & Eng. R. Cas.* 201, 30 *Kan.* 601, 2 *Pac. Rep.* 657.

* See also *SUNDAY*, 4, 5.

† Liability of company for defects in construction of road, see note, 11 *AM. ST. REP.* 65.

A corporation authorized by the legislature to construct and maintain a railroad or a mill-dam is liable in an action of tort to a person injured by the negligent construction of its railroad or dam. *Bryant v. Bigelow Carpet Co.*, 7 *Am. & Eng. R. Cas.* 72, 131 *Mass.* 491.

It is *prima-facie* evidence of the insufficiency and improper construction and maintenance of a railway that one of its embankments gave way; and in the absence of evidence in rebuttal such evidence becomes conclusive. *Great Western R. Co. v. Braid*, 1 *Moore P. C. C. N. S.* 101, 9 *Jur. N. S.* 339, 11 *W. R.* 444, 8 *L. T.* 31.—QUESTIONED IN *Czech v. General S. Nav. Co.*, *L. R.* 3 *C. P.* 14, 17 *L. T.* 246.

A railway company is not authorized by the Railways Clauses Act 1845 to commit acts which would constitute a nuisance if done by a private person. *Smith v. Midland R. Co.*, 26 *W. R.* 10, 37 *L. T.* 224, 25 *W. R.* 861.

A railway company having power by its act to cross a river, the property of certain persons, cannot be required to make a bridge of one span only, as demanded by the proprietors, but may do the work according to the terms of its act without doing any permanent damage to the proprietors. *Birmingham Waterworks Co. v. London & N. W. R. Co.*, 4 *L. T.* 398.

10. Liability for injuries to property, generally.*—If a railroad corporation voluntarily, for its own profit, so construct its track as necessarily to injure the property of an individual, and its charter gives no remedy for such injury, it is liable in an action for damages for the injury, though the work be constructed in a proper manner and place. *Evansville & C. R. Co. v. Dick*, 9 *Ind.* 433.—FOLLOWING *Tate v. Ohio & M. R. Co.*, 7 *Ind.* 479.—APPROVED AND DISTINGUISHED IN *Eaton v. Boston. C. & M. R. Co.*, 51 *N. H.* 504. DISTINGUISHED IN *Slatten v. Des Moines Valley R. Co.*, 29 *Iowa* 148.

Evidence that a contract for excavating a street for a cable railroad was made in a third person's name, but at defendant's request and for its benefit, and that the work

* Trespass for injuries incident to construction of road. Sufficiency of averments, see 52 *AM. & ENG. R. CAS.* 28, *abstr.*

Injury caused by negligent blasting. Recovery of damages, see note, 30 *AM. & ENG. R. CAS.* 232.

was paid for out of its funds and its fruits enjoyed by it, renders defendant liable for damages resulting therefrom. *Brady v. Kansas City Cable R. Co.*, 111 Mo. 329, 19 S. W. Rep. 953.

Where real estate is damaged by the construction of a railroad, but no part thereof is appropriated to the use of such road, an action at law for such damages may be maintained. *Republican Valley R. Co. v. Fellers*, 20 Am. & Eng. R. Cas. 256, 16 Neb. 169, 20 N. W. Rep. 217.—FOLLOWING *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279.—FOLLOWED IN *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727.

A charter granting the power to build a railroad is a mere franchise, conferring the title and rights of a corporation, but conveys no authority to take private property without making just compensation; neither does it exempt the company from liability for any wrongs to the rights of private property. *Robinson v. New York & E. R. Co.*, 27 Barb. (N. Y.) 512.—APPROVING *Fletcher v. Auburn & S. R. Co.*, 25 Wend. (N. Y.) 462; *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 487.

Under the charter of the Reading railroad company, § 12, the contractors were authorized to enter, and occupy with temporary dwellings, stables, blacksmiths' shops, etc., the lands adjoining the line of the road, provided no more was taken than was necessary for such purpose, while engaged in the performance of their contract. *Lauderbrun v. Duffy*, 2 Pa. St. 398

A railroad company, or any contractor employed by it to build a railroad, may use any material removed by them in grading the road, either in the adjacent or, it seems, in other localities, but they have no right to sell such material to third parties. *Aldrich v. Drury*, 8 R. I. 554.

A fill or bar made in a stream by blasting and throwing into it rock and other refuse material in the work of construction of a railroad on a strip granted for right of way by plaintiff, which fill is not necessary for the construction and maintenance of the railroad, and which entails injury to a mill situate on the residue of plaintiff's land, is a private nuisance, and ground of action against the company. *Watts v. Norfolk & W. R. Co.*, (W. Va.) 57 Am. & Eng. R. Cas. 694, 19 S. E. Rep. 521.

The statutory provision that a railway company shall do as little damage as may be in the exercise of its powers, and shall make satisfaction to all parties damaged, applies only to cases of damages to individuals for which compensation may be made. *Reg. v. East & W. I. D. & B. J. R. Co.*, 2 El. & Bl. 466, 17 Jur. 1181, 22 L. J. Q. B. 380.

A company is not liable to a party who purchases land after the road is constructed across it, for any damage done to the land in the construction of the road. *Toledo, W. & W. R. Co. v. Morgan*, 72 Ill. 155.—FOLLOWED IN *Wabash, St. L. & P. R. Co. v. McDougall*, 27 Am. & Eng. R. Cas. 386, 118 Ill. 229. QUOTED IN *Chicago & A. R. Co. v. Henneberry*, 28 Ill. App. 110.

A landowner sued a railroad company in assumpsit for earth taken from his land in the construction of the railroad. The company defended on the ground that the taking was tortious, and therefore it was not liable in assumpsit. The evidence showed that the engineer asked permission of the owner to take the earth, but there was no evidence of any reply. Held, that the taking was under contract. *Sweetser v. Boston & M. R. Co.*, 66 Me. 583.

The plaintiffs, who were railroad contractors, were allowed by the defendant to make a ditch upon his land, they promising to see that he had his pay for the damages which should be occasioned to him thereby, and it being the expectation of the parties that the damages would be appraised by the railroad commissioners and be paid by the plaintiffs, when thus ascertained, in the adjustment of their accounts. Subsequently, upon an attempt being made by the parties to settle the accounts, the plaintiffs said they would credit such sum for these damages as they should be appraised at by one of the engineers. But no appraisement was ever made of them by the commissioners or engineers. Held, that these damages might be adjusted in an action upon book-account between the parties. *Chamberlain v. Farr*, 23 Vt. 265.

11. Liability for injuries to crops.—A railroad corporation by whose direction a contractor enters and builds the road upon lands which it has acquired, subject to an existing lease, is liable as a joint tort-feasor with him and his servants for their damages therein to the crops of the lessee. *Ullman v. Hannibal & St. J. R. Co.*, 67 Mo. 118.—

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DISTINGUISHING *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202.

It is the duty of the court in all damage suits to give definite instructions to the jury as to the correct measure of damages, and where suit is brought to recover for injuries to land and destruction of growing crops, while the railroad is being constructed through the lands, an instruction is not explicit enough which tells the jury that they shall find such damages as are the actual natural proximate result of the acts complained of. *Missouri Pac. R. Co. v. Cox*, 2 Tex. App. (Civ. Cas.) 217.

Where a railroad company is sued to recover damages for negligently and unskillfully constructing its roadbed so as to cause plaintiff's land to be overflowed, and thereby destroying growing crops and injuring the land, the true measure of damages is the injury which the land and crops sustain from the successive overflows when they occur, and not the market value of the land immediately before and immediately after the injury. *Galveston, H. & S. A. R. Co. v. Bibb*, 3 Tex. App. (Civ. Cas.) 330.—**EXPLAINING** *Gulf, C. & S. F. R. Co. v. Helsley*, 62 Tex. 593; *Galveston, H. & S. A. R. Co. v. Tait*, 63 Tex. 223; *Texas Trunk R. Co. v. Elam*, 1 Tex. App. (Civ. Cas.) 201; *Missouri Pac. R. Co. v. Cox*, 2 Tex. App. (Civ. Cas.) 217.

12. Liability for consequential damages to adjoining owners.*—

(1) *General rules.*—A railroad company which has received a deed and paid the consideration for land upon which to construct and operate its road is liable to the grantor for injuries subsequently caused to his land adjoining the right of way by the construction and repair of its roadbed in such a manner as to encroach thereon, without regard to any question of negligence on its part, or knowledge that its works would cause the injury. *Roushange v. Chicago & A. R. Co.*, 33 Am. & Eng. R.

Cas. 142, 115 *Ind.* 106, 14 *West. Rep.* 853, 17 *N. E. Rep.* 198.

The damages allowed and settled for land taken for a right of way, by the exercise of the right of eminent domain, are not deemed to have been considered as consideration for future damages sustained by the negligent construction of culverts. *Hunt v. Iowa C. R. Co.*, 86 Iowa 15, 52 *N. W. Rep.* 668.

No action lies for incidental damages caused by building a railroad inconveniently near plaintiff's dwelling-house, where the road is authorized by law and the work has been carefully and properly done. *Koetmel v. New Orleans, M. & C. R. Co.*, 27 *La. Ann.* 442.

Where a railroad company constructs its road in front of a person's tract of land and in close proximity to his residence, he can recover for any damages he may have sustained in respect to his property not suffered in common by the public generally. Injuries resulting from smoke, soot, and cinders from passing engines are proper elements of damage. *Omaha & N. P. R. Co. v. Janacek*, 30 *Neb.* 276, 46 *N. W. Rep.* 478.—**APPLIED IN** *Atchison & N. R. Co. v. Boerner*, 34 *Neb.* 240.

An authority conferred upon a railroad corporation to construct a railroad carries with it no immunity from liability in executing the work for consequential damages to private property, as though it were acting as a strictly public agent; but the settled doctrine of New York is that the powers granted to such a corporation are to be construed as privileges conferred, upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in the execution of such powers were done by an individual. *Booth v. Rome, W. & O. T. R. Co.*, 57 *Am. & Eng. R. Cas.* 442, 140 *N. Y.* 267, 35 *N. E. Rep.* 592.

Where a railroad is so constructed and operated as to fill a house near the track with smoke and offensive odors, and to shake the walls thereof, an action of trespass on the case is the proper remedy against the company. *Northern C. R. Co. v. Holland*, 117 *Pa. St.* 613, 12 *Atl. Rep.* 575, 10 *Cent. Rep.* 746, 20 *W. N. C.* 428.

(2) *Illustrations.*—Upon the trial of an action for damages to abutting property against a railway company, defendants requested an instruction that, in determining

* Liability of company for consequential damage resulting from construction and operation of road, see note, 7 *AM. REP.* 179.

Injuries to abutting property caused by construction of railroad. Excessive damages, see 52 *AM. & ENG. R. CAS.* 33, *abstr.*

Injuries to adjoining lands caused by construction and operation of railroads. Value of property and damages, how proved, see note, 31 *AM. ST. REP.* 734.

Injuries to adjoining land by raising embankment. Pleading authority of charter as a justification, see 52 *AM. & ENG. R. CAS.* 28, *abstr.*

the damages, the jury may consider the nature of the property and the tendency to great fluctuations in value in the community, and that it must appear that the construction of defendant's track had been the sole cause of the depreciation, etc. *Held*, erroneous, as excluding from the consideration of the jury the effect of the operation and maintenance of the railway; and the trial court properly modified such instruction in that particular. *Denver & R. G. R. Co. v. Schmitt*, 32 Am. & Eng. R. Cas. 231, 11 Colo. 56, 16 Pac. Rep. 842.

After the construction of a railroad over a portion of a lot the owner erected a dwelling-house upon the lot in close proximity to the road, and occupied the same as a residence. *Held*, that the owner, having built the house with full knowledge that it would be affected by the road, could not recover for the injury incurred by the house standing near the railroad; but that, so far as the house sustained a direct physical injury, which the company was bound to avoid, as towards all adjacent property, the owner was entitled to recover. *Indianapolis, B. & W. R. Co. v. McLaughlin*, 77 Ill. 275.—*DISTINGUISHING Aurora v. Reed*, 57 Ill. 30.

In an action against a railroad company for damages to the plaintiff's premises used for a residence, caused by the construction and operation of its road in the near vicinity of his property, the court refused an instruction asked by the defendant, to the effect that the plaintiff could not recover for any damages to his property alleged to have been caused by reason of any noise, confusion, or disturbance occasioned by the operation of the defendant's trains in the yards or upon the tracks of the defendant, or for unsightly structures on the defendant's premises in front of the plaintiff's property. *Held*, that the instruction was properly refused. *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. Rep. 750.

Mass. Act of 1841, ch. 125, § 1, authorizes county commissioners, when assessing damages to the owner of land taken for a railroad, to direct the company, in addition to the damages assessed, to construct and maintain such embankments, drains, culverts, walls, fences, or other structures as the commissioners shall adjudge; and further provides that the commissioners shall prescribe the time within which, and the manner how, such structure shall be

made, and provides that the landowner may recover double damages if the company fail to obey the order of the commissioners. *Held*, that the remedy being in the nature of a penal action, a failure of the commissioners to prescribe the time in which the structure shall be made is fatal to the recovery of double damages. *Keith v. Cheshire R. Co.*, 1 Gray (Mass.) 614.

13. Liability for personal injuries.*

—Where a railroad company, while constructing its road, makes a deep cut across a street and erects a temporary bridge across it, it is such negligence to leave a fence, guarding the approach to the bridge, down at night as will make the company liable for the death of a person who, without fault, misses the bridge and falls into the cut. *Hogan v. Kentucky Union R. Co.*, (Ky.) 21 S. W. Rep. 242.

14. Liability for negligence of contractors.†

—Where a railroad company engages a contractor to construct a wharf under the supervision and direction of the company's engineer, the work to be done to his satisfaction, such contractor is but the agent of the company, and it is liable for injuries resulting from his negligence or the negligence of those working under him. *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. (U. S.) 649, 4 Am. Ry. Rep. 242.—*DISTINGUISHING Steele v. South Eastern R. Co.*, 32 Eng. L. & Eq. 366.—*REVIEWED IN Rogers v. Florence R. Co.*, 39 Am. & Eng. R. Cas. 348, 31 So. Car. 378, 9 S. E. Rep. 1059.

Where the contract between the railroad and construction companies provided that the latter should operate the railroad, so as to be completed and equipped, for two years, and should receive its earnings, the railroad company was liable for injuries occurring by the negligence of the construction company during that period, such operation being by virtue of the franchise of the railroad company, and with its knowledge and sanction. *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. Rep. 853.—*QUOTING Macon & A. R. Co. v. Mayes*, 49 Ga. 355.

* Action for death caused by blasting in process of construction, see 52 AM. & ENG. R. CAS. 29, *abstr.* See also DEATH BY WRONGFUL ACT.

† Liability of company for acts of contractors and their servants, see notes, 29 AM. & ENG. R. CAS. 589; 19 *Id.* 641; 18 *Id.* 113; 15 *Id.* 110.

Railroad corporators are liable for a trespass committed by its lessees; and it is equally liable if it permits its contractors to operate the road while building it. *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105.—DISTINGUISHED IN *West v. St. Louis, V. & T. H. R. Co.*, 63 Ill. 545. FOLLOWED IN *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90.

A railroad company is liable for injuries to adjoining lands caused by independent contractors engaged in the construction of the road. *Gulf, C. & S. F. R. Co. v. Doran*, 2 Tex. Unrep. Cas. 442.—FOLLOWING *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77.—*Bechnel v. New Orleans, M. & T. R. Co.*, 28 La. Ann. 522.

A railroad company, in the construction of its line of road through the inclosed lands of persons, owes to the owners of such lands a legal duty to protect such lands from injury. It cannot be doubted that the duty of placing stock-guards, preserving or supplying the fences, so far at least as on the right of way, and protecting the inclosure from injury in the construction of the road, is a duty to the proprietor from the railroad, annexed by statute to the privilege granted the corporation, and that the failure to perform that duty is unexcused, though its non-performance may have resulted from the negligence of a contractor. *Gulf, C. & S. F. R. Co. v. Flake*, 1 Tex. App. (Civ. Cas.) 99.

The power of the corporation to take the land and other materials adjoining the line of the road, for the purpose of constructing their road, is conferred upon them by their charter, and is as necessary to exist in and be exercised by all the contractors on the road as by the corporation. This power, to be exercised within reasonable limits and in a proper manner, is necessarily delegated from the corporation to the contractor, and for this purpose the contractor is the agent of the corporation, and the corporation is liable to the landowner, for the damages occasioned by the exercise of this power on the part of the contractor. *Vermont C. R. Co. v. Baxter*, 22 Vt. 365.

And the liability of the corporation to the landowner, in such case, is not affected by any stipulation in the agreement between the corporation and the contractor. *Vermont C. R. Co. v. Baxter*, 22 Vt. 365.

An action for damages alleged to have been suffered by the plaintiff by reason of

the construction of a railway over his property must be directed against the company building such railway, and not against the contractors of the works for the construction thereof, unless by their misfeasance, malfeasance, or nonfeasance they have rendered themselves personally liable. *Paquet v. Jackson*, 4 Low. Can. 495.

A railway company is not responsible for damages occasioned by the negligence of subcontractors in making the road where such damage was occasioned by said subcontractors doing acts which they were not required by their contracts to do. *Woodhill v. Great Western R. Co.*, 4 U. C. C. P. 449.

A railroad company let a contract for the erection of a train-shed and the contract was sublet. While the work was in process of construction a workman employed by the subcontractors let a tool fall and killed a person lawfully passing under the shed. *Held*, that a reservation by the company that the work should be superintended and directed by its architect, with power to reject any imperfect work or materials, did not make the workmen employed by the subcontractors the servants of the railroad company so as to make it liable. *Fitzpatrick v. Chicago & W. I. R. Co.*, 31 Ill. App. 649.—FOLLOWING *Chicago City R. Co. v. Hennessy*, 16 Ill. App. 153.

II. CONTRACTS FOR RAILWAY CONSTRUCTION.

1. Validity, Interpretation, and Effect.

15. Execution of the contract.—

The fact that a construction contract is signed and sealed by the company only is not a valid objection to its being read as evidence of the contract between the parties, where it appears that the contractors themselves had made a written assignment of the contract which was signed and sealed, and where the assignee, who was the plaintiff in the action, assented to the assignment over his signature and seal. *Western Md. R. Co. v. Orendorff*, 37 Md. 328.

The statutory agent and managing director of a railway company entered into contracts in his own name, acting for and on behalf of the company, for the construction of the road, erection of station houses, and maintenance of way, at certain prices set forth in the schedules, under which the contractor entered upon the execution of the works, constructed the road and some

of the station houses, and during the progress of the work had been paid large amounts on account of his work, according to the schedule prices, after which the company refused to allow him to complete the contracts, alleging that the prices agreed to be paid were exorbitant, and that the agent had not been authorized to enter into them. The court of chancery declared the company bound by the contracts, on the ground of ratification and for all the work that had been done according to the schedule of acquiescence therein, and that the contractor was entitled to be paid prices; and also to be paid for any loss he could show he had sustained in consequence of not being allowed to proceed to a completion of the contracts. On appeal the decree was varied in so far as it allowed damages for not being allowed to complete the same; and the contractor was entitled to be paid a reasonable sum for damages sustained on account of the stoppages. *Buffalo & L. H. R. Co. v. Whitehead*, 8 *Grant's Ch. (U. C.)* 157.

16. Validity, generally.—The privileges and franchises granted to a railroad corporation do not prevent it from letting out the construction of its roadbed to an independent contractor. *Rogers v. Florence R. Co.*, 39 *Am. & Eng. R. Cas.* 348, 31 *So. Car.* 378, 9 *S. E. Rep.* 1059.

The cost of the construction of a given railroad, and the time within which it will be completed to a given point, are not matters about which every one is presumed to be equally capable of judging, in such sense as would relieve the contract of the company, through its agents, from the ordinary effects of misrepresentations as to those particulars, where they are the essential inducements to the contract. *Henderson v. San Antonio & M. G. R. Co.*, 17 *Tex.* 560.—CRITICISED IN *Montgomery Southern R. Co. v. Matthews*, 24 *Am. & Eng. R. Cas.* 9, 77 *Ala.* 357. DISTINGUISHED IN *Cox v. Keahey*, 36 *Ala.* 340; *Houston & T. C. R. Co. v. McKinney*, 8 *Am. & Eng. R. Cas.* 723, 55 *Tex.* 176; *San Antonio v. Lane*, 32 *Tex.* 405.

While a railroad was in process of construction it went into the hands of two receivers, who notified the contractors to stop work. Subsequently the receivers submitted new plans and specifications to the court, which were approved, and one of the receivers, who seemed to be the active one, notified the contractors of the action of the court, whereupon the contractors submitted

bids for the completion of the work, which were accepted, and a written contract drawn up and signed by the contractors, but not by the receivers. One of the receivers claimed that he knew nothing about bids being submitted, but admitted that he knew that the work was going on. *Held*, sufficient to support a finding that the work was performed under a contract with the receivers. *Girard Life I., A. & T. Co. v. Cooper*, 51 *Fed. Rep.* 332, 4 *U. S. App.* 631, 2 *C. C. A.* 245.

Defendants agreed to construct a railroad and to receive in payment \$1,600,000 in certificates of full-paid stock and the like amount of the company's first-mortgage bonds, which included the full amount of its stock and bonds. At the same time the contractors entered into another agreement with plaintiff, who was acting for the directors who were the stockholders, for the payment to plaintiff of one half of the net profits realized out of the contract. After the road was completed plaintiff received \$50,000 in pursuance of the contract, but claimed that \$100,000 more was due him. *Held*, that the contract was voidable as to creditors or stockholders; yet, being an executed one, defendants could not take advantage of it. *Robison v. McCracken*, 52 *Fed. Rep.* 726.—QUOTING *Union Pac. R. Co. v. Durant*, 95 *U. S.* 579.

The defense set up by defendants that they were induced to enter into the above contract by false representations as to the amount of work to be done and other things, would not release them from the obligations of the contract, but might go in reduction of the damages recoverable. *Robison v. McCracken*, 52 *Fed. Rep.* 726.

Plaintiff received a verdict for \$92,500, which was \$7500 less than the amount claimed as above. It appeared that this was only one half of an amount which defendants had paid for the procurement of the assignment of a judgment against the road. The trial had been lengthy and the verdict appeared to be a compromise. *Held*, that it could not be disturbed. *Robison v. McCracken*, 52 *Fed. Rep.* 726.

17. Consideration.—Where, by the terms of the agreement between the contractors for the construction of a railroad and the railroad company, the former are not to proceed with the work until after the company has secured the means necessary to pay therefor, a subsequent contract of

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third persons, reciting the fact of a deficit in the funds of the company to a certain amount and their desire for the speedy completion of the road, and engaging to pay to the contractors the deficit, upon certain conditions, if so much remained when the work was completed, is enforceable by the contractors after the work is done and the conditions performed, it being then too late to question the consideration for the agreement; besides, the consideration is sufficient. *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. Rep. 301.

Where the deficit is twenty-five thousand dollars and the signers of the contract severally agree to pay the maximum sum of two hundred and fifty dollars, that amount may be collected from individual obligors until the whole debt is satisfied, although the proportion of the obligors as between themselves is less than the stipulated liability of each. *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. Rep. 301.

A., who had contracted in writing to grade, etc., a certain portion of a railway company's road, sublet a part of his work to B., and they two went to the treasurer of the company, and at A.'s request the treasurer agreed to pay B. for his work, instead of paying to A.; but the latter was not released from his contract, and B. assumed no liability to the company to perform his part of the work. *Held*, that this was not a contract by the company to pay B., there being no consideration, but a mere request by A. as to whom his money should be paid, which was assented to. *Laidlow v. Hatch*, 75 Ill. 11.

After a part of a road had been constructed the contractors informed the president of the company that they were embarrassed financially and could not complete the work at the contract price. The president instructed them to go on with the work, promising both them and their creditors that all money actually expended in the work should be paid and that claims of creditors should be met. *Held*, that the agreement of the president was without consideration, though the company had received a municipal subscription to the stock of the company, providing that it should be forfeited if the road was not completed within a given time. *Ayres v. Chicago, R. I. & P. R. Co.*, 52 Iowa 478, 3 N. W. Rep. 522.

18. Officers and stockholders as

contractors.—Where a construction contract is otherwise free from fraud, the mere fact that the president of the company is interested, without the knowledge of the directors, will not render it void. *Augusta, T. & G. R. Co. v. Kittel*, 52 Fed. Rep. 63, 2 U. S. App. 409, 2 C. C. A. 615.

Stockholders or bondholders, or a corporation itself may call upon a court of equity to set aside a construction contract made with a dominant stockholder for his own benefit, yet subcontractors who deal with the contractor in his individual character cannot question the legality or validity of such contract. *Central Trust Co. v. Bridges*, 17 Fed. Rep. 753.

19. Interpreting the contract.—(1)

In general.—*Semble*, that the fair construction of a contract to build a railroad between certain *termini*, at a specified price or rate per mile, according to certain specifications, among which the building of side-tracks and turnouts is provided for, imports a mile of the road, without regard to the amount of side-track or number of turnouts upon it, and not a mile of track, which would require the length of the side-tracks and turnouts to be added to that of the main track. The fact that, under such a contract, by which the contractor was to receive monthly payments according to the engineer's estimates of the work performed, he received and claimed no additional estimates or pay for the side-tracks and turnouts, during the progress of the work would seem to be conclusive, as a practicable construction of the contract, against his right to anything additional on account of them. *Barker v. Troy & R. R. Co.*, 27 Vt. 766.—FOLLOWING *Thayer v. Vermont C. R. Co.*, 24 Vt. 440; *Herrick v. Vermont C. R. Co.*, 27 Vt. 673.

Where an agreement between a railway company and a contractor gives the company a lien on the implements and materials which should be upon the ground whereupon a bridge was to be built, as security for the completion of the work, the company is entitled to a lien upon all such implements and materials as were upon any land possessed by the company, on which the building of the bridge was, in a popular sense, being carried on, and not to a lien upon materials of a temporary railway constructed for bringing articles to the bridge, nor to a crane at the end of such railway, not being on the company's land.

Hawthorn v. Newcastle-upon-Tyne & N. S. R. Co., 3 Q. B. 734, n., 2 *Railw. Cas.* 288.

Plaintiff undertook to build for defendants all the bridges on a portion of the Grand Trunk R. Co., and furnish the iron, "same to be shipped on board steamships from Great Britain to Montreal, the defendants paying the difference between freight and insurance by steamships and first-class sailing ships." *Held*, that they were bound to pay such difference on all shipments, not merely on those made at a time when sailing vessels could be procured. *Coulson v. Gzowski*, 22 U. C. Q. B. 33.

The formation of a street-railway company being in contemplation, the plaintiffs, in January, 1867, wrote to one K., saying that the tamarac wood required could be got then, but not later, delivered at their mill at a price specified, and they, the plaintiffs, would saw it for not over \$3 per M., perhaps less; and they added that if K. would start the stock list with \$5000 they would venture to order the wood, and would agree to get the balance of stock taken. K. said that upon this, after communicating with the plaintiffs, he took the \$5000 stock, and plaintiffs ordered the wood, and the company was formed, of which K. was made president. The sawing was not done until 1868, and the plaintiffs sued the company for it, claiming \$4.25 per M. The case having been tried without a jury—*held*, the letter was properly treated as fixing the price to be paid at not more than \$3 per M. *Currier v. Ottawa City Pass. R. Co.*, 30 U. C. Q. B. 61.

(2) *Embankments and excavations.**—Where a contract for the grading of a railroad provided that the contractor should have a certain price per cubic yard for stone excavated and a given price per cubic yard for placing the stone on the side of embankments—*held*, that the price named was not applicable to stone furnished by the contractor and excavated in the line of the road, but got from other places and hauled by him with teams to incase the embankments, and that for such stones so furnished the company was liable to pay what it was reasonably worth. *Western Union R. Co. v. Smith*, 75 Ill. 496.

Where it was stipulated, in a contract for

building a railroad, that if the aggregate amount of all material encountered in constructing it was increased by the definite location over the preliminary estimate, an allowance should be made—*held*, that an averment that the amount of material encountered was increased, etc., was in effect the same as the amount of all material, and that the stipulation did not apply to an increase of the aggregate of each kind of material, but the aggregate of all kinds must be increased. *Smith v. Boston, C. & M. R. Co.*, 36 N. H. 458.

A provision in a construction contract, requiring the contractors to make all the excavations or embankments connected with or incident to the construction of a railroad at a fixed price, covers the cost of removing dirt after a cut has been made, caused by the banks falling in. *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39, 12 N. Y. S. R. 821; reversing 38 Hun 636, *mem.*

A construction contract provided that "the measurement of quantities will usually be made in the cuts or pits from which material has been taken. When quantities are determined by a measurement of embankments the engineer will estimate the actual quantity, and no allowance will be made for shrinkage." The work for the first month or two was made from the measurement of the embankments, and payment was made on that basis. Subsequent payments were upon excavation measurements, which were determined by measuring the embankments and deducting two per cent. *Held*, that the contractors were entitled to payment for the actual amount of the embankments. *Galveston, H. & S. A. R. Co. v. Johnson*, 74 Tex. 256, 11 S. W. Rep. 1113.

Where two modes of calculation of the contents of an embankment for payment per cubic yard are in a contract, and which appear inconsistent, the fact that an actual measurement was made upon one may be considered as persuasive that the measurement in fact should be recognized as that provided for. The language being doubtful, the practical construction given it by the parties should control its interpretation. *Galveston, H. & S. A. R. Co. v. Johnson*, 74 Tex. 256, 11 S. W. Rep. 1113.

A provision in a construction contract that the company may make changes in the location or grade line, and that the con-

* Estimating contractor's compensation according to classification of excavation, see 52 AM. & ENG. R. CAS. 10, *abstr.*

tractor should only be paid once for the movement of earth, either as excavation or embankment, does not apply where there is a waste of excavated earth, caused by changing the construction from an embankment to trestle-work, and the contractor may recover for such embankment. *Wolff v. McGavock*, 29 Wis. 290.

(3) *Grading*.—A contract was entered into between a contractor and a railroad company, by which a contractor undertook to grade a road at a certain price per cubic yard for earth-work, and a certain price per mile for laying track. A portion of the track had previously been graded, and, at the solicitation of the company, the contractor laid the track on the old graded work in the winter time, when it was impossible to do the grading that should have been done, but afterward graded it properly, filling in and raising the track two and a half feet. *Held*, that this grading should be paid for at the agreed price. *Snell v. Coltingham*, 72 Ill. 161.

A contract to construct the roadbed of a railroad between F. and P. B. will include all the grading between the *termini* of the road at the points as indicated by the depot grounds, and will not be satisfied by completing the work to the corporate limits of the places named. And if the contractor goes on and completes the work within the corporate limits of the town without asking for terms, or even asking for a contract to do the work, that will be evidence that he understood such work to be embraced in his original contract. *Western Union R. Co. v. Smith*, 75 Ill. 496.

(4) *Time and manner of payment*.—Where a construction contract does not specify the time of payment, the custom of the company to make monthly payments upon the engineer's estimates will be considered as fixing the time of payment. *Boody v. Rutland & B. R. Co.*, 24 Vt. 660.

In such case a subsequent contract was entered into for additional work, but nothing was said as to the mode of payment. *Held*, that the time of payment would be the same as for the other work. *Boody v. Rutland & B. R. Co.*, 24 Vt. 660.

Where A. contracted with a corporation to build a railroad for a gross sum, to be paid monthly, as estimates of the work done should be made, with a proviso that \$29,000 of the whole sum should be for land damages, to be paid and settled by the cor-

poration without unnecessary delay, so much of the land damages as had been actually paid by the corporation before being summoned as trustee of A. is to be allowed as a payment to A. The unsettled balance cannot be treated as paid to A., although long previously charged to him by the corporation. *Harris v. Somerset & K. R. Co.*, 47 Me. 298.

A contract for building and grading a section of a railroad provided that for the services performed under the contract the contractor should be paid monthly, upon a certificate by the engineer of the road of his estimate of the work done, three fourths of the same, one fourth being retained until the work should be completed, and accepted by the engineer; and that in a certain contingency the employer might determine the contract to be abandoned by the contractor, in which event the contract should be void, and any balance due the contractor should be forfeited to the employer. After the contractor had performed one month's service and part of a second, and had been paid three fourths of the first, the employer determined that the contract had been abandoned by the contractor. *Held*, that nothing was due from the employer to the contractor. *Hennessey v. Farrell*, 4 Cush. (Mass.) 267.—REVIEWED IN *Strauss v. Chesapeake & O. R. Co.*, 7 W. Va. 368.

(5) *Retention of compensation to meet other claims*.—If a contractor to grade a railroad bed has the use of the engine, cars, etc., of the company in removing earth and stone that he is required to remove himself under this contract, the company will have the right to retain out of his estimates a reasonable amount for the use; but where such engine and cars are used only in transporting rock from other places to riprap embankments, under an agreement to furnish the same, the company cannot retain anything for such use. *Western Union R. Co. v. Smith*, 75 Ill. 496.

A construction contract provided that if the contractors failed to proceed with the work in a certain prescribed manner the contract might be declared void, and if any money was due them no part thereof should be payable until the work should be completed; and if in completing the same the cost thereof should be increased over the original contract price, then the sum due should be applied to the payment of such

increase. *Held*, that such contract, being penal in its nature, would be liberally construed in favor of the contractors, but enforced according to its meaning and intent. *Phelan v. Albany & S. R. Co.*, 1 *Lans. (N. Y.)* 258.

The plaintiffs, by their contract, were to procure the right of way and construct the defendant's railroad at a specified price per mile; they had constructed the road, but had not, in every instance, paid the landowners damages. *Held*, that the defendants, being directly liable to the landowners, might retain the amount of that liability from the sum which by the contract would be due to the plaintiffs. *Barker v. Troy & R. R. Co.*, 27 *VI.* 766.

20. Implied contracts.—Where it is stipulated that one party shall do the work, the other finding materials, there is an implied agreement that the materials shall be seasonably furnished. So where it is agreed that work shall be done under the superintendence of the other party's engineer, etc., there is an implied agreement that a suitable engineer shall be employed, and that he shall do what the contract requires, in due season. The party who neglects to furnish such engineer is liable to an action, and can take no advantage of his failure. In declaring upon such implied contract, it is not enough to set out the written contract in terms. It is necessary to state the implied contract, as it is contended to be, with all its qualifications. *Smith v. Boston, C. & M. R. Co.*, 36 *N. H.* 458.

21. Independent covenants.—A covenant to finish the work of constructing a railroad by a certain day, on the part of contractors, and a covenant to pay monthly on the part of the company, are independent covenants. And a right in the company to annul the contract at any time does not include a right to forfeit the earnings of the contractors for work done before the contract is annulled. *Philadelphia, W. & B. R. Co. v. Howard*, 13 *How. (U. S.)* 307.

Where the covenant of the plaintiff to construct a railway within a certain time upon being provided with certain material by the company, and the covenant of the company to supply such material are independent, the furnishing of the material is not a condition precedent to the right of the company to make the deduction provided for in the event that the work is not finished in time. *Macintosh v. Midland*

Counties R. Co., 14 *M. & W.* 548, 3 *Railw. Cas.* 780, 14 *L. J. Ex.* 338.

22. Construing two contracts together.—Plaintiff agreed with a bridge company to construct a bridge across a river, and also a turnpike road from the end of the bridge to a certain swamp. He was to receive \$37,500 for the bridge, forty-four cents per cubic yard for the embankments for the turnpike, and \$10 per lineal foot for building necessary bridges along the turnpike. Subsequently he and the bridge company contracted with a railroad company, by which the bridge company abandoned their work and assigned it to the railroad company, and plaintiff agreed to construct a railroad along the same route for \$204,000, it being expressly provided that the bridge over the river was not included. *Held*, that, construing the contracts together, plaintiff was to receive from the railroad company, in addition to the \$204,000, \$37,500 for the bridge and the forty-four cents per cubic yard for making the embankment, and the \$10 per lineal foot for building other bridges. *Petrie v. Wright*, 14 *Miss.* 647.

23. Interpreting particular words and phrases.—In construing a contract for the construction of a railroad, the court will use the terms employed by the parties according to their popular signification, if to apply them according to technical or scientific rules would defeat the manifest intention of the parties. Words of doubtful meaning will be so construed as to carry out the apparent intention of the parties. *Mansfield & S. C. R. Co. v. Veeder*, 17 *Ohio* 385.

A construction contract provided that grading and excavations were to be paid for either as earth, loose rock, or solid rock. Loose rock was described as "shale or soapstone lying in its original or stratified position, coarse boulders in gravel, cemented gravel, hard-pan, or any other material requiring the use of pick or bar, or which cannot be plowed with a strong ten-inch grading-plow well handled behind a good six mule or horse team." *Held*, that the plowing test only referred to "other material," and not to those specifically named. *Lewis v. Chicago, S. F. & C. R. Co.*, 49 *Fed. Rep.* 708.

Under the provisions of the above construction contract, where the material removed from cuts was broken up by the

plow, and though in irregular strata and varying much in consistency and hardness, it was proper for the engineer to estimate it as loose rock by percentages. *Lewis v. Chicago, S. F. & C. R. Co.*, 49 *Fed. Rep.* 708.

A contract for grading and laying the track of a railroad provided that the contractor should fill in after the track was laid with earth and to do all necessary grading to finish the road, to be measured in the "earth-work" aforesaid, and that the contractor should receive twenty cents per cubic yard for earth-work. *Held*, that the work of filling in between the ties, after the track was laid, should be measured as earth-work, to be paid for at the agreed rate, and was not embraced in the work of laying the track. *Snelt v. Cottingham*, 72 *Ill.* 161.

A party agreed, in writing, with a railway company to lay its track, using the words, "to make up the track in good running order, well surfaced, ties evenly and firmly bedded, and 2600 good ties to be put in per mile, joints to be properly set between ties, fastened with clasp-joint supplied for the purpose, properly fitted, so as to hold an equal portion of each rail, and no greater space to be left between the ends of the rails than is sufficient for expansion," etc. *Held*, that whether this required the contractor to fill up the space between the ties with earth or other proper substance, was a question of fact depending upon usage in such cases, and that what was meant by the word "surfaced" must be determined from the evidence of witnesses conversant with the subject to which it relates. *Western Union R. Co. v. Smith*, 75 *Ill.* 496.

Plaintiffs contracted to do certain railroad-bridge masonry, to be paid for on final estimates of the "engineers in charge" of the railroad. *Held*, that "engineers in charge" meant the engineers in charge of the entire road, and not one in charge of the specific masonry in question, whose decision was subject to the approval of the engineer in chief. *Reilly v. Lee*, 16 *N. Y. Supp.* 313.

A company contracted with a builder to do the work of a building "in a substantial and workmanlike manner," and "in accordance with the plans, specifications, and instructions furnished" by the company. *Held*, that the word "instructions" referred to the kind of structure, etc., relating to planning the building, but the mode of accomplishing the work was left to his own

skill and judgment. *Hunt v. Pennsylvania R. Co.*, 51 *Pa. St.* 475.

Where the plaintiff contracted to build "riprap" wall for the defendants at fifty cents per cubic yard, there being no general usage or uniform custom proved which should control the mode of measurement—*held*, the term used implies pay by the cubic yard for the "riprap" after the stone is fitted and laid into wall. *Wood v. Vermont C. R. Co.*, 24 *Vt.* 608.

24. Interpretation of particular contracts.—Contract for the construction of a bridge across the Mississippi river at La Crosse, between the Bridge company and the Southern Minnesota railroad company (in the hands of a receiver appointed by this court in a foreclosure proceeding), ratified; subject, however, to certain conditions limiting the duration of the contract, and to regulate the compensation to be paid for the use of the bridge by the railway company, or its assigns or successors, or the purchasers at the foreclosure sale under the deed of trust. *La Crosse Railroad Bridge*, 2 *Dill. (U. S.)* 465.

In a suit against a railroad company for earth used in filling its trestle, it appeared that the plaintiffs contracted with the company to do the filling, and were to be paid by the cubic yard; that they were paid for all the earth they furnished and the work they did; and that this suit was brought to recover for the space occupied by a brick culvert which passed under the trestle, plaintiffs contending that the meaning of the contract was that they were "to have solid measure." *Held*, that a verdict for the plaintiffs was contrary to law and evidence. *East Tenn., V. & G. R. Co. v. Matthews*, 85 *Ga.* 457, 11 *S. E. Rep.* 841.

Subcontractors agreed to grade a section of a railroad according to the plans and specifications in the railroad office, and under the direction of the engineers of the road and of the contractors, and according to the terms of the agreement between the company and the contractors, except as to price. The subcontractors were to be paid a fixed price per yard for excavation and for embankment, to be estimated by the engineer according to the contract between the company and the contractors. *Held*, that the subcontractors were not entitled to pay for any embankment or excavation where by the terms of the original contract the same would not have been payable to

the contractors. *Reed v. Hobbs*, 3 Ill. 297. See also *Irwin v. Smith*, 72 Ind. 482.

Where plaintiff was employed by defendant to drive piles on a railroad between certain points, and plaintiff agreed "to push said driving so as to keep out of the way of the track-layers," and "to drive on said line until all the piles are driven to" the terminus of the road; and the question arose whether plaintiff had, by virtue of said language in the contract, the *exclusive* right to drive piles on said line, and it was shown that, when he began work, another, to his knowledge and without objection on his part, began like work at another point on the line, and continued such work over a large portion of the line, and that plaintiff, without objection, accepted help from such other person, on the part where he (plaintiff) was engaged—*held*, that the contract, construed in the light of these circumstances as indicating the intention of the parties, did not give plaintiff the exclusive right to drive the piles on said line. *Thompson v. Locke*, 65 Iowa 429, 21 N. W. Rep. 762.

Where a written contract for the construction of a railroad specifies that the contractor is to receive a written sum per mile for stone "hailed by wagon," the railroad company is not bound thereby to pay for the transportation of stone by rail or steamboat. *Campbell v. Cincinnati Southern R. Co.*, (Ky.) 34 Am. & Eng. R. Cas. 113, 6 S. W. Rep. 337.

The plaintiffs had contracted to build for the defendants certain sections of their railroad at agreed prices. While the work was progressing the defendants, with a view to some change in their location, desired a suspension of the work. Thereupon the contract was modified by the parties. For an agreed compensation the work was to cease till the further order of the defendants, and if the work should not be resumed within two years, the defendants were to pay the plaintiffs \$750; if resumed within that time the former contract was to apply to a residue part only of the said road sections; and upon such resumption the plaintiffs were, upon notice, to proceed with the work and upon said residue sections, in the manner and at rates of price originally agreed. In the modified contract a quantity of stones for the road, which the plaintiff had procured, were purchased by the defendants upon a stipulation that, if such

resumption should take place, the stone should be repurchased by the plaintiffs. The location of the road having been altered as to some of its sections, the defendants, within two years, recommenced operating upon some of its unchanged parts. They gave no notice to the plaintiffs of their intention, but employed another company to do the work. *Held*: (1) that as the work was resumed within the two years, the plaintiffs were not entitled to recover \$750; (2) that the plaintiffs were entitled to do the work when resumed, and to recover damages for not being called upon and employed to do it. *Fowler v. Kennebec & P. R. Co.*, 31 Me. 197.

A contractor agreed to build a section of a railroad by a written contract, which stipulated that four fifths of the monthly estimates should be paid to him during the progress of the work and the balance on the completion of the contract, and that the monthly and final estimates made by the local engineer should be conclusive between the parties, unless modified by the chief engineer, in which event his estimate was to be conclusive. After part of the work was done under this contract a parol modification of it was made, by which the estimates were to be paid the contractor according to his expenses, until the work was completed, the understanding being that he was not to lose his twenty per cent. on the work already done, and was to be protected from further loss, and, save in these particulars, the contract was to stand as it was; his expenses were to be monthly estimates. *Held*, that by the contract, as modified, a final estimate was to be made, after the whole was completed, of the work done *prior* to the new arrangement, and paid for according to contract prices, and the work done *after* was to be paid for according to its *actual cost*, to be ascertained by the monthly account of expenses; that the measure of damages for work done *after* the new arrangement was its *actual cost*, and a prayer which asserts that the measure of damages for *such* work is the rates fixed by the original contract, is erroneous; that for all work done after the new arrangement the contractor was to be indemnified *his expenses*, no matter what the *measurement* of such work was; and that the company having released the contractor by *consent* from the completion of the

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work under the contract, he can sue in assumpsit for the work done. *Baltimore & O. R. Co. v. Resley*, 7 Md. 297.

Certain provisions of two contracts—one a contract between the St. Paul & Chicago R. Co. and the Minnesota R. Construction Co., for constructing and equipping a railroad from St. Paul to Winona, the other a contract for the delivery and payment, by the construction company, to H. M. Rice, or his assignees, of a certain share of the proceeds and profits of said contract for construction and equipment—considered. *Hatch v. Minnesota R. Constr. Co.*, 26 Minn. 451, 5 N. W. Rep. 97.

The contract between the parties contained a provision that if the defendants neglected or refused, after notice, to proceed with the work as fast as, in the opinion of the plaintiffs or of the chief engineer of the railway company, was necessary for its completion within a time specified in the contract, then the plaintiffs might "employ other parties to execute any part of the work, and charge the cost of the same to the defendants, to be deducted out of the retained percentage, or out of any payment that shall have become due on any former estimate, or that may become due on any subsequent estimate." Held, that the defendant's liability to reimburse the plaintiff for the cost of executing a part of the work is not limited to the amount due defendants on the contract retained in the hands of the plaintiffs. *Langdon v. Northfield*, 42 Minn. 464, 44 N. W. Rep. 984.

Morris and others agreed with the Harlem railroad company to construct an extension of their road from Dover Plains to Chatham Four Corners, for certificates of indebtedness amounting to \$2,000,000, with interest warrants attached, payable out of the funds to arise from operating the extension, the surplus of its earnings, after paying its expenses, to be applied to paying the interest warrants semi-annually; and the company covenanted, that if the net earnings of the extension were not enough to pay the interest warrants as they fell due, to "apply the gross receipts from the business over the present road, from and to stations thereon, to and from stations on" the extension, "so far as the same may be necessary for the payment of interest, to an amount not exceeding three quarters of such gross receipts." Held, that by the true meaning of the contract (there being

no net earnings of the extension, but, on the contrary, the expenses of running the extension exceeded its earnings) that the three quarters of such gross receipts must be applied directly and solely to pay such interest warrants, and not to defray the expenses of running the extension, which its earnings were insufficient to satisfy. *Knapp v. New York & H. R. Co.*, 2 Bosw. (N. Y.) 297.

The fact that the company had settled with the certificate-holders semi-annually during the period of some three years, on the assumption that such gross receipts, to the extent of three quarters thereof, were to be applied with the earnings of the extension to pay its expenses, and only the surplus thus arising was to be applied to the payment of the interest warrants, and deferred warrants were issued for the residue, was no answer to an action to have the contract enforced according to its true meaning, as the company, by the settling, had not paid as much as it was their legal duty to pay, and had not done, or engaged to do, any other act to their prejudice. *Knapp v. New York & H. R. Co.*, 2 Bosw. (N. Y.) 297.

Such settlements did not amount to a cotemporaneous or continuing practical construction of the contract, by which the certificate-holders were included, nor one which the court was equitably bound to adopt or enforce, as they did not appear to have been made with knowledge of the particular facts of the case, or under such circumstances as to establish that such was, in fact, their view of the actual meaning of the contract, or that such was the view of the contractors to whom the certificates were originally issued. *Knapp v. New York & H. R. Co.*, 2 Bosw. (N. Y.) 297.

It was competent for the company, by an agreement between them and such contractors, made while the latter held such certificates, to become purchasers and owners of a part of such certificates, without the purchase of them by the company being treated as a satisfaction and payment thereof, in any such sense as that the holders of the residue of those originally issued would be entitled to the whole fund, for the payment of the interest warrants on their certificates, if required to make an amount sufficient to satisfy the same. *Knapp v. New York & H. R. Co.*, 2 Bosw. (N. Y.) 297.

The company, by the true construction of

the contract, were not personally liable for the payment of the certificates, and were only liable for the performance of the covenants on their part in relation to operating the extension and applying its net earnings, and doing other things, as in the contract they had covenanted and agreed to do. *Knapp v. New York & H. R. Co.*, 2 *Bosw. (N. Y.)* 297.

On December 3, 1869, plaintiffs entered into a contract under seal with defendant, whereby they agreed to "construct and finish all the graduation, masonry," etc., on a portion of defendant's railroad, on or before Sept. 1, 1871, and defendant agreed to pay therefor eighty-five per cent. of the stipulated price as the work progressed, and the balance when the work was finished and accepted by the defendant's engineer. It was also thereby agreed that the plaintiffs should "from time to time, on three months' notice in writing" by defendant, "retard or lessen the work for such time and to such extent" as defendant should be thereby delayed or retarded. The time in which the work was to be completed should be extended to such length as the engineer might determine. Plaintiffs immediately began work with a force insufficient to complete it within the contract period, but intending to increase it sufficiently for that purpose, and continued therein till May 28, 1870, when defendant's engineer notified them "to stop any increase of work." It was then agreed that plaintiffs should do a limited amount of work, to prepare a part of the road for early use, and should be allowed a reasonable time after expiration of the contract period for completion of the residue. Plaintiffs thereafter prosecuted the work in accordance with that agreement until November, 1872, when defendant directed them to stop work, which they did within three months. Defendant paid all of the contract price except the part that was earned after the giving of the notice in November, and a part of the final payment of fifteen per cent., for which plaintiffs brought covenant. *Held*, that the original contract was, in effect, that the work should be done on or before Sept. 1, 1871, or such later date as might be fixed on a contingency therein provided for; that the work was therefore done in performance of the original contract, and that for the breach by defendant covenant would lie; that the provision for three months' notice of the retarding or

lessening of work was for plaintiffs' benefit and might be waived by them; that as it was defendant's fault that no definite extended time was fixed, plaintiffs were not to be prejudiced thereby; that the direction given to the plaintiffs by the engineer was for retarding or lessening the work, within the meaning of the contract; that evidence proving the agreement for an extension of the time for performance, and performance according to that agreement, was admissible; and that plaintiffs were entitled to pay for work done within three months after the notice of November, 1872. *King v. Lamoille Valley R. Co.*, 51 *Vt.* 369.

A railroad company telegraphed to railroad contractors that it wanted ballasting done between designated places, and offered to pay a stated price therefor per cubic yard. In answer the contractors telegraphed accepting the proposition. Subsequently the contractors submitted a written proposition to do all the train-work required by the company for the grading of a depot, side-tracks, etc., in a certain city, at a specified price per cubic yard, which proposition was accepted by the company. *Held*, that the plain meaning of the two propositions was for so much ballasting and grading as the company should wish to have done at the places named; and therefore there was no such ambiguity therein as to justify evidence on the part of the contractors explaining the amount of grading or ballasting necessary to render the road serviceable, and that they were prevented from doing the necessary amount by the action of the company. *Wells v. Milwaukee & St. P. R. Co.*, 30 *Wis.* 605, 7 *Am. Ry. Rep.* 279.

An agreement was entered into under the authority of an act of the parliament of Ontario between the municipality of York and the Toronto gravel road and concrete Company, under which the latter were to have a right to construct a tramway from their gravel-pits to the city of Toronto. One of the clauses of the agreement was that: "So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction-engine from the public highways of the said county, and shall discontinue the use and employment of the said traction-engine and of any other traction-engine upon or along such public highways," under which the company claimed the right to put steam-engines upon the

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road over such public highway. *Held*, that the use of steam-engines was an infraction of the said clause. *Toronto Gravel R. & C. Co. v. County of York*, 12 *Can. Sup. Ct.* 517.

McC. et al., appellants, entered into a contract with McG., respondent, the contractor for the construction of the North Shore railway between Montreal and Quebec, to do and perform certain works of construction on a portion of the road, and by a clause in his contract agreed "to keep open at certain times and hours at his own cost and expense the main line for the passage of traffic or express trains run by McG. without any charge to the latter," but there was a proviso that "any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby, shall be paid by the contractor, McG., on a certificate to that effect signed by the superintendent of the contractor." On an action brought by McG. for damages caused by the interruption of the work on said road by the passing of McG.'s trains—*held*, that it was his duty to get the superintendent's certificate within a reasonable time, and not having taken any steps to obtain it until six years after the superintendent had left the respondent's employment, the failure to produce such certificate was sufficient ground for dismissing the action. *McCarron v. McGreevy*, 13 *Can. Sup. Ct.* 378; *affirming* 14 *Rev. Leg.* 422, 12 *Quebec L. R.* 373.

25. Agreement to take stock in payment.*—(1) *In general.*—Where one road contracts to build its road and sell it by sections as soon as built to another company, contractors who build the road and accept in payment stock of the purchasing company, after the road has been operated for years by the latter, are estopped from claiming the right to be regarded as stockholders in the selling company, or as preferred creditors as against the railroad itself. *Branch v. Jesup*, 9 *Am. & Eng. R. Cas.* 558, 106 *U. S.* 468, 1 *Sup. Ct. Rep.* 495.

Where contractors build a road and accept in payment preferred stock, and hold it and draw interest on it for several years, they cannot then question the power of the

company to issue such stock. *Branch v. Jesup*, 9 *Am. & Eng. R. Cas.* 558, 106 *U. S.* 468, 1 *Sup. Ct. Rep.* 495.

Where a contractor with a railroad company is to receive capital stock of the company for labor, services, and materials furnished, and the failure to perform all of the conditions of the contract by the contractor renders it null and void, such contractor cannot sell or transfer any part of such stock so as to bind the company before he has complied with the terms and conditions of the contract on his part. *Sargent v. Kansas Midland R. Co.*, 48 *Kan.* 672, 29 *Pac. Rep.* 1063.

Where a contractor under such a contract becomes financially embarrassed and is unable to complete his contract, and subsequently enters into an agreement with a construction company to transfer to such company all of his contracts, upon condition that the company shall receive all of the stock, moneys, and property agreed to be paid to the contractor, and such construction company carries out and completes such contract, it has a prior right to all of such stock, moneys, and property as against the contractor, or any persons to whom the contractor has attempted to transfer any stock, when it was not earned or paid for. *Sargent v. Kansas Midland R. Co.*, 48 *Kan.* 672, 29 *Pac. Rep.* 1063.

Where a contractor is to be paid in the stock and bonds of the company he cannot excuse a failure to complete the work as contracted, on the ground that the credit of the company was so run down that he was unable to sell stock and bonds to raise money to purchase material and hire labor. *Wood v. Boney*, (N. J. *Eq.*) 21 *Atl. Rep.* 574.

Where contractors have agreed to receive, as part compensation, stock of the company, the fact that the legislature subsequently amends the company's charter, allowing the company to increase both its capital stock and indebtedness, will not justify the contractors in refusing the stock and demanding money, where there is nothing to show that the value of the stock has depreciated; neither will a resolution of the company not to pay interest on the stock in cash, as it had before done, justify such refusal. *Moore v. Hudson River R. Co.*, 12 *Barb. (N. Y.)* 156.

When a contract is entered into for work in constructing a railroad at a certain price, with a stipulation that the same is to be

* Construction contract payable in the bonds and paid-up stock of the company. Contract between the contractors for a division of the stock and bonds between themselves, see 25 *AM. & ENG. R. CAS.* 272, *abstr.*

partly paid for in stock of the company, at a certain rate or price, the company has an election to deliver the stock or pay the specified amount of money, if such right of election is expressed or fairly to be implied; but if such election is not expressed, and the subject-matter of the contract or *res gestæ* indicates that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable, and the contract is a single and imperative promise to deliver the specific stock. *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180.—APPROVED IN *Bates v. Cherry Valley, S. & A. R. Co.*, 3 T. & C. (N. Y.) 16.

Persons who construct a portion of a railroad under a contract to be paid therefor in stock or transportation notes, as against common creditors, are not entitled to share in the fund arising from a sheriff's insolvent sale of the road. *Hart's Appeal*, 96 Pa. St. 355.

(2) *Illustrations*.—A. contracted with a corporation to build a railroad for \$287,000, 80 per cent. to be paid monthly on estimate of the work done, and \$75,000 of the whole sum, including the 20 per cent. reserved, to be paid in stock; time of payment not stipulated. A. abandoned the contract without completing it, and the company was summoned as his trustee. *Held*, that the company had a right to deliver an amount of stock proportioned to the work done, and did not waive that right by making full payment for several months in cash. *Harris v. Somerset & K. R. Co.*, 47 Me. 298.

Where a railroad corporation, on settlement with a contractor, agreed to pay him a certain sum in shares, or bonds of the road, at his election, the amount, however, to be retained by them as indemnity against certain liabilities to which the road was subject, and they made out and delivered to the contractor a certificate of so many shares, with an agreement indorsed, to exchange them for bonds at his election, and these certificates were then returned to the railroad as such indemnity—*held*, that the corporation was bound to deliver the bonds according to their agreement, notwithstanding the treasurer of the road had entered the shares on their records as the property of the contractor, and they had in consequence been sold on execution as his property. *Jones v. Portsmouth & C. R. Co.*, 33 N. H. 544.

A contract for the construction of a railroad provided that until \$5000 should be realized by subscription or sale of securities, that the contractor might purchase material on the credit of the company, but that he should be paid for his work in the stock and bonds of the company. *Held*, the contractor was not entitled to \$5000 in cash, neither could he claim to be reimbursed for any loss occurring by reason of having to sell the stock or bonds at a discount. *Wood v. Boney*, (N. J. Eq.) 21 Atl. Rep. 574.

Railroad contractors agreed to subscribe for and take an amount of capital stock of the company equal to one fourth of the amount received for work. *Held*, to mean that the contractors should subscribe for stock equivalent to one fourth of the amount of their contract for work, and not that they should receive payment for one fourth of their work in stock. *McMahon v. New York & E. R. Co.*, 20 N. Y. 463.

A contract was entered into between a railroad company and contractors to pay the latter, for certain labor, in stock of the company, within thirty days after completion of the work. At the time the stock was depreciated. *Held*, that the law relating to a tender did not apply, and therefore it was not necessary to seek the contractors and tender the stock. *Moore v. Hudson River R. Co.*, 12 Barb. (N. Y.) 156.—DISTINGUISHED IN *Hart v. Lauman*, 29 Barb. (N. Y.) 410.

The board of directors of a railroad company accepted the services of plaintiff's testator in organizing the company, and passed a resolution to pay him in stock both for his past and future services, which was accepted. At the time of this resolution no stock had been issued, but it was supposed that it would sell in the market at par value. *Held*, that such services were payable in stock at par value without reference to what its market value might be. *Bates v. Cherry Valley, S. & A. R. Co.*, 3 T. & C. (N. Y.) 16; *affirmed* in 59 N. Y. 641, *mem.*—APPROVING *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180. DISTINGUISHING *Barker v. Troy & R. R. Co.*, 27 Vt. 766.

A contract between a railroad company and contractors, by which the latter agree to furnish labor and materials for the construction of a railroad at a cost not to exceed \$200,000, and the company on its part to issue stock to the amount of \$300,000

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and its first-mortgage bonds for an equal amount, where it appears that the road could be built for \$180,000 cash, is in conflict with the Pa. Const. art. 6, § 7, providing that no stock or bonds shall be issued except for money, labor performed, or property actually received. *New Castle Northern R. Co. v. Simpson*, 21 Fed. Rep. 533.—APPLYING *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

26. Conditions precedent.—A contract provided that the balance due on it should be paid to the contractor, "upon his giving a release under seal" to the company. Held, that the tender of this release is not a condition precedent, but an act to be done simultaneously with the payment of the money. *Baltimore & O. R. Co. v. Resley*, 7 Md. 297.

A railroad contractor agreed to furnish material and lay a railroad track and complete a wharf, the work to be commenced within thirty days and completed within a specified time, and to receive as part pay certificates of capital stock of the company. Held, that the provisions as to the time of commencing and of completing the work were only agreements subjecting the contractors to damages for a breach thereof and were not conditions precedent; and a failure to begin work within the thirty days was no ground for discontinuing the contract where the work was being prosecuted in good faith, without any intention to abandon it. *Hamby v. Delaware, M. & V. R. Co.*, 21 Fed. Rep. 541.—APPLYING *Mersey S. & I. Co. v. Naylor*, 9 Q. B. D. 648.

27. Necessity of performance.—Where the plaintiffs, under a contract for the construction of a railroad for the defendant, agreed to collect and receive in part payment a certain sum from a township tax voted by the people of the township, or from certain subscriptions to stock that had been made—*Id.* that to entitle the plaintiffs to recover they must show proper effort and diligence on their part to collect either from the subscription or tax, or some excuse for not so doing. *Arnold v. River R. Constr. Co.*, 35 Iowa 99, 5 Am. Ry. Rep. 189.

A provision of a contract that the contractors shall "proceed with such diligence and with such force of laborers as the executive committee of said company may direct to perform the work," etc., is subordinate to and qualified by a provision requiring

the work to be completed by a day named, and is intended to enable the company to compel completion by the day specified. *Grand Rapids & B. C. R. Co. v. Van Deusen*, 29 Mich. 431.

Where a railroad company is sued for a failure to pay its contractors according to agreement, partly in money and partly in stock, the fact that it has mortgaged its road after suit is commenced will not render it liable to pay money for the part that was payable in stock, nor amount to a disability to perform its contract. *Boody v. Rutland & B. R. Co.*, 24 Vt. 660.

A contractor agreed to build certain railroad bridges at a fixed price per foot, to be paid for part in cash and part in the stock of the company. The contract was silent as to the time and place of payment. Held, that payment was not required to be made of either the money or the stock until a complete performance of the contract, or at least until each bridge was completed; and thereafter a suit to recover the stock could not be maintained without a proper demand and refusal. *Boody v. Rutland & B. R. Co.*, 24 Vt. 660.

A construction contract provided that the engineer should make monthly estimates of the work, eighty-five per cent. of the value of which should be paid and the remaining fifteen per cent. held until the contract should be completed and accepted by the engineer. Held, that the contractor could not recover any part of the fifteen per cent. retained without showing a complete performance of the contract or a sufficient reason for its non-performance. *Jackson v. Cleveland*, 19 Wis. 400.

28. Sufficient or substantial performance.—Where a railroad company agrees to furnish ground from which an embankment shall be laid by its contractors, it must furnish the ground within a reasonably convenient distance; and if it fails to do so the contractor has a right to demand additional compensation, though the contract provides that there shall be no charge for extra labor. *Chicago & G. E. R. Co. v. Vosburgh*, 45 Ill. 311.

A contract for grading a railroad provided that there should be no classification of materials other than earth, loose and solid rock, and that loose rock should comprise shale or soapstone, coarse boulders in gravel, cemented gravel, hard-pan, or any other material which could not be

plowed with a ten-inch grading-plow and drawn by six horses or mules. *Held*, that an estimate of work which allowed the price for grading the loose rock for 25 per cent. of the work done, where it required six horses to pull the plow, and then they could only work half the time, and for 50 per cent. where eight horses were required, was a substantial compliance with the contract. *Ross v. McArthur*, 52 Am. & Eng. R. Cas. 1, 85 Iowa 203, 52 N. W. Rep. 125.

The contract with a railroad company bound the contractor to erect, build, and complete, furnishing all the material, the bridges remaining to be built along the line of its road between two points specified therein and situated in the same county. The times for payment were fixed to commence from the completion of each bridge. *Held*, that for the purpose of obtaining a lien and of filing the affidavit mentioned in section 2 of the act of May 4, 1877 (74 Ohio Laws 168), such contract is an entirety. *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37.

Equity never aids in enforcing a forfeiture when the contract has been substantially carried out. So where one railroad contracted with another to build a road by a given time, when the builders were to have a lease thereon at a nominal rent, the lease to be forfeited if not completed on time, a court refused to enforce the forfeiture where the road was completed within six days of the agreed time and its completion on time was only prevented by unexpected difficulties and unusually severe weather. *Oil Creek R. Co. v. Atlantic & G. W. R. Co.*, 57 Pa. St. 65.

29. Waiver of strict performance.—

Where an agreement for the construction of a railroad provides that the engineer, if he thinks the work does not progress in such manner as to insure its completion by the stipulated time, may, upon giving ten days' notice, hire men to have the work done at the expense of the other party, if the engineer fails to give such notice and to avail himself of the conditions in the contract, the company will be held to have waived their claim for damage by reason of the non-completion of the work by the time specified. *Grant v. Savannah, G. & N. A. R. Co.*, 51 Ga. 348, 7 Am. Ry. Rep. 81.

Where a contractor fails to perform his contract within the time fixed the other party may permit him to go on and finish

the work, and then accept it, without waiving anything except the performance on the day fixed. In such case the contractor could recover for his work on the *quantum meruit*, and the other party could recoup such damages as he may have sustained by the delay. *Snell v. Cottingham*, 72 Ill. 161.

Where contractors are to be paid for each mile of railroad as completed, and the company allows the contractors to work along the line without fully completing any portion, and pays, with full knowledge of the facts, upon contractors' own estimates, it cannot afterward object to the completion of the work, after it has taken possession, on the ground that the work was not completed mile by mile as agreed, and that the contractors have been overpaid on their estimates. *Wood v. Boney*, (N. J. Eq.) 21 Atl. Rep. 574.

Where the monthly estimates of the work done were made out according to the price designated in the contract, and received and receipted for as under the contract, thus treating the contract as subsisting, the parties thereby waived the consequences of previous changes, and the contractors could not afterwards avail themselves of such changes to recover upon a *quantum meruit* for work done in pursuance of the written agreement. *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 82.

Proof that a railroad company has leased its road and that the lessees run cars thereon is a sufficient acceptance of the road as between the company and its contractors, and the only remedy that the company has against its contractors is that it may insist on the reduction of the contract price for a failure of the contractors to completely finish the road. *Barker v. Troy & R. R. Co.*, 27 Vt. 766.—APPROVING *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151.

30. Extra work.—(1) *Claims for, when allowed.*—In an action for work and labor plaintiff cannot recover for work done in excess of what is called for by the terms of the contract, occasioned by his own unskillfulness and neglect. But if such extra work was done at defendant's request, or in consequence of any change in the plans and specifications for the work, plaintiff is entitled to recover. *Fruin v. Crystal R. Co.*, 89 Mo. 397, 14 S. W. Rep. 557.

Where it was stipulated that payment should be made for building a railroad partly in money and partly in stock, the

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payment for extra work may be recovered in money. *Smith v. Boston, C. & M. R. Co.*, 36 N. H. 458.

Where contractors engaged to make a railroad tunnel of certain dimensions at a fixed price, additional work, such as the removal of rock that may fall from the roof, or removing rocks that may be outside of the line of the tunnel, should be paid for extra; or an extra width of excavation made by orders of the company's engineer must be paid for extra, unless it is made necessary by the carelessness of the contractor or his workmen. *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396.

Where a contract states specifically the manner in which culverts are to be built, the materials to be used, etc., and the plan of construction is afterward changed by the railroad's chief engineer, as allowed by a clause in the contract, the contractors can recover, after a reference to original plans, for the extra work entailed by the change. *Logan v. Stranahan*, 12 U. C. Q. B. 15.

Where a party employed to build a railroad expended labor in incasing the embankments with stone to protect them from high water and floods, for which he claimed extra compensation—*held*, that if this work was done at the request of the company (it not being specified in the original contract), and was not to secure his other work from injury or destruction by high water, he was entitled to recover what the services were reasonably worth, but that this was a question for the jury to find from the evidence. *Western Union R. Co. v. Smith*, 75 Ill. 496.

Under a contract to do certain work for a railroad company, part payment therefor to be received in the bonds of the company, the contractors sued and recovered for a breach of the contract and for extra work performed. *Held*, that if extra work was required by changes in the original plans of a railroad company, and was done at its instance, the contractors were entitled to compensation therefor. *Orange, A. & M. R. Co. v. Placide*, 35 Md. 315.

(2) *When not recoverable.*—Where a written construction contract provides that no claim for extra work shall be allowed, unless upon the written order of the engineer, a recovery cannot be had by showing that extra labor was done upon a verbal order from the engineer, though the contract provides that the engineer shall have power to make alterations in and additions to the

work. *White v. San Rafael & S. Q. R. Co.*, 50 Cal. 417. *Simpson v. New York, W. S. & B. R. Co.*, 19 J. & S. (N. Y.) 419.

Where a construction contract binds contractors to make certain embankments and do the work necessary for the construction of a road for a certain contract price, if the banks fall in after a cut is made, the dirt must be removed without extra compensation. *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39, 14 N. E. Rep. 832, 12 N. Y. S. R. 821, 10 Cent. Rep. 442; *reversing 38 Hun 636, mem.; rehearing denied in 13 N. Y. S. R. 901.*

Where contractors engaged to make necessary excavations and embankments on a portion of a railroad at a fixed price per cubic yard for earth and a certain extra price in case of rock excavation, what is known as hard-pan is included in the earth-work, and evidence of a custom to pay more for hard-pan is inadmissible. *Nesbitt v. Louisville, C. & C. R. Co.*, 2 Spears (So. Car.) 697.—*REVIEWING Dubois v. Delaware & H. Canal Co.*, 12 Wend. (N. Y.) 334.—*REVIEWED IN Colcock v. Louisville, C. & C. R. Co.*, 1 Strobb. (So. Car.) 329.

A construction contract provided that the contractor should construct "seven rock culverts, more or less, as directed by the engineer." The structures were not specially described, but there was a provision in the contract that "no claim for extra work, or for work not provided for in the contract, will be made or allowed, unless upon written order of the engineer." *Held*, that no work on the culverts could be considered extra work, though done under the direction of the engineer. *Houston, E. & W. T. R. Co. v. Trentem*, 63 Tex. 442.

A contractor who does extra work for a railway company under a verbal arrangement with the company's engineer which allows for a variance in the prices from those fixed in the original contract, but stipulates that, with the exception of that variance, the provisions of the contract shall be considered as applicable to the extra work, cannot afterwards reject the terms of the contract and claim remuneration for the work as upon a *quantum meruit*. *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72.

Contractors for the construction of a railway under a contract providing that the company shall not be liable under any circumstances to pay the contractors a greater sum than the amount named, are bound to

complete the railway for such amount and cannot demand payment of claims for extra work beyond such amount. *Sharpe v. San Paulo Brazilian R. Co.*, 27 L. T. 699, L. R. 8 Ch. 605, n.

Where a contractor for the construction of a section of a railway agrees to do the work for a lump sum and to waive all claim for any further sum for extra work, or as damages or otherwise, by reason of any change, alteration, or addition made to such works, or in the plans or specifications, he will be bound thereby. *Berlinguet v. Queen*, 13 Can. Sup. Ct. 26; affirming 1 Can. Exch. 346. *Jones v. Queen*, 7 Can. Sup. Ct. 570, 1 Can. Exch. 360.—QUOTING *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 607.

31. Breach, and its effect.—Where a contract for railroad construction provides for payment in instalments as the work progresses, a failure to pay an instalment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further and to recover the profits which he would have earned had the contract been fully performed. *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. Rep. 589.

In case of such failure the contractor may either at once rescind the contract and recover for materials furnished or services rendered, or he may proceed with performance and bring suit to recover the past due instalment. *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. Rep. 589.

32. Effect of delay.*—Where a contract for railroad construction provided that if the work did not go on fast enough the chief engineer of the road could take charge of it and carry it on at the contractor's expense and for his benefit, it seems that he would be entitled to take the teams and tools of the contractor for the purpose, especially if there was not time enough to get others. Whether the contractor would have a right to so mortgage them as to prevent this, *quære*. *Hendrie v. Canadian Bank*, 11 Am. & Eng. R. Cas. 610, 49 Mich. 401, 13 N. W. Rep. 792.

A railroad contractor cannot be excused from completing a road in the time agreed, where he is to be paid in the stocks and bonds of the company, where it appears that they are duly delivered to him until the

month before the contract expired, when he declared that he was not able financially to proceed further unless more stock were issued him, or more funds furnished, which was refused on the ground that he had already been overpaid; and where it further appeared that he claimed a balance due him, but, instead of insisting on it, importuned the company for money, and even offered to mortgage his individual property to secure the same. *Wood v. Boney*, (N. J. Eq.) 21 Atl. Rep. 574.

Where a railroad was in process of construction, and the railroad company, by resolution of its directors, duly recorded and signed by the company's secretary, granted to the contractors, upon certain conditions, an extension of the time for completing the road, and the contractors accepted, in writing, the terms of the extension, with a proviso that the guarantors for the payment of monthly estimates of the cost of the road would consent to the extension, in a proposed written form of assent, the contractors might waive the proviso without thereby invalidating the extension. *Rutherford v. Brachman*, 40 Ohio St. 604.

Where such guarantors, with full knowledge of the facts, have assented to or ratified such extension of time, by parol, or by their conduct, they will not be discharged from liability, as guarantors, for the payment of such monthly estimates. *Rutherford v. Brachman*, 40 Ohio St. 604.

Where the testimony established *prima facie* that a written assent to such extension of time was signed by all the guarantors except one, who was willing to sign the same but had omitted so to do through inadvertence, such written assent is admissible in evidence to the jury, as a fact or circumstance tending to show the actual assent of the guarantors to the extension. *Rutherford v. Brachman*, 40 Ohio St. 604.

A provision in a contract for the construction of a railroad, that if the company should be delayed in acquiring title to lands, or for other reasons, the contractor should not be entitled to damages therefor, but shall have extension of time, applies to delay caused by the company failing to have a survey made for the work. *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. Rep. 168.

Where, by a contract with a railway company, the contractor agrees that in case of his default the company may enter and complete the works, using his plant, with

* Loss to contractor by delays caused by company, see 52 Am. & Eng. R. Cas. 12, *abstr.*

power to sell the same to reimburse it for any loss or damage which it might sustain, and by a second contract, entered into after the contractor had become embarrassed, the company agreed to complete the works, using the contractor's plant, which should be returned to him on the completion of the work, the provisions of the second contract are in substitution of the corresponding provisions of the first, and on the completion of the works the company must deliver up the plant to the contractor. *Hunt v. South Eastern R. Co.*, 45 L. J. C. P. D. 87.

The agreement between the plaintiff, a contractor, and the defendant railway company, whereby, if the plaintiff did not proceed with expedition to construct a bridge, the defendant had a right, on giving notice, to take the contractor's implements and materials and complete the work, and to have a lien on such implements and materials, was lawful, not being made in contemplation of bankruptcy. *Hawthorn v. Newcastle-upon-Tyne & N. S. R. Co.*, 3 Q. B. 734, n., 2 Railw. Cas. 288.

Where a railway company's agreement with a contractor gives it the right on seven days' notice to use his implements and materials for completing the work, provided he does not proceed expeditiously, it has no right to use such implements and materials until the expiration of the seven days' notice, and a previous use amounts to a conversion. *Hawthorn v. Newcastle-upon-Tyne & N. S. R. Co.*, 3 Q. B. 734, n., 2 Railw. Cas. 288.

During the time of the construction of a railroad the company became financially embarrassed, and one of the stockholders entered into an agreement with a contractor for the completion of the work by a certain day, in consideration of which the stockholder agreed to give his individual note in part payment for the work. *Held*, that suit could not be maintained against the stockholder without proof that the work was completed within the time fixed. *Slater v. Emerson*, 19 How. (U. S.) 224.

Where plaintiffs contracted to grade a certain section of defendant's road within a given time, and, after the time had expired, the work being unfinished, defendants abandoned the construction of that part of their line and directed plaintiffs to cease—*held*, that the fact that the contract was not fully performed within the stipu-

lated time was no ground of recovery of damages by defendants in an action in equity to enforce a lien for the work done, it not appearing that any complaint was made of the failure to complete the work within that time. *Hutchinson v. New Sharon, C. V. & E. R. Co.*, 16 Am. & Eng. R. Cas. 617, 63 Iowa 727, 18 N. W. Rep. 915.

A contract contained a provision that the right of way over the said sections of railway should be furnished. *Held*, that the contractors were entitled to damages for an unreasonable delay in procuring the right of way. *Lauman v. Young*, 31 Pa. St. 306.

A contract between M. and a railroad company provided that if M. should fail to prosecute the work with such force as the engineer should deem adequate to its completion within the time specified, the engineer in charge might proceed to employ such number of laborers, etc., as might be necessary to insure the completion of the work within the time limited, pay all persons so employed, and charge the amount to M.; or the company might, for any neglect or omission on the part of M. in complying with the contract, declare the same abandoned and render it void, and the percentage, or as much thereof remaining in the hands of the company as might be necessary for its complete indemnity, be forever retained. *Held*, that on the voluntary abandonment of the work by M., and while the contract was still subsisting between the parties, there was nothing in the hands of the company due to the contractor which could be attached. *Strauss v. Chesapeake & O. R. Co.*, 7 W. Va. 368.

The contract contained the following clause: "The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against her majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of her majesty's agents; and it is agreed that, in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the minister." *Held*, that this clause covered delay by the government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss. *Mayer v. Queen*, 2 Can. Exch. 403.

33. Forfeiture.—Where a construction contract provides that the company shall

retain fifteen per cent. of the amount of the contract until the work is completed, it will be considered as a mere indemnity to the company; and when the work is completed it must be paid over, unless the jury believe that the company has suffered damages, through the negligence or default of the contractors, equal to the sum retained. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307.

A construction contract provided that ninety per cent. of the monthly estimate should be paid, and that if the engineer was dissatisfied he might terminate the contract, whereupon "any balance of money due should be forfeited by the party of the first part to the corporation." *Held*, that a discontinuance of the contract would not work a forfeiture of monthly estimates that had been made and past due. *Ricker v. Fairbanks*, 40 Me. 43.—QUOTING *Williams v. Androscoggin & K. R. Co.*, 36 Me. 201.

A provision in a contract with a railway company for the construction of certain works by a certain date, by which it is stipulated that if the contractor fails to proceed at the rate of progress required by the company's engineer, the contract shall, at its option, be considered void as far as relates to the works to be done, and all sums that might be due, together with all implements and materials in the contractor's possession, shall be forfeited to the company, can only be enforced within the time fixed for the completion of the works. *Walker v. London & N. W. R. Co.*, 45 L. J. C. P. D. 787, L. R. 1 C. P. D. 518, 36 L. T. 53, 25 W. R. 10.

Where a contract for the construction of a railway contains a clause specifying the date upon which the work is to be completed, under penalty of forfeiture, and the work is not completed as specified, but the parties continue to work under the contract, and payments are made as therein provided, the contract is to be treated as governing the transaction, and can be determined at the will of the company, as provided in the clause of forfeiture. *McDonnell v. Canada Southern R. Co.*, 33 U. C. Q. B. 313.

34. Waiver of forfeiture.—A contract between a railroad company and its bridge contractor provided for the retention of fifteen per cent. of the monthly estimates, and also for a forfeiture of the contract if not completed by a certain time. The provision for forfeiture was waived by the com-

pany. *Held*, that this waiver was also a waiver of an absolute forfeiture of the fifteen per cent.; so also a failure to pay the monthly estimates entitled the contractor to the fifteen per cent. previously reserved, with interest from the date of the estimates. *Henderson Bridge Co. v. O'Connor*, (Ky.) 11 S. W. Rep. 957.

35. Liquidated damages or penalty.—The character and importance of the work, and the great difficulty in estimating the damages resulting from the failure to perform a contract for the construction of any portion of a railroad, render it just and proper that the party so failing should be held to pay the stipulated forfeiture, unless it be so exorbitant that to enforce its payment would be to inflict a penalty on the party in default instead of merely making good the injury. *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56.

A contract for construction of a street railway in a town stipulated that, upon failure to complete it within a certain time, the contractors should forfeit and pay to the town the sum of \$500, and, as an earnest of good faith, should deposit with the town council a good and sufficient bond in the sum of \$500, conditioned that they would comply with such stipulation. *Held*, that the sum fixed was intended as compensation for breach of the contract, and that it was a liquidated damage, and not a penalty. *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. Rep. 1093.—REVIEWING *Indianola v. Gulf, W. T. & P. R. Co.*, 56 Tex. 594.

A construction contract provided that fifteen per cent. of the monthly estimates should be retained until the completion of the work; and further provided that if the work did not progress satisfactorily, the chief engineer might terminate the contract, "and every claim and part thereof shall become null and void, and the unpaid part of the balance of the work shall be forfeited by the said parties of the first part to the use of said company, in the nature of liquidated damages." At the time that the contract was discontinued the company had retained the fifteen per cent., and owed in addition thereto a certain amount of the monthly estimates. *Held*, that such amount, as well as the fifteen per cent., was included in the forfeiture. *Geiger v. Western Md. R. Co.*, 41 Md. 4.—QUOTED IN *Pennsylvania R. Co. v. Reichert*, 10 Am. & Eng. R. Cas. 429, 58 Md. 261.

2. Rights, Duties, and Liabilities of Contractors.

36. Compensation, generally.—

Where one contracts to complete for a company a tunnel which a former contractor had undertaken but abandoned, and takes upon himself the performance of the contract made with such former contractor, erroneous excavations made by the former contractor in his headings out of the true line cannot, in the account between the company and the new contractor, be estimated for the benefit of the latter. *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396.

The engineer having the right under the contract to stop the work, if the means for carrying it on should fail, and having informed the contractor that the work must be stopped unless he would receive his monthly payments in orders which were at a discount, and the contractor having consented to receive them, he is not entitled to recover for the amount of the depreciation of said orders. *Kidwell v. Baltimore & O. R. Co.*, 11 Gratt. (Va.) 676.

A contract provided that an estimate should be made on the first of every month, of the value of the work, and 90 per cent. thereof paid to the contractor, and that upon the completion of the entire work a final estimate should be made, and the balance then appearing due should be paid to the contractor. M. abandoned the work in the middle of a month. *Held*, that M. had earned nothing for the previous part of the month, and that the reserved estimates never became a debt which could be attached. *Strauss v. Chesapeake & O. R. Co.*, 7 W. Va. 368.—REVIEWING *Baltimore & O. R. Co. v. Gallahue*, 14 Gratt. (Va.) 563; *Hennessey v. Farrell*, 4 Cush. (Mass.) 267.

The action was brought to recover the value of work done by the plaintiff in grading a railroad, in pursuance of a contract with the defendant. By the terms of the contract the road was to be constructed according to a general route and profile, subject to such variations as the chief of the road might direct. The plaintiff was to receive a fixed price for the work, whether the variations ordered by the engineer should make the work heavier or lighter. During the progress of the work the plaintiff entered into a secret arrangement with the engineer to give the latter a share of the profits of the contract if he would, without

impairing the character of the road or doing anything to the disadvantage of the railroad company, make such variations, whenever possible, as would make the work less expensive. The engineer made certain variations and received a percentage of the plaintiff's profits. The changes made by the engineer were, however, all submitted to and approved by the railroad company. *Held*, that the arrangement with the engineer, conceding it to have been improper, did not prevent the plaintiff from recovering the reasonable value of his work. *Cor v. McLaughlin*, 76 Cal. 60, 18 Pac. Rep. 100; former appeals, 44 Cal. 18, 47 Cal. 89, 54 Cal. 605, 52 Cal. 590, 63 Cal. 196.

A contract for grading a railway provided that the company might relocate its road and change the grade line if deemed expedient; that whether the work became greater or less by any change that might be made, the contractors should be paid only for the actual work done. The work was divided into sections so as to make the excavation and embankment in each as nearly equal as possible. The line was changed after the contract was made, so that a certain number of feet, consisting of excavation, were included in a section wherein they were only paid for embankment. *Held*, that plaintiff, having been once paid for his work, could not demand payment upon a sectional division which would give him more. *Fish v. Wolfe*, 50 Iowa 636.

Under a contract to do certain work for a railroad company, part payment therefor to be received in the bonds of the company, the contractors sued and recovered for a breach of the contract and for extra work performed. *Held*, that the fact that either of the contractors had private means sufficient to carry out the contract, although not paid promptly by the company according to contract, would not release the latter from liability. *Orange, A. & M. R. Co. v. Placide*, 35 Md. 315.

37. Extra pay.—Where a party contracts to lay the iron on a certain number of miles of a railroad track, and is bound to complete the same before the ground should freeze, and the company is bound to furnish the iron and materials for that purpose, a failure of the company to furnish the iron necessary to complete the work before the freezing of the ground will authorize the contractor to abandon the contract and refuse to proceed further with it. But if he

afterwards, on being furnished with material, proceeds and completes the work without any new contract, it will be presumed that he proceeded under the original contract, and that will furnish the measure of his compensation; and he cannot recover extra pay by showing the work was worth more on account of the state of the weather or because the ground was frozen. *Western Union R. Co. v. Smith*, 75 Ill. 496.—DISTINGUISHED IN *Louisville & N. R. Co. v. Hollerbach*, 24 Am. & Eng. R. Cas. 340, 105 Ind. 137.

38. Conclusiveness of settlements with company.—Monthly settlements made between the contractors and company under a contract for the construction of a railroad—*held*, not to be conclusive as final settlements between the parties. *Ford v. St. Louis, K. & N. W. R. Co.*, 54 Iowa 723, 7 N. W. Rep. 126.

A contractor excavating a tunnel, during the progress of the work claimed additional compensation because of the inadequacy of the contract prices; also damages sustained by him in consequence of alleged delinquencies of the company in not furnishing cars to remove material and omitting to free the tunnel of water. The company added \$27,500 to the schedule prices in consideration that the contractor would release and discharge the company from all claim to damage by reason of any non-performance by the company, and the contractor thereupon executed such release. *Held*, that the allowance by the company was not a settlement of the accounts which then existed between the company and the contractor, but left the question as to the amount of work to be settled by a subsequent account. By such allowance the contractor was simply estopped from setting up any claim for damages prior to the date of the release. *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396.

39. The contractor's bond.—K. executed a bond, with the other defendants as sureties, for the performance of a contract to build a section of a railway. The contract obligated K. to pay all just claims against him or against any subcontractor, for materials, services, and labor used by him in the construction of the road. *Held*, that an action might be maintained on the bond by one holding claims for services and materials furnished to and used by the contractor in performing the work specified in the contract. *Wells v. Kavanagh*, 70 Iowa

519, 30 N. W. Rep. 871.—FOLLOWING *Jordan v. Kavanagh*, 63 Iowa 152.

A surety in a contractor's bond is not bound by the admissions of the principal that certain claims are such as were intended to be secured by the bond. *Wells v. Kavanagh*, 70 Iowa 519, 30 N. W. Rep. 871.

Under the Kansas act of March 1, 1872, entitled "An act to protect laborers, mechanics, and others in the construction of railroads," and requiring railroad companies to take bonds from their contractors to secure payment of laborers, mechanics, and material-men, and giving a right of action on such bonds to persons holding claims against such contractors, the railroad company is to be deemed the obligee in such bond; and a bond given under the statute is not vitiated by a provision that the contractors will save the company harmless from all "trouble, damage, costs, suits, and judgments." *Atchison, T. & S. F. R. Co. v. Cuthbert*, 14 Kan. 212.

The liability of the obligors on the bond given by a contractor with a railroad company for the construction of its road, under section 35, c. 84, Comp. Laws 1879, p. 785 (Laws 1872, p. 286), does not extend to an account for provisions furnished to the laborers employed by a subcontractor upon the order of such subcontractor. Such an account is not for provisions supplied to the contractor within the terms of the statute. *Wells v. Mehl*, 25 Kan. 205.—RECONCILING *Kent v. New York C. R. Co.*, 12 N. Y. 628; *Mundt v. Sheboygan & F. du L. R. Co.*, 31 Wis. 451; *Redmond v. Galena & S. W. R. Co.*, 39 Wis. 426; *Peters v. St. Louis & I. M. R. Co.*, 24 Mo. 586.—FOLLOWED IN *St. Louis, K. & A. R. Co. v. Cobb*, 25 Kan. 388.

Under Kan. Comp. L. 1879, p. 785, ch. 136, requiring the company to take a bond from its contractors or be liable for their debts, proof that a bridge builder was paid by a railroad company for work on a bridge, payments being made upon estimates of the company's agents as the work progressed, is sufficient to support a finding that such bridge builder was a "contractor." The removal of an old bridge and the substitution of a new one is a "construction" of a "part" of the company's road within the statute. *Atchison, T. & S. F. R. Co. v. McConnell*, 25 Kan. 370.

Where a bond is given by the contractor, under the Kansas statute, and goods are furnished by a merchant, in payment *pro*

tanto of the wages of the laborers constructing the railroad, under an agreement with a sub-subcontractor and upon his orders, and such goods are not intended to be and are not used in the construction of the railroad, the sureties on the bond of the contractor are not liable to the merchant for the purchase price of such goods. *Parkinson v. Alexander*, 37 Kan. 110, 14 Pac. Rep. 466.

H. tendered an offer for the construction of a line of railway and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit 5 per cent. of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action against H. on the bond—*held*, that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into, H. was not liable on the bond. *Brantford, W. & L. E. R. Co. v. Huffman*, 19 Can. Sup. Ct. 336; *affirming* 18 Ont. App. 415.

40. Right to sublet the work.—

A contract provided that no subcontract should be made without the written approbation of the engineer and of the party giving out the contract, under penalty of forfeiture of the work so sublet. *Held*, that a subletting of a portion of the work previous to the execution of the contract, and which had been acquiesced in by all the parties, did not work a forfeiture under this provision. *Lauman v. Young*, 31 Pa. St. 306.

In a contract for the performance of work and labor in the construction of a railroad, a provision against the subletting of any part of the work without the written consent of the chief engineer is intended for the benefit of the railroad company and may be waived by it; and proof of the facts that the engineer knew portions of the work were sublet, directed the subcontractors when and where to work, and

made estimates of their work for the chief contractor, and that the president of the company, having knowledge of these facts, made no objection, is competent evidence to establish a waiver. *Danforth v. Tennessee & C. R. Co.*, 93 Ala. 614, 11 So. Rep. 60.

A contract for grading a railroad provided that the contractors should receive in payment the wages for actual labor of men and teams in performance of the work, at prices to be approved by the chief engineer, with ten per cent. additional as compensation to themselves. *Held*, that they might properly sublet the work with the approval of the chief engineer, and were entitled to recover their percentage computed upon the amount paid the subcontractors, such amount being the wages paid them for the performance of the work as contemplated in the contract. *Ford v. St. Louis, K. & N. W. R. Co.*, 54 Iowa 723, 7 N. W. Rep. 126.

41. Right to abandon work and recover for part performed.—

If a party who contracts to grade a railroad is prevented by the party with whom he contracts from completing his whole contract, he is justified in abandoning it and may claim to be paid a fair compensation for the work performed. *Cox v. Western Pac. R. Co.*, 47 Cal. 87.

The conduct which will justify a party in abandoning a contract and entitle him to recover, not only for the work he has done, but for the profits he can prove he would have made had the contract gone on, must be such as in effect prevents the performance of the contract; the acts for which the abandonment is made must be such as indicate an intention not to fulfil and such as affect the very substance of the contract; and further, it should appear that such acts are deliberately done and are not the result of something inadvertently overlooked. Speculative and fanciful profits cannot be recovered, but profits which it is proven the party would have made are in such case recoverable. *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 560.—*QUOTING Toledo, W. & W. R. Co. v. Jacksonville Depot Bldg. Co.*, 63 Ill. 308; *Leopold v. Salkey*, 89 Ill. 412.

Where a party undertakes to do the grading on a railroad and gives a bond for the faithful performance on his part, he is entitled to receive the compensation provided for in the contract, at the times and in the

manner therein provided for; and those with whom the contract was entered into have no right to withhold any part thereof for the purpose of paying the hands or subcontractors on such work; and if they do so the contractor has the right to abandon the contract and sue for and recover compensation for damages. *Dobbins v. Higgins*, 78 Ill. 440.

Continued and repeated defaults in payment, according to the provisions of a contract, will justify the contractors in abandoning the work before its completion, and entitle them to recover as damages what the uncompleted portion of the work would amount to, at the contract price, beyond the cost to them of completing it. *Grand Rapids & B. C. R. Co. v. Van Deusen*, 29 Mich. 431.

But failure to pay monthly, as agreed, would not of itself, and in the absence of any showing that any delay was authorized by the company, entitle the contractors to recover extra compensation for the labor performed on account of the delay occasioned by such default in payment, and the consequent increased cost of the work. *Grand Rapids & B. C. R. Co. v. Van Deusen*, 29 Mich. 431.

Where work is done in constructing a railroad, under a contract which provides for payment by instalments at stated periods, and the payments are not made, the contractor may quit the work, and he will then be entitled to recover for all that he has done at the contract rates; and this notwithstanding the contract provides in express terms that the work shall be steadily prosecuted, without intermission, to final completion. *Bean v. Miller*, 69 Mo. 384.

A railroad company was to pay its contractors at stated times as the work progressed. During the progress of the work the company refused to pay a certain instalment, then due, unless the contractors agreed to pay out the money under the direction of the company, which the contractors refused to do, and abandoned the work. *Held*, that the contractors were entitled to recover for the work already done, but could not recover damages for the profits they would have made in the future if the work had been completed, as the breach of the company did not deny the right to complete the work; and the financial condition and standing of the parties

could not affect their rights. *Moore v. Taylor*, 5 N. Y. S. R. 202, 42 Hun 45, 651.

A railroad company made a breach of a construction contract, and the contractors ceased work. A part of the work had been sublet, and workmen employed by the subcontractors, who were unpaid, filed liens against the company for work done and materials furnished. With the consent of the subcontractors the company paid off these claims and took an assignment of them to itself. *Held*, that such claims could be set off in a suit by the contractors against the company for money earned and unpaid at the time the work was discontinued. *Moore v. Taylor*, 5 N. Y. S. R. 202, 42 Hun 45, 651.

42. Rights of contractor's assignee.—The assignment of a contract to construct a railroad, without consideration from the assignee, but made to facilitate the completion of the contract, and to secure at the earliest moment the entire sum to be paid under it, for the benefit of the assignor's creditors, is not fraudulent and void. But if the assignment were intended to hinder and delay the creditors of the assignor, and therefore fraudulent, the assignee, being a party to the intent, may not complain in equity, after the money payable under the contract has been paid over, on completion, according to the terms of the assignment. *Ahl's Appeal*, 129 Pa. St. 49, 18 Atl. Rep. 475, 477.

A railroad contractor assigned or sublet a part of the work, with a provision in the contract that he "should have the same control over the execution of the work, sale of the stock, etc., as if the contract had never been executed." *Held*, that the contractor was thereby constituted the attorney-in-fact of the subcontractor, and that the latter could not question his authority, except on the ground of a want of good faith. *McReynolds's Appeal*, 66 Pa. St. 102.

Contractors agreed with S. that if he would indorse their notes to a bank to the amount of \$10,000 they would give an assignment to the bank of all money to be payable to them from a railway company on contracts made and to be made with the railway company to secure the notes. They also agreed with the bank that, in consideration of an advance to them of the money upon their notes indorsed by S., they would assign to the bank the moneys, and give the bank manager a power of attorney to collect from the railway company the

said moneys. *Held*, that this transaction amounted to an equitable assignment to the bank of the moneys in question as to existing and future contracts. *Molsons Bank v. Carscaden*, 8 *Man.* 451.

43. Remedy for breach by company.—If the company annulled the contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained; and of the reasons which influenced the company the jury were to be judges. *Philadelphia, W. & B. R. Co. v. Howard*, 13 *How. (U. S.)* 307.—*QUOTED IN Myers v. New York & C. R. Co.*, 2 *Curt. (U. S.)* 28; *South & N. Ala. R. Co. v. McLendon*, 63 *Ala.* 266; *Black River Lumber Co. v. Warner*, 93 *Mo.* 374; *Smith v. O'Donnell*, 8 *Lea (Tenn.)* 468.

When a railroad company enters into a construction contract with the understanding that it may discontinue the work if the enterprise should prove unprofitable, and that the contractor's claim shall depend upon the company being in funds, the contractor cannot insist that the work shall go on, in the face of absolute failure, in order that the company may have funds with which to pay him. *Zimmer v. Brooklyn Sub-R. Co.*, 25 *N. Y. S. R.* 974, 53 *Hun* 637, 23 *Abb. N. Cas.* 382, 6 *N. Y. Supp.* 316.

After the commencement of a work its progress was delayed by the failure on the part of the company to secure the right of way, and by the inability of the company to pay the monthly estimates according to the terms of the contract. The work was afterwards actively resumed, and no claim was then made by the contractors on account of any supposed breaches by the company. *Held*, that there was no ground upon which their assignees in bankruptcy could maintain a claim for damages on account of breaches of the contract by the company. *Geiger v. Western Md. R. Co.*, 41 *Md.* 4.

In such case evidence was inadmissible to show that the new parties to whom the work was allotted, after the annulment, proceeded with no more expedition than the old contractors. *Geiger v. Western Md. R. Co.*, 41 *Md.* 4.

44. Remedy for delay caused by company.—Where, in the progress of work, the contractor was stopped by an injunction issued by a court of chancery, he

was not entitled to recover damages for the delay occasioned by it, unless the jury should find that the company did not use reasonable diligence to obtain a dissolution of the injunction. *Philadelphia, W. & B. R. Co. v. Howard*, 13 *How. (U. S.)* 307.

A provision in a contract for the construction of a railroad, that at the completion of the work the balance due shall be paid the contractor on his giving a receipt in full and rendering clear receipts to the company from all subcontractors, discharging the company from all liability to them, exempts the company from all liability to a contractor for damages recoverable against him by a subcontractor, for breach of the subcontract, consisting in the delay of the company to have the road surveyed. *O'Connor v. Smith*, 84 *Tex.* 232, 19 *S. W. Rep.* 168.

The fact that on the completion of the work the contractor is paid, on the giving of a bond to hold harmless the company from all suits or claims for work or material, or for damages done in construction of the road, in no way affects the contract as regards the claim of the subcontractor for damages for a delay. *O'Connor v. Smith*, 84 *Tex.* 232, 19 *S. W. Rep.* 168.

During the progress of a contractor's work for a railroad, a new agreement was made, releasing him from completing his contract, and stipulating for what matters compensation should be made, but not providing for any damages for the suspension of work during the existence of the original contract. *Held*, that it was not error for the court, after affirming the point of defendants that no such damages could be claimed, to add that the question was not material, because of the supplemental agreement; for by it no compensation for such a cause was provided. *Memphis, C. & L. R. Co. v. Wilcox*, 48 *Pa. St.* 161.

Though the plaintiff had been dismissed and the work taken off his hands, the company were not thereby released from paying for the work he had done, as stipulated in the supplemental agreement what it was fairly worth; nor could his claim be restricted to what was coming to him under the final estimates of the engineer; nor, after their agreement to pay, could the company claim to set off against any balance due the plaintiff the expense and loss incurred in completing his unfinished work.

Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. St. 161.

A construction contract provided that certain preliminary work should be prepared by the employer. The contract was to be completed by a fixed time. The contractor expended money in preparing for the execution of his part of the labor, but the employer negligently failed to have the preliminary work done at the proper time, by reason of which the contractor suffered damage. He gave the employer due notice that the delay would occasion him damage, for which he should hold the employer liable. *Held*: (1) that the employer could not, by negligently failing to proceed with his part of the work, impose upon the contractor the election between the burden of carrying the material prepared until it should suit the employer to proceed, or of abandoning his contract; (2) that the contractor could proceed with the work when the employer's part thereof had been completed, and recover the contract price therefor, together with damages for any direct loss which he had suffered by reason of the defendant's unreasonably suspending the work; (3) that the allowance of six per cent. interest on the sum which the contractor had invested during the time which the work was suspended by the negligence of the employer was proper. *Louisville & N. R. Co. v. Hollerbach*, 24 Am. & Eng. R. Cas. 340, 105 Ind. 137, 5 N. E. Rep. 28. —DISTINGUISHING *Bush v. Chapman*, 2 Greene (Iowa) 549; *Western Union R. Co. v. Smith*, 75 Ill. 496; *Shaw v. Turnpike Co.*, 3 P. & W. (Pa.) 445.

45. Remedy for fraud.—Where a railroad bribes the officers of a rival road which is in process of construction, and obtains control of the road, and by false reports breaks down the credit of a contractor and secures a forfeiture and repeal of a state land grant, and secures a subsequent grant to itself of the same lands, it becomes liable to the contractor for the damages he has sustained, and the land so obtained may be subjected in equity to payment of the damage. *Angle v. Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1, 14 Sup. Ct. Rep. 240.

A railroad contractor cannot complain of fraud and deceit on the part of the company if, after he knows, or ought to have known, of it, he enters upon the work, accepts pay at the contract prices, and makes new engagements and agreements

thereunder. Such conduct amounts to an estoppel, and extends to all who come under the contractor. *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583, 6 So. Rep. 467.

46. Liability for injuries to property.—A contractor agreed to construct piers for a railroad bridge over a navigable river, and, among other things, was to maintain buoys with lights thereon as a warning to persons navigating the river. During the progress of the work a pier became submerged and the buoy that had been constructed was washed away, and on account of the absence of the light a barge was run onto the pier and lost. By the terms of the contract the person doing the work was an independent contractor. *Held*, that the contractor was liable for a loss of the barge by reason of a failure to provide the necessary warning signals within a reasonable time after the buoy was washed away. *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 672.

By the terms of a construction contract, the contractor, who was charged with building piers in a navigable river, was required to maintain necessary buoys with lights thereon as a warning to persons navigating the river. *Held*, that a navigator could not be charged with contributory negligence for running on a submerged pier where no light or warning was given. *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. Rep. 672.

47. Liability for personal injuries caused by servants.—Contractors with a company for the construction of a railway are liable for injuries caused by negligence of their servants in running their train. *Campbell v. McGregor*, 29 New Brun. 644. —APPROVING *Canada Southern R. Co. v. Phelps*, 14 Can. Sup. Ct. 132; *Canada Atlantic R. Co. v. Moxley*, 15 Can. Sup. Ct. 145. DISTINGUISHING *New Brunswick R. Co. v. Robinson*, 11 Can. Sup. Ct. 688.

The Code of Tennessee, §§ 1166, 1167, touching the liability of railroads for failing to observe certain precautions in running their trains, do not apply to railroad contractors. *Griggs v. Houston*, 8 Am. & Eng. R. Cas. 359, 104 U. S. 553.

Where it is the duty of contractors for the construction of a railroad to keep the crossings in safe condition for public use, and a verdict against both the company and the contractor is returned for failure to do so, a verdict over against the contractors

for the amount for which the railroad company is primarily liable is properly rendered at the request of the railroad company. *Dallas & G. R. Co. v. Able*, 37 Am. & Eng. R. Cas. 453, 72 Tex. 150, 9 S. W. Rep. 871.

Where contractors leave a crossing in such a condition as to injure a person traveling on the highway, they are liable over to the railroad company, whether they be regarded as independent contractors or not. *Dallas & G. R. Co. v. Able*, 37 Am. & Eng. R. Cas. 453, 72 Tex. 150, 9 S. W. Rep. 871.

A contract between a company and a builder for the extension of a platform contained a provision that the contractor would indemnify the company "for any damages arising from injuries sustained by mechanics, laborers, or other persons, by reason of accidents or otherwise." Held, such indemnity provision did not cover damages caused by the company's engine killing one of the contractor's employes. *Manhattan R. Co. v. Cornell*, 7 N. Y. Supp. 557, 27 N. Y. S. R. 300, 54 Hun 292.

48. Liability to company for overpayments, advances, etc.—Where a railroad company advances money to a subcontractor, the contractor is only chargeable therewith so far as authorized by him. *Mineral Point R. Co. v. Keep*, 22 Ill. 9.

Although a railway company's engineers, in collusion with a subcontractor, certify that certain work is done according to specifications, yet if it proves not to have been so done, the company may maintain an action against the contractor, but the fraud of the engineer may be considered in regard to the question of damages. *South Eastern R. Co. v. Waiton*, 2 F. & F. 457.

49. Liability to company on abandonment of road.—A railroad contractor agreed with the company to construct and equip its entire road for \$1,600,000, of which \$250,000 was to be paid in cash and cash assets, and the balance in the bonds and stock of the company, the price named being more than twice the cash value of the work. The contract provided that payment should be made on monthly estimates, and in such of the said descriptions of payment as the contractor deemed would best subserve his purpose in doing the work; but the contract fixed no time for the completion of the work. It also provided that both the parties should aid in converting said assets, bonds, and stock into means for carrying

on the work, and that the contractor need not carry it on faster than such means would serve. The contractor performed work under the contract to the nominal amount of \$117,000, which, at his request, was mostly paid him in the cash assets, and then, the charter of the company having expired by its own limitation, the work was suspended by mutual consent and the road abandoned, its bonds and stock thus becoming worthless. Held, that the contractor is bound to account to the company for all actual profits realized from the work. *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St. 208.

50. Liability to laborers.—The fact alone that a man is a contractor on a particular section of a railroad does not render him primarily liable for the board of hands employed to work on it; especially if there is evidence of a subletting by him. *Cahill v. Ragan*, 20 Mo. 451.

A firm or partnership composed of private persons, not being a railroad corporation or a *de facto* railroad corporation, having a subcontract to construct a part of the road of a railroad corporation organized under the laws of this state, and operating cars and trains on the road in the prosecution of their work, and having servants and employes at work upon the road and in charge of their trains, are not within the statute enlarging the liability of the master to a servant injured by the negligence of a fellow-servant (ch. 93, Laws of 1874, Gen. St. 1889, p. 1251). *Beeson v. Busenbark*, 44 Am. & Eng. R. Cas. 584, 44 Kan. 669, 25 Pac. Rep. 48.—DISTINGUISHING *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298; *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. Rep. 103.—DISTINGUISHED IN *Hornsby v. Eddy*, 56 Fed. Rep. 461.

C. & Co. were contractors to grade the roadbed of a certain railway, and sublet a portion of the contract to one D. D. was insolvent, and had taken the contract for less than the amount required to grade the same. C. & Co., finding the amount due for labor exceeded the estimates, and to prevent the filing of liens against the railway, which they had agreed to prevent, demanded and obtained from D. the pay-rolls, and undertook to pay the hands employed by D. One B. D., having rendered services for D. as foreman on said contract, and with his team, presented his account for such services to C. & Co., who paid only in

part. *Held*, that C. & Co. were liable for such services. *Carlile v. Dauchy*, 26 *Neb.* 337, 41 *N. W. Rep.* 1119.

The prevention of filing liens for services rendered in grading the railway was a sufficient consideration between employes of such subcontractor, in grading the railway roadbed, and the contractor, who had agreed to save the railway company harmless from such liens. *Carlile v. Dauchy*, 26 *Neb.* 337, 41 *N. W. Rep.* 1119.

3. Powers of the Company's Engineer.

a. In General. Estimates and Certificates.

51. The authority vested in the engineer.*—In an action against a railroad company upon a contract for work upon the roadbed, made by the chief engineer, it must be shown that the chief engineer had authority to bind the company. *Lake Erie & W. R. Co. v. Faught*, 31 *Ill. App.* 110.

A covenant to do the work according to a certain schedule, which schedule mentioned that it was to be done according to the directions of the engineer, bound the company to pay for the work, which was executed according to such directions, although a profile was departed from which was made out before the contract was entered into. *Philadelphia, W. & B. R. Co. v. Howard*, 13 *How. (U. S.)* 307.

So also, where the contract was to place the waste earth where ordered by the engineer, it was the duty of the engineer to provide a convenient place; and if he failed to do so, the other party was entitled to damages. *Philadelphia, W. & B. R. Co. v. Howard*, 13 *How. (U. S.)* 307.

A provision in the agreement that, if the contractor fails to employ such a force of workmen as the company's engineer may deem adequate to a completion of the work within the time fixed, the latter may do so and charge the contractor with the amount paid in wages, must be given a reasonable construction; and control of the work cannot be taken from the contractor without sufficient cause. *Louisville, E. & St. L. R. Co. v. Donnegan*, 34 *Am. & Eng. R. Cas.* 116, 111 *Ind.* 179, 9 *West. Rep.* 641, 12 *N. E. Rep.* 153.

In such case there is an implied under-

* Construction contract. Authority vested in company's engineer, see note, 12 *AM. & ENG. R. CAS.* 319.

taking on the part of the railroad company that the engineer to be put in charge shall be competent, honest, and reasonably careful, and that he will not make delays, caused by his wrongs, a pretext for taking the work out of the control of the contractor. *Louisville, E. & St. L. R. Co. v. Donnegan*, 34 *Am. & Eng. R. Cas.* 116, 111 *Ind.* 179, 9 *West. Rep.* 641, 12 *N. E. Rep.* 153.

Where the work which the contractor undertakes to do is to be performed under the direction of the railroad company's engineer, who is clothed with almost absolute authority as to the manner in which it shall be done, the contractor is entitled to pay for piling of the original length ordered by the engineer and subsequently shortened at his direction, notwithstanding a provision in the contract that the contractor is to be paid for the lineal feet of piling actually used. *Louisville, E. & St. L. R. Co. v. Donnegan*, 34 *Am. & Eng. R. Cas.* 116, 111 *Ind.* 179, 9 *West. Rep.* 641, 12 *N. E. Rep.* 153.

A written contract entered into by the trustees of a railway company cannot be modified by the construction engineer, nor has he any power to contract verbally with the contractor with reference thereto. *Campbell v. Cincinnati Southern R. Co.*, (Ky.) 34 *Am. & Eng. R. Cas.* 113, 6 *S. W. Rep.* 337.

When, in a suit against a railroad company to recover on a contract made with its chief engineer to construct depot buildings, it appeared that the contract for building the road was let to an investment company, all inferences of authority from defendant to any one but the contractor to do any part of the work ceased. *Bond v. Pontiac, O. & P. A. R. Co.*, 26 *Am. & Eng. R. Cas.* 571, 62 *Mich.* 643, 29 *N. W. Rep.* 482.

After a railroad cut was made the earth from the sides caved in, and plaintiffs, who were subcontractors, removed it upon the request of the engineers in charge, and under an agreement that the work was to be outside of the contract. It appeared that the work was under the general supervision of the contractors, who made the subcontracts. Plaintiffs sued the company for the price of this extra work. *Held*, that the fact that the company took possession of the work after its completion was not such a ratification of the agreement as to bind it to pay for the work, in the absence of evidence of any knowledge on its part of

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the agreement with the engineers. *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39, 12 N. Y. S. R. 821; reversing 38 Hun 636, mem.

In a contract providing that "whenever in the opinion of the chief engineer (of the railway company) this contract shall have been wholly completed by the party of the first part (the contractor) they (the railway company) will pay in currency, for the performance of the same in full, for material and labor as follows," etc. *Held*, that thereby the chief engineer did not have the power to finally determine the construction of the agreement. *Galveston, H. & S. A. R. Co. v. Johnson*, 74 Tex. 256, 11 S. W. Rep. 1113.—FOLLOWING *Galveston, H. & S. A. R. Co. v. Henry*, 65 Tex. 685.

The provision, in a contract with a railroad company, for the construction of their road to the satisfaction and acceptance of their engineer, has reference, as to its final acceptance, to the chief engineer. *Barker v. Troy & R. R. Co.*, 27 Vt. 766.

Contractors for the construction of a railway cannot, on mere verbal promises by the company's engineer under whose direction the railway was to be constructed, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal. *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597, 29 L. T. 9.

52. Engineer not disqualified by reason of interest.—The fact that the engineer was a stockholder in the company does not render a stipulation that the work shall be done under his direction invalid, for under the contract the engineer is not a judge between the parties, acting indifferently, but a person who represents the company, and will look after its interests. *Williams v. Chicago, S. F. & C. R. Co.*, 112 Mo. 463, 20 S. W. Rep. 631.—QUOTING *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 88.

The approval of the engineer in an action on such contract must be averred and proved. *Williams v. Chicago, S. F. & C. R. Co.*, 112 Mo. 463, 20 S. W. Rep. 631.

An engineer of a railway company is not disqualified from certifying under a contract payments to a contractor, although such engineer has become lessee of the railway at a rent depending on the amount so certified for. *Hill v. South Staffordshire R. Co.*, 11 Jur. N. S. 192, 12 L. T. 63.

53. Compensation of engineer.—In 1881 a chief engineer wrote a letter
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claiming compensation from the company for services to the middle of 1875. In 1882 he commenced a suit to recover for services from 1871 to 1875, but an amendment was allowed, claiming for services up to 1880. There was evidence that from 1875 to 1880 he performed various services for the company, and that he was to have had a salary, but the amount was never fixed. *Held*, that any inference to be drawn from the writing of the letter was for the jury, and there was evidence to go to the jury of a continuing employment subsequent to 1875. *Shanly v. Grand Junction R. Co.*, 4 Ont. 156.

54. Reimbursement of expenditures.—A declaration alleging that defendant employed plaintiff as civil engineer, to take charge of construction of a road, and authorized him to employ and hire teams and transportation in the course of such employment at defendant's expense, and that plaintiff employed and paid for teams, etc., in the performance of his duties, is not demurrable. Such contract entitles him to be reimbursed for reasonable outlay for means of transportation. *Pensacola & A. R. Co. v. Atkinson*, 20 Fla. 450.

55. Validity of engineer's estimates.—A stipulation in a construction contract, providing that it shall be executed under the direction of the company's engineer, by whose admeasurement the amount of work performed shall be determined, and whose determination shall be conclusive, is valid and binding, since it is a part of the consideration of the contract. *Williams v. Chicago, S. F. & C. R. Co.*, 112 Mo. 463, 20 S. W. Rep. 631.

The estimate of the expenses will not be affected by the inadequacy of the amount or the neglect of the agent to employ the usual and proper means of informing himself upon the subject, provided his conduct is *bona fide*—a fact to be submitted to the jury. *Wilson v. York & M. L. R. Co.*, 11 Gill & J. (Md.) 58.

A contractor for the construction of a bridge on a railroad having received the monthly estimates, based upon a particular construction of his contract, without objection, will be held to have acquiesced in that construction, and to be bound by it. *Kidwell v. Baltimore & O. R. Co.*, 11 Gratt. (Va.) 676.

Where the contract for building a road provided that the engineers of the com-

pany, on or about the first day of each month during the progress of the work, should make an estimate of all work done during the preceding month; and that on or before the fifteenth day of each month eighty-five per cent. of the value of such estimate should be paid by the company to the contractors; and that, at the completion of the work, a final estimate should be made, and the balance appearing due the contractors should then be paid to them—the work done during the last month of the life of the contract became the proper subject of a monthly estimate, and, in an action against the guarantors to recover the amount thereof, it was error in the court to withdraw from the consideration of the jury a final estimate made by the engineer, from which, by computation, might be determined the amount of such monthly estimate. *Rutherford v. Brachman*, 40 Ohio St. 604.

56. How measurements should be made.—A provision in a construction contract providing that the engineer shall supervise the work, with power to reject or condemn it, and that the amounts of the several kinds of work shall be determined by his measurements, whose decision should be final, is legal and binding; but the contractor has a right to be present when the measurements are made, and an *ex parte* measurement and estimate is not binding on him. *McMahon v. New York & E. R. Co.*, 20 N. Y. 463.

In making the measurement it is not necessary that the agent should give previous notice thereof to the parties, that they may be present at the performance of that duty; but if such agent is to make an estimate of certain expenses to be allowed the contractor, and he proceeds to do so, in the absence of, and without notice to the contractor, the latter will not be bound by the estimate. *Wilson v. York & M. L. R. Co.*, 11 Gill & J. (Md.) 38.

57. Measurement by engineer in person or by assistant.—Where the parties agreed that the work to be done by a contractor for a railroad should be measured by an agent in the employment of the company, whose measurement should be final and conclusive, it is indispensable, if he can be procured, that such agent should himself measure the work; and it is error for the court to instruct the jury that the measurement of a third person would be

conclusive (in the absence of fraud), provided it was adopted by the agent designated by the parties. *Wilson v. York & M. L. R. Co.*, 11 Gill & J. (Md.) 38.

Where a contract for grading and work on a railroad provided that the work should be done under the direction and supervision of the chief engineer of the company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and whose decision should be conclusive—*held*, that a measurement by an assistant engineer, estimating the embankments made by the contractors, was not conclusive upon the employers that the work was done according to the contract, and that the contractors were entitled to payment for the price thereof. *Snell v. Brown*, 71 Ill. 133.

Where a contract for the construction of a considerable portion of a railroad provides that the chief engineer shall be the sole judge as to the quantity of the work done and materials furnished, merely providing that he is to make the estimates, and not that he is to make personal measurements, the engineer is authorized to make such estimates on the reports of persons working under him, and cannot be required to take the evidence of the contractor or his witnesses as to the amount of work or materials furnished. *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. Rep. 276, 26 N. Y. S. R. 445.—*DISTINGUISHING McMahon v. New York & E. R. Co.*, 20 N. Y. 463.

58. Conclusiveness of measurements and estimates.—(1) *When conclusive.*—A contract between a railroad and its contractor that the estimates of the company's engineer shall be final and conclusive will be enforced, except in cases of fraud, or such gross mistakes as imply bad faith, or a failure to exercise an honest judgment. *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. Rep. 1035.—*FOLLOWED IN Chicago, S. F. & C. R. Co. v. Price*, 47 Am. & Eng. R. Cas. 298, 138 U. S. 185; *Galveston, H. & S. A. R. Co. v. Henry*, 35 Am. & Eng. R. Cas. 265, 65 Tex. 685.—*Wood v. Chicago, S. F. & C. R. Co.*, 39 Fed. Rep. 52. *Lewis v. Chicago, S. F. & C. R. Co.*, 49 Fed. Rep. 708.—*FOLLOWED IN Summers v. Chicago, S. F. & C. R. Co.*, 49 Fed. Rep. 714.—*Mitchell v. Kavanagh*, 38 Iowa 286.—*QUOTING Mansfield & S. C. R. Co. v. Vee-*

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An agreement entered into by a subcontractor with a railroad company, to grade land for said company, which provided that the work should be done under the supervision of the railroad company's chief engineer, whose classification and measurements of the work done were to be conclusive on all parties, is a valid contract, and binds the parties by the estimates of said engineer, unless they are shown to have been wrongfully, falsely, or fraudulently made. *Ross v. McArthur*, 52 Am. & Eng. R. Cas. 1, 85 Iowa 203, 52 N. W. Rep. 125.

Where, under such a contract, the engineer was instructed to use his best judgment in making the classifications, if there was no material error in his classification his estimates will not be set aside, even though the instructions did not strictly conform to the contract. *Ross v. McArthur*, 52 Am. & Eng. R. Cas. 1, 85 Iowa 203, 52 N. W. Rep. 125.

Where a bridge builder contracts with a railroad for the construction of a bridge, and the contract provides for periodical measurements and estimates by the company's engineer, the contractor is bound by such estimates, in the absence of an averment and proof of fault. *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 11 S. W. Rep. 957.

Under the provisions of the sealed instrument that the work should be done as directed by the engineer and should be paid for as estimated by the engineer in charge during the month, the kind and classification of the work was for the engineer, and his estimates, monthly and final, were conclusive upon parties, and parol testimony is inadmissible in an action on the contract to prove the reasonable value of the work. *McCauley v. Keller*, 40 Am. & Eng. R. Cas. 509, 130 Pa. St. 53, 18 Atl. Rep. 607.

Where a contractor agrees with a railway company to construct and deliver the railway completed by a certain day for a certain sum, he cannot, after the completion of the work, maintain any claim against the company on the ground that the amount of work to be executed was understated in

the engineer's specifications. *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597, 29 L. T. 9.

A railroad contracted to pay 80 per cent. of the price of dirt-work in grading its road on monthly estimates, with the provision that if the work was not carried on as fast as contracted the company might take possession and retain the 20 per cent., the work to be done "under the direction and to the approval and acceptance of the engineer of the company, who is to measure work." In the measurement the engineer did not allow for earth misapplied in making fills wider and higher than contracted, which measurement made the amount of work less than the required amount. *Held*, in the absence of fraud in the measurement, the estimate by the engineer was binding, and the contractors could not recover the 20 per cent. *Central M. T. R. Co. v. Spurck*, 24 Ill. 587.

(2) *When not conclusive.*—The estimates and decisions of an engineer of a railroad company are conclusive, in disputes with contractors, only when such is the positive stipulation of the contract; in every other case the estimate of the engineer is to be tested by its correctness; and, in an action by a contractor to recover a balance due for work, an instruction to the jury to rely on the engineer's final estimates, unless shown to be erroneous, is not error. *Memphis, C. & L. R. Co. v. Wilcox*, 48 Pa. St. 161.—REVIEWED IN *McGovern v. Bockius*, 10 Phila. (Pa.) 438.

If the alterations were not within the scope of the contract, but required of the plaintiffs a class of work more costly than that required in the contract, then the estimate of the engineer was not binding, because it was only in regard to the work done under the contract that his decision was to be final and conclusive. *Annapolis & B. S. L. R. Co. v. Ross*, 68 Md. 310, 10 Cent. Rep. 546, 11 Atl. Rep. 820.

Where it is stipulated in a contract for the construction of a railroad that the work to be done under it is to be paid for upon the estimates of an engineer, to be made at stated times, if the engineer makes only approximate estimates, and the contractor is prevented from completing the work through the fault of the other party, he may recover for the whole amount of work done, as well that of which no estimate has been made as that which has been estimated. *Bean v. Miller*, 69 Mo. 384.

A contract to haul and embank hard rock at a fixed rate per cubic yard provided that "the measurement of quantities will usually be made in the cuts or pits from which the material has been taken;" and "the quantities and amounts of work performed shall be determined by the chief engineer, and his determination shall be conclusive upon both parties." The engineer estimated the amount furnished by measuring the excavation from which the rock was taken. The contractor contended that the rock should have been measured after it was embanked. *Held*, that as the specifications showed that the measurements were not to take place in the cuts in all cases, the exception would have to be determined by outside testimony, by usage, or the practice of the company in like cases. The evidence was sufficient to warrant the conclusion that the provision as to measuring in the cuts was not usually enforced when solid rock was the material taken from them; while the determination of the engineer as to the matter submitted to him was final and conclusive, unless he was guilty of fraud, misconduct, or such gross mistake as would imply bad faith, or a failure to exercise an honest judgment, yet his decision had to be in accordance with the contract; he was to decide under the legal construction of the contract, not upon such construction as he chose; he could not adopt rules of measurement that the contract did not authorize, and if his measurements were based upon an erroneous view of the contract they did not conclude the parties. *Galveston, H. & S. A. R. Co. v. Henry*, 25 *Am. & Eng. R. Cas.* 264, 65 *Tex.* 685.—FOLLOWING *Martinsburg & P. R. Co. v. March*, 114 *U. S.* 549.—FOLLOWED IN *Galveston, H. & S. A. R. Co. v. Johnson*, 74 *Tex.* 256.

59. Necessity of obtaining his certificate of work done.*—(1) In general.—Where a construction contract provides that an estimate shall be made by the company's engineer as a condition precedent to payment, a request by the contractor to the company to have the measurements and estimates made is sufficient, and he is not bound to request the engineer to do so, but may recover the price of his work upon other evidence of the amount thereof, in

the absence of such estimates. *McMahon v. New York & E. R. Co.*, 20 *N. Y.* 463.

Where a construction contract provides that an engineer should make a final statement of the work done, after its completion, and in doing so he was not to be bound by certificates made from time to time as the work progressed, a promise made by the engineer before the work is completed, agreeing to a classification of certain excavations, is not binding on either party where he does not carry out such agreement in making the final certificate. *Dorwin v. Westbrook*, 71 *Hun. (N. Y.)* 405, 54 *N. Y. S. R.* 390, 24 *N. Y. Supp.* 955.

If payment for the work performed is dependent upon and to be made according to the engineer's estimates as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, etc., the obligation to pay will not arise until such estimates are made. *Herrick v. Belknap*, 27 *Vt.* 673.

Where the contract for the construction of a section of a railroad required any work done on the road to be certified to by the chief engineer before payment, until he so certifies and such certificate is approved by the commissioners the contractors are not entitled to be paid anything. *Jones v. Queen*, 7 *Can. Sup. Ct.* 570, 1 *Can. Exch.* 360.—REVIEWING *Ranger v. Great Western R. Co.*, 5 *H. L. Cas.* 72.

Where it is stipulated that a certain part of the contract price for the construction of a railway shall be retained until the completion of the work, and then paid on a certificate of the engineer, acceptance of the road is not a waiver of such certificate. *Ferguson v. Galt*, 23 *U. C. C. P.* 66.

(2) *Illustrations.*—Where a contract for the grading of a railroad provided that the engineer should in all cases determine the amount and classification of work done; that all work should be done to his satisfaction; that he should decide every question that might arise to the proper understanding of the contract, and that his decision should be conclusive and binding upon the parties—*held*, where the contractors for whom the work was performed and the engineer refused to take estimates, that the other party might have the work estimated by an engineer employed by him for that purpose, and that his evidence in respect thereto was admissible, for the purpose of showing the amount of work done, in an

*Certificate of contractor's engineer as a condition precedent to recovery by subcontractor, see 53 *AM. & ENG. R. CAS.* 11, *abstr.*

action to recover therefor. *Crawford v. Wolf*, 29 Iowa 567.

A contract for grading the road of a railroad company provided that eighty-five per cent. of the price therefor should be paid in monthly instalments as the work progressed and the balance within fifty days after the completion of the work and the production of a certificate of an engineer therein named as to the quantity of work done, to be determined by measurements taken after the completion. Measurements of the work done were made by an assistant engineer each month, but these were for the purpose merely of estimating the amount payable under the provision for payment of the monthly instalment. *Held*, that the provision of the contract requiring a certificate from the engineer as to the amount of work done before final settlement was valid; that the measurements taken monthly were not a compliance with such provision, and that plaintiffs were not entitled to maintain an action for the balance alleged to be due them under such contract until fifty days after the production of the certificate of the engineer therein named, or a showing of sufficient excuse for not producing the same. *McNamara v. Harrison*, 81 Iowa 486, 46 N. W. Rep. 976.

A railroad company entered into a contract with plaintiff to move a portion of its track, with a provision that the work should be done under the direction and to the satisfaction of a certain surveyor, whose certificate of the performance of the work should be a condition precedent to a right to demand payment. When the work was only partially completed, the surveyor ordered it stopped. *Held*, that the surveyor had a right to stop the work, but being discontinued, it dispensed with the certificate from the surveyor, and the contractor might recover for the work performed without it. *Devlin v. Second Ave. R. Co.*, 44 Barb. (N. Y.) 81.

Where a contract between a principal contractor with a railroad company and a subcontractor provided that the first of each month the estimate of the work should be made by the engineer and be conclusive between the parties, that payment should be made on such estimate, and that in any dispute the decision of the chief engineer should be conclusive, waiving right of action or remedy in law, so that the decision shall, in the nature of an award,

be final and conclusive—*held*, that had there been no provision for an arbitrament or no waiver of a right to sue at law, it was an essential prerequisite to an action for work done that the estimate should be made by the engineer. *Reynolds v. Caldwell*, 51 Pa. St. 298.—FOLLOWED IN *Howard v. Allegheny Valley R. Co.*, 69 Pa. St. 489.

60. Conclusiveness of engineer's certificate.—Where a contract with a railroad company for construction work provided for monthly payments to the contractor, "on the certificate of the engineer," and that the determination of the chief engineer should be conclusive on the parties as to quantities and amounts, and where, in executing the contract, each monthly estimate as made up by the division engineer was sent to the chief engineer, and the monthly payments were made on the certificate of the latter officer, his action in making such a certificate was held to be a "determination," under the contract, conclusive upon the parties in an action at law, in the absence of fraud, or of such gross error as to imply bad faith. *Chicago, S. F. & C. R. Co. v. Price*, 47 Am. & Eng. R. Cas. 298, 138 U. S. 185, 11 Sup. Ct. Rep. 290; *affirming* 38 Fed. Rep. 304.—FOLLOWING *Martinsburg & P. R. Co. v. March*, 114 U. S. 549.

A contract that the work shall be done to the satisfaction of the engineer on the road is an appropriate engagement, and will be enforced and carried into execution by the court; and whilst his certificate will not be regarded as conclusive and unassailable, yet it will be so where there is no fraud or special showing to avoid its effect. *Finegan v. L'Engle*, 8 Fla. 413.—FOLLOWING *Herrick v. Belknap*, 27 Vt. 673.—*Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597, 29 L. T. 9. *Canty v. Clarke*, 44 U. C. Q. B. 505.

Railroad contractors for two hundred miles of a road sublet a portion of the work to plaintiffs, who were to perform their work to the satisfaction and acceptance of the chief engineer or assistant engineers of the company. It was specially provided that the engineer was made an umpire to decide all the matters growing out of the work, and that his decision should be final and conclusive, the parties waiving all right of action at law or otherwise, and that the contractors, upon a final estimate, would pay the subcontractors the sums found due. Upon the completion of

the work the engineer gave his certificate and estimate, but the subcontractors made a claim for extra work done in excess of the engineer's estimate, and that he inserted in his final estimates the quantities without personal measurements. *Held*, that the engineer was not required to make personal measurements, but might rely upon the reports of his subordinates; that it was not his duty to hear evidence offered by the subcontractors as to the amount of work, and, in the absence of fraud, corruption, bad faith, or palpable mistake appearing on the face of his estimate, a court had no power to supervise it. *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. Rep. 276, 26 N. Y. S. R. 445.

61. Effect to pass title to materials.—Where under an agreement for the construction of a railway it is provided that the company's engineer shall certify the amount payable to the contractor in respect of the value of materials delivered, and that such certificates shall be paid by the company seven days after presentation, the property in "materials delivered," upon their being certified for, passes to the company, although the materials were not fixed. *Banbury & C. R. Co. v. Daniel*, 54 L. J. Ch. D. 265, 33 W. R. 321.

62. Settlement of accounts by engineer.—The engineer-in-chief of a railway company, who by a contract for the construction of a road is required to settle all accounts with contractors, has no power to alter the terms of the contract by a provision of which the contractors are not to receive, under any circumstances, a greater amount than the sum named. *Sharpe v. San Paulo Brazilian R. Co.*, 27 L. T. 699, L. R. 8 Ch. 605, n.

Contractors for the construction of a railway are bound by an agreement to abide by the certificates of the company's engineer-in-chief settling the accounts between the contractor and the company. *Sharpe v. San Paulo Brazilian R. Co.*, 27 L. T. 699, L. R. 8 Ch. 605, n.

63. Review of engineer's proceedings in the courts.—If an engineer or person selected to measure and estimate the work done under a contract is in the employ of one of the contracting parties, it is the duty of the court to scrutinize his estimates with great care. *Wood v. Chicago, S. F. & C. R. Co.*, 39 Fed. Rep. 52.

When a contract for the construction of a road provides that the engineer of "rail-

road company shall make and furnish to the contractor monthly estimates of work done, upon which the company shall pay a certain per cent., the balance to be retained subject to payment on completion of the work, upon a final estimate by the engineer; and that such monthly estimates are to be considered as approximate only, and are not to control the final estimate; and that the decision of the engineer shall be conclusive and in the nature of an award—the omission of the engineer to furnish the contractor with monthly estimates may afford a cause of action as a breach of covenant, but will not support a bill in equity to set aside the final award of the engineer, where the engineer has exercised his judgment and no fraud is shown. *Crumlish v. Wilmington & W. R. Co.*, 5 Del. Ch. 270. —QUOTING *Carter v. Carter*, 109 Mass. 309; *Sanborn v. Murphy*, 50 N. H. 65; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. (Pa.) 205; *Knox v. Symmonds*, 1 Ves. Jr. 369. REVIEWING *Randel v. Chesapeake & D. Canal Co.*, 1 Harr. (Del.) 233.

A stipulation in a contract between a railroad company and a contractor that the estimates made by the former's engineers as to the quality, character, and value of the work performed by the contractor shall be final and conclusive against the latter "without further recourse or appeal," cannot deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates. *Louisville, E. & St. L. R. Co. v. Donnegan*, 34 Am. & Eng. R. Cas. 116, 111 Ind. 179, 9 West. Rep. 646, 12 N. E. Rep. 153.

64. Relief against mistakes in estimates.*—A court will relieve against mistakes in estimates and measurements as follows: (1) Where the mistakes are apparent on the face of the estimate, or are clearly proven, though not so apparent; (2) where it is satisfactorily shown that the engineers failed, through oversight, to measure or estimate any particular part of the work; (3) where it appears that the engineer in charge put a wrong construction on any provision of the contract, where the engineers' interpretation of the contract is not to be final and conclusive. (4) But the court will not undertake to revise the decision of the engineer in determining the

* Relief against mistake in engineer's estimates, see 52 AM. & ENG. R. CAS. 8, *abstr.*

kind of material found in cuts, where it appears that his decision has been made in good faith; (5) and the presumption is that all measurements made by engineers are correct; and the court will disregard slight discrepancies between the estimates of the respective parties, and where the discrepancies are large, the estimates made by the company's engineers will be taken as true, unless clearly shown to be otherwise. *Lewis v. Chicago, S. F. & C. R. Co.*, 49 *Fed. Rep.* 708.

If the contractor might have refused to abide by the final estimate of the engineer, yet, having submitted his charges for the work done to the engineer, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer. *Kidwell v. Baltimore & O. R. Co.*, 11 *Gratt. (Va.)* 676.

If there was a final estimate, which was erroneous, and the contractor's covenants were broken, an action at law could not be maintained upon it, but resort must be had to the tribunal appointed by the agreement. *Reynolds v. Caldwell*, 51 *Pa. St.* 298.

A contractor agreed with a railroad company to make for it a certain part of its road, and was to receive a sum certain for every cubic yard of excavation and embankment, and for every section of the road cleared and grubbed. Monthly estimates were to be made by the company's engineer of the work done, and when the whole was completed it was to be inspected by the engineer, and payment was to be made in a manner specified for the amount of work estimated as above to have been done. Subsequently the contractor sued the railroad company for a sum alleged to be due, alleging that the engineer had omitted in his inspection and report certain of the work done by him. *Held*, that the company was bound to see that its engineer duly estimated the work done by the plaintiff and that it had failed in this duty, and that therefore plaintiff was entitled to recover. *Kistler v. Indianapolis & St. L. R. Co.*, 13 *Am. & Eng. R. Cas.* 314, 88 *Ind.* 460.

The Vermont C. R. Co. contracted with B. for the construction of their railroad, and B. contracted with the orator for the construction of a part of it. In both contracts there was a provision in reference to the conclusiveness of the engineer's estimates. *Held*, that there was no privity of contract between the orator and the Ver-

mont C. R. Co., and that he could not recover of them for work not estimated by the engineer, by reason only of a mistake, which they had not either directly or indirectly caused or connived at; and their indebtedness to B. for the same work for which he was indebted to the orator did not constitute a fund against which the orator had a claim. But if there was any connivance on the part of the Vermont C. R. Co. or their agents in bringing about the underestimates complained of, even if it was without the design ultimately to defraud, but only as a temporary expedient for present relief, the orator would be entitled to recover of them the loss which he sustained by reason thereof. *Herrick v. Belknap*, 27 *Vt.* 673.—APPROVING *Thayer v. Vermont C. R. Co.*, 24 *Vt.* 440.—APPLIED IN *Woodruff v. Rochester & P. R. Co.*, 108 *N. Y.* 39, 14 *N. E. Rep.* 832, 13 *N. Y. S. R.* 901, 10 *Cent. Rep.* 442. FOLLOWED IN *Barker v. Troy & R. R. Co.*, 27 *Vt.* 766.

Where a contractor, by the terms of his contract with a company for making a tunnel, was to execute the work "under the direction and constant supervision of the engineer of the company, by whose measurements and calculations the qualities and amounts of the several kinds of work performed under the contract should be determined"—*held*, that the engineer was the special agent of the company and not the agent of the contractor, as to the measurements and calculations made by the engineer or his assistants, and if they were not correct, and extra or unnecessary work and expenditure should result, the loss ought not to fall on the contractor but upon the company. *Seymour v. Long Dock Co.*, 20 *N. J. Eq.* 396.

65. Relief against fraud on part of engineer or company.—The provision in a contract for railroad construction that the work shall be executed and performed under the direction of the chief engineer or his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed shall be determined, does not prevent an appeal to the courts in case of fraudulent or unjust conduct of the engineer; and in such case testimony of other experts is allowable. *Byron v. Bell*, 16 *Daly (N. Y.)* 198, 10 *N. Y. Supp.* 693, 32 *N. Y. S. R.* 323.

The estimates made by an engineer may be impeached for fraud; that is to say,

it may be shown that the engineers in charge intentionally underestimated or overestimated the work. They may also be impeached by proof of gross errors in the measurements and calculations. If the evidence shows such errors, it either creates the presumption of fraud or warrants the conclusion that the engineers did not exercise that degree of care, skill, and good faith in the discharge of their duty which the law exacts; and in either event the court will disregard the estimates so far as necessary to do substantial justice. *Lewis v. Chicago, S. F. & C. R. Co.*, 49 *Fed. Rep.* 708.

Where a construction contract provides that the company shall pay the contractors for work on estimates and certificates of its chief engineer, the company is not required to pay until it is satisfied that the contractors are entitled to compensation; but it cannot arbitrarily refuse to pay because its engineer fraudulently withholds his estimates and certificates. *Fletcher v. New Orleans & N. E. R. Co.*, 19 *Fed. Rep.* 731.

Where the plaintiff entered into the agreement whereby he submitted to the classification and measurements of the engineer, with a full knowledge of the relation of the engineer to the defendant railroad company, such relation is not sufficient to establish fraud in the estimates made by the engineer. *Ross v. McArthur*, 52 *Am. & Eng. R. Cas.* 1, 85 *Iowa* 203, 52 *N. W. Rep.* 125.

In an action for work and labor by a contractor on a railroad against the company, under a special contract which provides that the final estimate of the engineer shall be conclusive upon the parties, if the plaintiff proves that the final estimate made by the engineer was fraudulently made, he may recover without proving further that he was unable to procure such final estimate as is required by the contract after demand on the company, or other proper exertions on his part. *Baltimore & O. R. Co. v. Polly*, 14 *Gratt. (Va.)* 447. *Baltimore & O. R. Co. v. Laffertys*, 14 *Gratt. (Va.)* 478.

In such a case the special contract provides that upon receiving the full amount of the final estimate made out agreeably to the terms of said contract, the contractor shall give a release under seal from all claims or demands whatsoever growing out of said contract. The giving such release is a condition precedent to the plaintiff's recovery, if the final estimate has been properly made out, but not if the final estimate

was fraudulently made. *Baltimore & O. R. Co. v. Laffertys*, 14 *Gratt. (Va.)* 478. *Baltimore & O. R. Co. v. Polly*, 14 *Gratt. (Va.)* 447. — **DISTINGUISHING** *Dimes v. Grand Junction Canal Co.*, 16 *Eng. L. & Eq.* 63. — **QUOTED IN** *Lynn v. Baltimore & O. R. Co.*, 60 *Md.* 404, 45 *Am. Rep.* 741.

In such a case, if the final estimate has been made out in accordance with the contract, and the full amount thereof has been paid to the contractor, then, in the absence of any proof of fraud or other misconduct on the part of the engineer, the action cannot be maintained. *Baltimore & O. R. Co. v. Laffertys*, 14 *Gratt. (Va.)* 478.

b. As Arbitrator.

66. Validity of provision making engineer arbitrator.—A stipulation in a contract for the construction, in part, of a railroad, that "the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," is binding upon the parties, and constitutes the engineer an arbitrator or umpire between them. *Herrick v. Belknap*, 27 *Vt.* 673. — **FOLLOWED IN** *Finegan v. L'Engle*, 8 *Fla.* 413. — *Denver, S. P. & P. R. Co. v. Riley*, 7 *Colo.* 494, 4 *Pac. Rep.* 785.

67. Effect of the provision to oust jurisdiction of courts.*—A stipulation, whereby parties to a construction contract name an umpire who shall settle differences between them, and agree not to resort to the courts, is against public policy and void. *Kistler v. Indianapolis & St. L. R. Co.*, 12 *Am. & Eng. R. Cas.* 314, 88 *Ind.* 460.

A provision in a railroad construction contract constituting the chief engineer of the company an umpire to determine all questions growing out of the contract, and making him the sole judge of the quality and quantity of work done and materials furnished, does not authorize the engineer to change the price to be paid where it has been fixed by contract; nor does such stipulation extend to extra work done outside of the contract. And in case the engineer refuses to measure or estimate the work, the contractor may recover payment therefor on other proof. *Starkey v. De Graff*, 22 *Minn.* 431, 18 *Am. Ry. Rep.* 444.

A provision in a construction contract to the effect that all questions and matters

* Effect of a provision referring matters in dispute to the chief engineer for final decision, see 24 *AM. & ENG. R. CAS.* 353, *abstr.*

growing out of the contract in dispute shall be submitted to and decided by the chief engineer, does not prevent the parties from bringing an action at law on the contract. *Hart v. Lauman*, 29 *Barb. (N. Y.)* 410.

A contract for the construction of part of a railroad provided that in case of dispute the engineer's decision was to be final and conclusive. *Held*, that a suit at law could not be maintained. *Howard v. Allegheny Valley R. Co.*, 69 *Pa. St.* 489.—FOLLOWING *Reynolds v. Caldwell*, 51 *Pa. St.* 298; *O'Reilly v. Kerns*, 52 *Pa. St.* 214.

68. What is covered by the submission.—The provision of a railroad contract that the decision of the engineer shall be final and conclusive in any dispute which may arise between the parties relative to or touching the same, does not include within its terms of submission damages happening to the plaintiff from a rescission of the contract. *McGovern v. Bockius*, 10 *Phila. (Pa.)* 438.—REVIEWING *Dubois v. Delaware & H. Canal Co.*, 12 *Wend. (N. Y.)* 334; *Memphis R. Co. v. Wilcox*, 48 *Pa. St.* 161.

Nor does it embrace a claim for damages for refusing to permit the contractors to proceed with the execution of the work. *Lauman v. Young*, 31 *Pa. St.* 306.

A construction contract provided that in case of disputes or differences between the company and the contractor "as to the construction or meaning of the agreement and specifications, or sufficiency of the performance of any work to be done under it, or price to be paid," such disputes or differences should be referred to the engineer. *Held*, that the aggregate amount of the work done under the contract was not one of the things that must be submitted to the engineer. *Denver, S. P. & P. R. Co. v. Riley*, 7 *Colo.* 494, 4 *Pac. Rep.* 785.

A contract for the delivery of 60,000 railroad ties, to be paid for upon the monthly certified estimates of a certain engineer, contained a provision that he should decide all disputes that might arise during the execution of the contract, and that his estimates and conclusions should be final and conclusive. *Held*, that this did not constitute the engineer the final umpire to determine mixed questions of law and fact that might arise, nor prevent a recovery by the plaintiffs in an action on the *quantum meruit* for 47,787 ties delivered and accepted. *Jennison v. Gray*, 29 *Iowa* 537.

In a contract for the construction of a railroad it was agreed that the engineer should be the sole judge of the quality and quantity of the work, and that there should be no appeal from his decision, except as thereafter provided. It was further agreed that any dispute relative to the performance of the work under the contract, or to any work not provided for in the contract, and all damages claimed by either party for non-compliance with the contract, should be referred to two engineers, whose decision should be conclusive between the parties. *Held*, in an action for work done under the contract and for extra work, that it was a condition precedent to the bringing the action that the amount due the plaintiff should be ascertained by the arbitrators. *Myers v. St. Andrews & Q. R. Co.*, 10 *New Brun.* 577.—APPLYING *Brown v. Overbury*, 11 *Ex.* 715. DISTINGUISHING *Scott v. Avery*, 5 *H. L. Cas.* 811, 2 *Jur. N. S.* 815; *Horton v. Sayer*, 4 *H. & N.* 642.

69. Form and sufficiency of the award or decision.—A stipulation in a railroad construction contract provided that "the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each and every of said parties do hereby waive any right to action, suit or suits, or other remedy in law or otherwise, by virtue of said covenants, so that the decision of said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties." *Held*, that such stipulation did not require that the engineer's award, as given to the contractor, should be signed by him in order to be binding on the company; in such a case there is a sufficient compliance with the contract if a copy of the award, signed by the engineer, is retained by the railroad company, and an unsigned copy delivered to the contractors. *Malone v. Philadelphia & R. R. Co.*, 157 *Pa. St.* 430, 27 *Atl. Rep.* 756.

70. Conclusiveness of engineer's award or decision.—Where by a contract for the construction of a railroad the engineer of the company is made the arbitrator to determine whether the contract has been complied with, his decision is binding upon the parties, and can only be set aside for fraud, illegality, or gross mistake. *Grant v. Savannah, G. & N. A. R. Co.*, 51 *Ga.*

348, 7 *Am. Ry. Rep.* 81. *Hot Springs R. Co. v. Maher*, 48 *Ark.* 522, 3 *S. W. Rep.* 639. *Langdon v. Northfield*, 42 *Minn.* 464, 44 *N. W. Rep.* 984. *O'Reilly v. Kerns*, 52 *Pa. St.* 214.—FOLLOWED IN *Howard v. Allegheny Valley R. Co.*, 69 *Pa. St.* 489.

Where there is an essential parol alteration of the written contract, and there is no stipulation providing that the engineer's decision shall be final as to matters of dispute arising under the contract as changed, the decision of the engineer is not binding; and where such decision covers indiscriminately the whole work it cannot stand as to a part. *Malone v. Philadelphia & R. R. Co.*, 157 *Pa. St.* 430, 27 *Atl. Rep.* 756.

A construction contract provided that "the engineer shall be the sole judge of the quality and quantity of all such work herein specified, and from his decision there shall be no appeal," and that if alterations were to be made, "such allowances or deductions shall be made therefor as the engineer may judge fair and equitable to both parties." *Held*, that such provisions constituted the engineer an umpire, and no recovery could be had for work not covered by his estimates, except upon the most positive proof of corruption or fraud, or of mistake in fact. *Vanderwerker v. Vermont C. R. Co.*, 27 *Vt.* 130.

A provision in a construction contract that "no claim shall be made or allowed for extra work unless the same shall have been done in pursuance of written contracts or orders signed by the engineer," and then the claims must be presented within a stated time, bars a recovery for extra work, unless made under the engineer's directions in writing, and presented within the time fixed. *Vanderwerker v. Vermont C. R. Co.*, 27 *Vt.* 130.

Where a construction contract provides—"And whereas the above work must be inspected and received, it is hereby agreed that the engineer of the company or some one appointed by him shall be the inspector of said work, shall determine when this contract is complied with according to its just and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same; and his decision shall be obligatory and conclusive between the parties to this contract, without further recourse of appeal," such a contract is legal and binding on the parties, and the decision of the engineer is conclusive upon the

parties, even as to the price of a species of excavation not mentioned in the specifications. *Condon v. South Side R. Co.*, 14 *Gratt. (Va.)* 302.—QUOTING *Faviell v. Eastern Counties R. Co.*, 2 *Ex.* 346.

Under a contract to supply rails to a railway company to the satisfaction of the company's engineer, where the contract shows that the parties intended the final expression of the engineer's satisfaction to be conclusive, although the contract contains certain expressions to the contrary, no action can be maintained for supplying defective rails after they have been accepted and laid down. *Dunaberg & W. R. Co. v. Hopkins*, 36 *L. T.* 733.

71. Engineer cannot act after resignation.—In a contract for the construction of a railroad it was provided that the decision of the chief engineer should be final and conclusive, in any dispute that might arise between the parties to the agreement relative to or touching the same. *Held*, that the individual who filled the office of chief engineer, when the adjudication was called for, was the proper person to decide disputes between the parties; and that one who had held the office of chief engineer at the time the contract was made, but who had resigned, was not empowered to adjudicate between them. If the company failed to appoint a chief engineer the parties would be at liberty to resort to the courts of law. *North Lebanon R. Co. v. McGrann*, 33 *Pa. St.* 530.—QUOTING *Ranger v. Great Western R. Co.*, 27 *Eng. L. & Eq.* 35.

72. When relief will be granted in equity.—Where a construction contract provides that the engineer shall make monthly estimates and upon completion of the work a final estimate, a failure to furnish the monthly estimates may be good ground for an action at law for a breach of contract; but, in the absence of fraud, will not support a bill in equity to set aside a final estimate made by the engineer. *Crumlish v. Wilmington & W. R. Co.*, 5 *Del. Ch.* 270.

Where a bill was filed by the contractors on a railroad against the railroad company, to set aside the award of an interested arbitrator and to have an account for damages sustained by the contractors for breach of contract on the part of the company—*held*, that a court of equity had jurisdiction to grant relief where it appeared that by the

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terms of the agreement it was stipulated between the parties "that all disputes and differences arising under the contract should be submitted to the engineer of the company, whose decision should be obligatory and conclusive between the parties, without further recourse or appeal," it appearing the engineer was a stockholder in the company to the amount of ten thousand dollars, which fact was unknown to the contractors at the time of making the agreement by which the engineer was selected as such arbitrator. *Milnor v. Georgia R. & B. Co.*, 4 Ga. 385.

73. Personal remedy against the engineer.—A clause of arbitrament is binding, although recourse to the tribunal selected is not reasonably possible by circumstances which the party could not control, and although the engineer refuses to act, and although there are such gross and palpable mistakes in the estimates as amount to fraud in the engineer. If the engineer undertook to act as umpire and fraudulently injured plaintiff, the remedy is by action against him, the guilty agent, and not by action on the contract. *Reynolds v. Caldwell*, 51 Pa. St. 298.

4. Subcontractors.

74. Relation with company, generally.—A subcontractor cannot pass by his immediate employer and sue the principal or proprietor of the work. *Lake Erie, W. & St. L. R. Co. v. Eckler*, 13 Ind. 67.

A railroad contractor was to furnish the iron and build a road, and receive pay in certain bonds. He then contracted with plaintiffs for the iron to be paid for in the same bonds. The contractor and plaintiffs then made a contract with the president of the company by which the bonds were to be deposited in bank, to be withdrawn to pay for the iron as the work progressed. The bonds became discredited, and plaintiffs filed a bill against the contractor and the railroad, to recover a balance due for iron, claiming that the contractor acted as agent of the railroad in the purchase. *Held*, that the contract for the deposit of the bonds in bank did not operate to make the company a party to the contract to purchase iron, and the agency being denied, the railroad was not liable. *Baltzer v. Raleigh & A. A. L. R. Co.*, 24 Am. & Eng. R. Cas. 354, 115 U. S. 634, 6 Sup. Ct. Rep. 216.

A railroad contractor was the principal

stockholder in the company and therefore had power to control its action. *Held*, that this fact alone would not constitute him the agent of the company in subletting the work, so as to make his contracts the contracts of the company, as between it and the contractors, where there seemed to be no intention nor representation by the contractor or company of such agency. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

When men employed in the construction of a road by contractors have quit work, the statement by the president of the company, in a speech to a mob of men, "Go back to work and I will see that you are paid"—*held*, not a contract with a subcontractor, who was present, to pay for all work done by him. The language was addressed to the striking men. *Indianapolis & St. L. R. Co. v. Miller*, 71 Ill. 463.

75. Rights of, when fixed by original contract.—A railroad contractor having made a general contract with another person to perform a portion of the work undertaken according to the original contract with the railroad company, the two contracts are so connected, and the one so dependent on the other, that they form one contract; and the subcontractor is entitled to the same benefits, as well as bound by the same conditions, as affected the first contractor under the original contract. *Price v. Garland*, 3 N. Mex. 285, 6 Pac. Rep. 472.

A contract subletting a portion of the work in building a railroad provided that the work was to be paid for according to the estimates made by the division engineer. After the work was completed the contractor refused to pay the subcontractors for the full amount of their work; thereupon they instituted suit against the contractor, but suspended the action under an agreement with the contractor by which he was to prosecute a suit against the company, with the assistance of the subcontractors, and to pay them all that he recovered on their sections. A large recovery was had from the company, but the contractor still refused to pay the subcontractors, on the ground that they were already overpaid and that he had recovered nothing on their sections from the company. *Held*, that it was error, in a direct action against the contractor, to refuse to submit the evidence of the new contract to the jury and to refuse to charge that the subcontractors

were entitled to recover whatever the contractor recovered from the company on the subcontractors' sections. Such discontinuance of the former suit was a valid consideration for the contract independent of any estimates by the engineer as provided for in the original contract. *Collins v. Barnes*, 83 Pa. St. 15.

76. Right to sue company on default of contractor.—If a railroad company let a contract to construct a road to a firm and that firm sublets the contract to another firm which does a large amount of work, and the first firm fails and does not pay the subcontractors, and the railroad company, to induce the subcontractors to go on with the work, agrees to pay to them the debt of the contractors, such agreement is founded on a valid consideration and is binding. *Chapman v. Pittsburgh & S. R. Co.*, 9 Am. & Eng. R. Cas. 484, 18 W. Va. 184.

A sum due to a subcontractor for labor performed in the construction of a railroad becomes the debt of the company, when judgment is rendered against the company, upon its drafts drawn in payment for such labor upon and accepted by its treasurer; and in determining the rights of such a creditor under a decree providing for the payment of all debts for the construction of a certain part of the road, it is immaterial whether the basis of the judgment was a contract between the company and the original contractor or with the plaintiff. *Ney v. Dubuque & S. C. R. Co.*, 20 Iowa 347.

In 1873 the I. M. & H. R. Co. contracted with A. for the construction of the road from Helena to Forest City for a specified compensation, payable in instalments, which being unable to pay, they, in 1874, issued to A. change tickets in the sum of five dollars, in a form prohibited by statute and payable to bearer in freight or passage six months after the completion of the road. A., with the knowledge and consent of the company, delivered a part of the tickets to a subcontractor, B., for work done by him in 1875. Six months after the completion of the road the company refused to honor the tickets held by B. and he sued them for the amount of work represented by the tickets. *Held*: (1) that B. was the equitable assignee of the demand which the tickets professed to represent and could recover so much of the claim of A. against the company as was

represented by the tickets, and they, though illegal, were evidence of the amount; (2) the contract with A. being entire and indivisible, the statute of limitations did not run against any part of the demand until the whole road was completed; (3) but as the work was payable in instalments, B.'s demand bore interest from the time he received the tickets. *Iron Mountain & H. R. Co. v. Stansell*, 43 Ark. 275.

A contract between a railroad company and a contractor for the construction of the road provided that the contractor should be liable for the payment of the wages of his laborers; and when, in the opinion of the president of the company, it should be necessary to secure the laborers, the president should pay them, and their receipts should be a sufficient voucher against the contractor, as so much paid on the contract. The president of the company, in order to prevent the laborers quitting work, promised to see them paid, and thereupon appointed a timekeeper to keep the time of the laborers, and paid all the hands laboring on the road, including those employed by subcontractors. *Held*, that this was not an abandonment of the contract between the company and the contractor, and that, if the company was liable to the subcontractors for any work done by them or their men, the amount of the liability would be measured by the original contract. *Indianapolis & St. L. R. Co. v. Miller*, 71 Ill. 463.

A railway contractor, after agreeing that the material furnished by him for construction should become the property of the company as soon as estimated by its engineer, sublet the job of fencing, subject to the conditions of his contract with the company. The contractor was paid eighty-five per cent. on monthly estimates. The subcontractor furnished timber, but did not do his work within the time limited, and the company took possession of the timber. The contractor had before this surrendered his contract. The subcontractor sued the company in assumpsit and recovered. *Held*, by an equally divided court, that the judgment should be affirmed. *Sherwood v. Saginaw, T. & H. R. Co.*, 16 Am. & Eng. R. Cas. 605, 53 Mich. 317, 19 N. W. Rep. 14.

77. Contractor not liable if contractor gave bond.—Where a railroad company takes from the contractor engaged in the construction of its road a good and

sufficient bond, such as is required by chapter 136 of the Laws of 1872, it cannot be held liable for the debts due from the contractor for the labor and material which go into the building of such road. The filing of the bond in the office of the register of deeds is not a condition precedent to immunity from such liability. *Mann v. Burt*, 35 Kan. 10, 10 Pac. Rep. 95.

The company cannot be held liable for the debts due from the contractor for the labor of teams in constructing the road, whether such labor was used in connection with the services of the person furnishing the same or not. *Mann v. Burt*, 35 Kan. 10, 10 Pac. Rep. 95.

Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the company is not chargeable. *Mann v. Burt*, 35 Kan. 10, 10 Pac. Rep. 95.

78. Right to recover for material prepared but not used.—A railroad subcontractor may recover the price of materials prepared for the construction of the road, though not actually delivered, where it appears that they were so cut and shaped as not to be marketable for other purposes, under a contract providing that in the event of the cancellation of the construction contract that subcontractors shall be paid for labor done and materials furnished up to the date of cancellation. *Dickinson v. Gray*, (Ky.) 9 S. W. Rep. 281.

79. Liability of company for goods furnished to subcontractor.—Where a railway company contracts with another railway company for the construction of its road, although no bond is taken by the former company from the corporation with which the contract is made, yet the liability of the first company does not extend to an account for provisions or goods furnished to a subcontractor. *St. Louis, W. & W. R. Co. v. Ritz*, 11 Am. & Eng. R. Cas. 35, 30 Kan. 30, 1 Pac. Rep. 27.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Davis*, 25 Am. & Eng. R. Cas. 305, 34 Kan. 199.

80. Right to recover for extra work ordered by engineer.—Where a subcontractor for the construction of a portion of a railway agrees that he shall be paid upon the certificate of the contractor's en-

gineer that the work has been fully completed, and that the engineer shall estimate extra work at such prices as he shall deem just and reasonable, and his decision shall be final, he will be bound thereby, and the certificate of the engineer is a condition precedent to his right to recovery. *Gulbault v. McGreevy*, 18 Can. Sup. Ct. 609.

The plaintiff, as a subcontractor under one B., contracted to build a section of defendant's road, and the engineers of the company had authority to direct the removal of earth from one section to another when needed, and by the contract between the company and B., the contractor, he, B., was bound to move earth from one section to another, but no engineer had power to bind the company (the defendants in this case) by any contract for grading or removing earth, and if B. was required by engineers so to move earth, he could obtain compensation under his contract. The plaintiff while at work on the section thus taken of B. was required by an engineer of defendants to move earth from the section he was building to another, under the assurance that defendants would pay for the same, it being extra haul. And this was beneficial to defendants, and plaintiffs charged them no more than it would have cost defendants to have procured the earth elsewhere, but it did not appear that the defendants ever consented to have plaintiff do it upon their credit, or that they had knowledge that plaintiff was doing it upon their credit; and the plaintiff has no general contract with defendants, their contract for all this work being with said B. Under these facts—*held*: (1) that plaintiff could not recover of the defendants for this labor; (2) that there was nothing in the general duties of an engineer that would authorize him to employ others to do the work on the road, which by express contract belonged to the contractors to do. *Thayer v. Vermont C. R. Co.*, 24 Vt. 440.—APPLIED IN *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39, 14 N. E. Rep. 832, 13 N. Y. S. R. 901, 10 Cent. Rep. 442. APPROVED IN *Herrick v. Belknap*, 27 Vt. 673. FOLLOWED IN *Barker v. Troy & R. Co.*, 27 Vt. 766.

One B. contracted in writing with the defendants to build their railroad, and the plaintiff subcontracted in writing with B. to build particular portions of it. By both contracts the work was to be done to the satisfaction and acceptance of the engineer

of the defendants, and no claim was to be made or allowed for extra work, unless it was performed under written contracts or orders signed by the engineer. The plaintiffs, in the execution of their contract with B., had made an excavation for a bridge, agreeably to the directions of the engineer, and had left it as finished; the engineer had found it necessary to have the excavation enlarged, and ordered it done. The plaintiff made the enlargement, but no contract was made between them and the defendants in reference to it. *Held*, that there was no ground for implying or presuming a contract; and that consequently the plaintiffs could not recover of the defendants therefor. So far as the work was extra, there could be no recovery for it, even under B.'s contract, there having been no written order of the engineer. *Vanderwerker v. Vermont C. R. Co.*, 27 *Vt.* 125.—APPLIED IN *Woodruff v. Rochester & P. R. Co.*, 108 *N. Y.* 39, 14 *N. E. Rep.* 832, 13 *N. Y. S. R.* 901, 10 *Cent. Rep.* 442.

The fact that the company had paid similar claims would not affect their liability to plaintiff, where there was nothing to show that plaintiff had knowledge of such payment at the time he did the work, and was induced thereby to do it. *Vanderwerker v. Vermont C. R. Co.*, 27 *Vt.* 125.

81. Remedy for breach of contract by contractor.—A subcontractor for the construction of a railroad is not bound to procure the right of way, and if he is prevented from fulfilling his contract by reason of the fact that the company has not a right of way over some of the lands through which the road is to run, and the owners refuse him permission to enter and do the work, this is a sufficient excuse for his failure. *Bean v. Miller*, 69 *Mo.* 384.

Where defendants, having contracted to build a railroad, gave plaintiff an oral subcontract to grade certain sections, and defendants were unable to have the work ready for plaintiff at the time designated because the railroad company had not fixed the grade—*Held*, in an action by plaintiff for damages for breach of the contract, that it was a question for the jury whether the contract was dependent upon the railroad company establishing the grade in time. *Hammond v. Beeson*, 112 *Mo.* 190, 20 *S. W. Rep.* 474.

The plaintiff was entitled to recover, not

alone for loss of profits on his contract, but for the reasonable value of the services of teams and workmen while idle, and for the necessary incidental expenses, where the evidence showed that he was ready to begin work at the time specified, and that by reason of defendant's promises he was kept in idleness for some time with his teams and workmen and then informed that he could not do the work. *Hammond v. Beeson*, 112 *Mo.* 190, 20 *S. W. Rep.* 474.

A contract subletting a portion of the work of building a tunnel provided that the contractor should furnish as many cars as he could conveniently supply for removing material from the mouth of the shaft. It was further provided that if the subcontractor did not drive the work to the satisfaction of the chief engineer that the contractor should have the right to enter upon and take possession of the work, and put on as many men as would insure the completion of the work. Subsequently the contractor gave notice that the engineer was dissatisfied, and entered upon the work and completed it without the consent of the subcontractor, whereupon the subcontractor brought suit. There was some evidence of bad faith on the part of the contractor. The court charged that if the contractor, by unreasonably withholding cars from the subcontractor, caused the delay, or designedly embarrassed him in his work, and procured the notice from the engineer to be given merely to get possession, then the subcontractor ought to recover; and further charged that the clause as to furnishing cars did not mean that the contractor might furnish such as suited his whim, but as many as he could without inconvenience to himself; and that if plaintiff was entitled to recover at all he was entitled to recover all the profits that he would have made if he had been permitted to finish the work. *Held*: (1) that there was no error in the court's charge; (2) that damages arising after the suit was brought might be allowed. *McAndrews v. Tippet*, 39 *N. J. L.* 105.

In an action upon a contract for the grading of a railroad, to recover damages for a breach of the contract by the defendant, the original contractor, in preventing the plaintiff, a subcontractor, from completing the work, the difference between the probable cost of doing the work and the contract price is a proper measure of damages. *Smith v. O'Donnell*, 8 *Lea (Tenn.)* 468,—

QUOTING *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 320.

In such an action it is incompetent to prove by the plaintiff the amount of the work remaining to be done and its probable cost; and the fact that after stating that the quantity might be so much, he confesses that he does not know and cannot pretend to state the quantity, will not make the evidence incompetent, although it may render it of little value. *Smith v. O'Donnell*, 8 Lea (Tenn.) 468.

In an action by a subcontractor upon a contract for grading a railroad to recover damages for a breach of the contract in preventing him from completing the work, the loss which the plaintiff may have sustained by the foreclosure of a trust assignment on the stock used by him in performing the work, or by the levy upon his tools, after he has been compelled to stop the work, is not an element in ascertaining the damages occasioned by such stoppage; and it was error to permit the plaintiff, over the objection of the defendant, to make such proof. *Smith v. O'Donnell*, 8 Lea (Tenn.) 468.

82. Right to recover from contractor for work done.—Where a person contracts with a railroad company to grade and construct a division of the road, the company to retain a certain percentage as a security for the completion of the entire work, and the contractor sublets a portion of the division to another, and it is agreed between them that the contractor shall retain a certain percentage as a security for the completion of the subcontract, and the subcontractor completes his portion, and it is received, he may recover the sum agreed upon, including the percentage of the contractor, although the latter may have failed to entitle himself to his percentage as against the railroad company. *Blair v. Corby*, 29 Mo. 480.

A railroad contractor sublet a part of the work, agreeing to pay 90 per cent. of the monthly estimates within 10 days after he received it from the company, the 10 per cent. to be retained as security for the due completion of the work. The subcontractor's work was duly completed and accepted, but the contractor made default on other parts of the road, and the company put an end to the contract. It appeared that there was due the subcontractor \$719.61 for percentages which had been paid the contractor, and \$790.75 for work done which

had not been paid the contractor owing to his default. *Held*, that the subcontractor was entitled to recover the full amount of both sums. *McBrien v. Shanley*, 24 U. C. C. P. 28.

83. Right of contractor to keep back estimates—Forfeitures.—Where a general contractor for building a railroad, who is held liable to the railway company to protect it against liens of laborers and material-men, in a contract subletting a part of the work, reserved the option to retain in his own hands the amount of estimates, or such part thereof as he might deem necessary, and pay the laborers and other creditors of the subcontractor, and charge the amount thereof as so much money paid to him, the general contractor may keep back estimates due the subcontractor, and pay it out on debts incurred by him in attempting to perform his subcontract, and in so doing the general contractor cannot be charged with meddling in his affairs; and such general contractor may make such payments through the subcontractor as his agent, or by any other agent. *Solomon v. Nicholas*, 113 Ill. 351, 1 N. E. Rep. 901.

A contract between railroad contractors and subcontractors provided that all estimates of work done, and as to whether the work progressed with sufficient speed, should be left to the company's engineer, whose decision should be final. *Held*, that the contract was binding, and that the subcontractors might be dismissed whenever the engineer decided that the work was not being done with sufficient speed. *Faunce v. Burke*, 16 Pa. St. 469.—*FOLLOWING* Monongahela Bridge Co. v. Fenlon, 4 Watts & S. (Pa.) 205.

In such case payment after the forfeiture by one of the original contractors of the bonds employed by the subcontractors, and furnishing money to carry on the work—*held*, not a waiver of the forfeiture, especially if he was ignorant that the contract had been forfeited. *Faunce v. Burke*, 16 Pa. St. 469.

A contract between contractors and subcontractors provided that "monthly and final estimates as to the quality, character, and value of the work done" should be made by the company's engineer. *Held*, that the term "value" was distinguishable from the contract "price," allowing the engineer to consider both the character and quantity of

work in estimating its value. *Faunce v. Burke*, 16 Pa. St. 469.

A contract between railroad contractors and subcontractors provided for retention of 20 per cent. of the monthly estimates and forfeiture of the contract if the work did not progress with sufficient speed. *Held*, that the 20 per cent. was to be regarded as the measure of damages in case of a forfeiture, and not as a penalty. *Faunce v. Burke*, 16 Pa. St. 469.

84. Dispute with contractor—Effect of receipt in full.*—A subcontractor claimed for extra work, but gave the contractors a receipt in full upon their agreeing to pay him, if they succeeded in collecting from the railroad company. In settling with the company they received \$25,000 by way of compromise on various claims amounting to \$75,000, including the subcontractor's. *Held*, that it must be presumed that the amount received included a *pro rata* share of the subcontractor's claim, which presumption was not destroyed by showing that the claim was not a valid one. *Read v. Hitchings*, 71 Me. 590.

85. Right to pledge contractor's credit for supplies.—A contract whereby railroad contractors sublet a portion of the work, to be completed to the satisfaction of the engineers, at a time specified, reserving the right to end the contract and retain the sums withheld from the monthly estimates, and to pay the laborers directly, payment to be made when the work is completed, provided the railroad company had then paid them, and which provided that until the work was finished no money should be paid the subcontractor except for labor actually performed and materials furnished on said work, and that all moneys received upon estimates as the work progressed should be used to pay for such labor and materials, and that the subcontractor should stand, in respect to such work, as disbursing agent for his contractors, and be liable, as for a breach of trust, for any misapplication of such moneys—*Held*, not to authorize such subcontractor to pledge the credit of his contractors for supplies furnished to him by third persons. *Wells v. Martin*, 32 Mich. 478.

And proof that the paymaster of such

* Effect of receipt in full given by subcontractors with full knowledge of facts, see 53 AM. & ENG. R. CAS. 14, *abstr.*

contractors paid so much of a bill presented to him, against the subcontractor, as the latter said it would be, and refused to pay any more, referring to it as a bill furnished to the latter, and that he stated that such contractors would pay for stuff furnished the subcontractor to go on the road, on his order, on presentation of the voucher and order, does not make out a case of ratification of the agency of the subcontractor in purchasing supplies on credit. *Wells v. Martin*, 32 Mich. 478.

86. Enforcement of provisions for forfeiture.—A railway contractor made a subcontract for building a section of road and stipulated therein that if the work should not be carried on with sufficient force and energy the chief engineer of the road might, on giving written notice to the subcontractor, declare the subcontract forfeited, or might take possession of the work and carry it on at the subcontractor's expense and for his benefit. *Held*, that as the chief engineer was a stranger to the agreement he could not be compelled to give the notice, and that a written notice from the contractor to the subcontractor was sufficient where the engineer had already orally notified both that the work was not advancing satisfactorily. *Hendrie v. Canadian Bank*, 11 Am. & Eng. R. Cas. 610, 49 Mich. 401, 13 N. W. Rep. 792.

An agreement entered into between the contractor for the construction of a railroad and his subcontractor provided that, in case of violation of the terms of the contract by the latter, the contractor might declare the contract forfeited, or should have the right to such other measures as the engineer of the road might deem necessary to insure the completion of the work by the time and in the manner stipulated, and to deduct from the current and final estimates such sum or sums as might be necessary to defray the expense of such measures. *Held*, that an express declaration of forfeiture was not necessary to entitle the contractor to take charge of the work, in accordance with the direction of the engineer, before the completion of the work. *Maloney v. Malcolm*, 31 Mo. 45.

87. Reletting by subcontractor.—A party who had taken a contract to build part of a railroad underlet his contract, it being agreed that the subcontractor should not relet any of the work without the consent of the contractor or the chief engineer.

The agreement further provided: "In case permission to sublet is granted (the subcontractor) shall not in any case be released from responsibility for the wages of men and teams, or the cost of material employed in the work. * * * (The original contractor) is hereby authorized to pay said laborers the amount due them." Subsequently such subcontractor relet a portion of the work to one who employed laborers to aid in its completion. *Helt*, there was no agreement between the original contractor and the person to whom he underlet that the latter should pay for the labor employed by the party to whom he might relet the work. *Moore v. House*, 64 Ill. 162.

5. *Liability of Company to Laborers Employed by Contractors.**

88. Indiana.—In a suit against a railway company, to recover for work and labor, if the evidence tends to show that the plaintiff was employed by and the labor was done for a subcontractor in the construction of the road, it is error to instruct the jury that if the plaintiff performed labor in constructing the defendant's road, for which he has not been paid, and the defendant has had the benefit of the labor, the plaintiff is entitled to recover, and that the question of subcontractor, contractor, or other interested parties makes no difference in regard to the plaintiff's rights. If the work was done for a subcontractor of the railroad company, under a contract with him, the plaintiff cannot recover against the company. To recover against them he must show that the work was done under contract with them. *Indianapolis, B. & W. R. Co. v. O'Reilly*, 38 Ind. 140. *Marks v. Indianapolis, B. & W. R. Co.*, 38 Ind. 440.

A city, having subscribed to the stock of a railroad company, under the Ind. act of May 4, 1869, authorizing cities to aid in the construction of railroads, is bound by the

* Liability of company for labor or materials furnished to contractor. Sufficiency of notice, see 32 AM. & ENG. R. CAS. 16, *abstr.*

Statutes making company liable for "labor" held not to include services performed by contractors and directors, see note, 33 AM. REP. 350.

Liability to servants of contractor, see note, 39 AM. & ENG. R. CAS. 325.

Who are laborers, servants, or employés, under statutes making stockholders individually liable, see notes, 33 AM. REP. 264; 18 L. R. A. 308.

same liability which, under section 38 of the act for the incorporation of railroad companies (1 Rev. St. 1876, p. 712), attaches to an ordinary stockholder in such company for labor done in the construction of its road. *Shipley v. Terre Haute, 4 Am. & Eng. R. Cas. 345, 74 Ind. 297.*

Ind. Act of May 4, 1869, § 38, for the incorporation of railroad companies, is constitutional, its provisions being matter properly connected with the subject of the title of such act, within the meaning of section 19, article 4, of the state constitution. *Shipley v. Terre Haute, 4 Am. & Eng. R. Cas. 345, 74 Ind. 297.*

89. Kansas.—If a railroad company fails to take the bond required by the statute it is liable to laborers personally, and to their assignees. *Missouri, K. & T. R. Co. v. Brown*, 14 Kan. 557.

One who is in the employ of a contractor with a railroad company simply as time-keeper and superintendent is not a laborer in the sense in which that term is used in Kan. Laws 1872, ch. 136, and cannot recover of the railroad company the amount due him therefor by the contractor, notwithstanding the company failed to take the bond required by that statute. *Missouri, K. & T. R. Co. v. Baker*, 14 Kan. 563.

Laborers and mechanics employed by a subcontractor in the building of a railroad are within the protection of section 35, ch. 84, Comp. Laws 1879, and, if the railroad company fails to take the bond required by such section, may maintain their action against it. *Mann v. Corrigan*, 28 Kan. 194.

90. Maine.—The statute provision (Rev. St. ch. 51, § 141) which imposes a liability on railroad corporations to pay for the work of laborers employed in constructing their roads does not apply to the labor of a subcontractor personally expended with that of a crew employed by him upon a section of a railroad which he has contracted to build. *Rogers v. Dexter & P. R. Co.*, 85 Me. 372, 27 Atl. Rep. 257.

91. Michigan.—Stockholders are made liable, under Comp. Laws, § 2412, for the labor debts of the corporation only to the amount of their stock. *Peck v. Miller*, 39 Mich. 594.

If the right to sue a stockholder for a labor debt of his corporation became complete before the passage of the act of 1877, providing that the corporation might be

made a joint defendant, the plaintiff could still proceed at common law, under Comp. Laws, § 2852, against the stockholder alone. *Tilden v. Young*, 39 Mich. 58.

A suit against a railroad corporation for a labor debt is to fix it with a liability resulting from its ownership of the road, and will not admit of the theory that defendant is merely an agent of the owner. *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. Rep. 213.

An unwritten promise by a railroad corporation to a contractor, to pay the latter's obligations to his laborers, will not sustain an action. *Bottomley v. Port Huron & N. W. R. Co.*, 44 Mich. 542, 7 N. W. Rep. 214.

Where a railroad contractor has assigned his contract to the superintendent of the company and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt does not rest on Comp. Laws, §§ 2393-2395, but is at common law on a special contract; and the declaration must so aver the cause of action. *Bottomley v. Port Huron & N. W. R. Co.*, 44 Mich. 542, 7 N. W. Rep. 214.

The true intent and meaning of Act No. 100, Laws of 1871 (How. Stat. §§ 3423-3425), is to protect laborers and persons furnishing material for the construction and repairs of railroads, which protection is limited to the amount due from the railroad company to its contractor at the time the bill of items of the labor and material furnished is furnished to the company. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884.—DISTINGUISHED IN *Dawson v. Iron Range & H. B. R. Co.*, 97 Mich. 33, 56 N. W. Rep. 106. FOLLOWED IN *Quackenbush v. Chicago & W. M. R. Co.*, 91 Mich. 308.

The labor covered by the statute applies to manual labor of persons employed, and does not extend to teams used upon the work; and the material referred to does not include feed furnished such teams, or clothing or board of the laborers so employed. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884.

To warrant a recovery in a suit based on the statute, the plaintiff must allege and prove that the items of labor for which he claims payment were performed by a laborer employed by a contractor, with the company, or by a subcontractor in constructing or repairing the railroad, and that

the bill of items of labor and materials sued for has been furnished to the railroad company, together with the amount claimed, prior to its usual pay-day, when such claim shall be due, or, if the contractor was not paid on such pay-day, then prior to the payment then due to the contractor. He must further show that at the time he furnished said bill of items, or at the pay-day next ensuing, there was an amount due from the company to the contractor, and the amount, and that the claims he seeks to collect are undisputed, and acknowledged to be due from the contractor or subcontractor. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884.

Where a railroad company is sued for goods furnished a subcontractor it has in its power to protect itself by notifying the contractor or subcontractor of the pendency of the suit, and thus give to such contractor the opportunity of showing that the claims disputed are not acknowledged as being due from him. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884.

A notice of a claim against a railroad company for labor performed for a subcontractor, given under How. St. § 3423, which makes the company liable in case a bill of items of the labor is furnished to the company, with the amount claimed, which fails to show on its face whether the work charged for is the claimant's personal labor or team-work, or to state the kind of labor performed, the dates when performed, and the rate per day, and the amount of payments made thereon, cannot be held to be the "bill of items, together with the amount claimed," required by the statute. *Quackenbush v. Chicago & W. M. R. Co.*, 91 Mich. 308, 51 N. W. Rep. 883.—FOLLOWING *Martin v. Michigan & O. R. Co.*, 62 Mich. 458; *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 657.

An assistant chief engineer of a railroad company is not a "laborer," within the meaning of the constitutional and statutory provisions making stockholders liable for the labor debts of the corporation. *Brockway v. Innes*, 39 Mich. 47.

Contractors and subcontractors are not "laborers," within the meaning of the statute giving a right of action for labor debts. *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. Rep. 213. *Peck v. Mil-*

ler, 39 Mich. 594. *Martin v. Michigan & O. R. Co.*, 26 Am. & Eng. R. Cas. 351, 62 Mich. 458, 29 N. W. Rep. 40.—FOLLOWED IN *Quackenbush v. Chicago & W. M. R. Co.*, 91 Mich. 308.

Railroad contractors gave certificates to their workmen, showing the amount due them, which were accepted by the company. They were then presented to third persons, who furnished goods to the amount of the certificates and charged the same to the contractors. Upon a suit brought against the contractors the issue was made whether the goods were furnished on the credit of the contractors or of third persons. On appeal the court was unanimously of the opinion that the contractors were liable if the goods were furnished under an arrangement with the contractors, but were equally divided as to whether they were liable if they were not so furnished, but if they subsequently assented to the goods being charged to them, the question being whether such transaction would not be within the statute of frauds, as an oral promise to answer for the debt of another. *Farwell v. Dewey*, 12 Mich. 436.

H. was a subcontractor working upon the line of a railway company. He had no visible property save a few scrapers and tools, used in his business of grading and clearing. Arrangements were made with two merchants to take his orders from laborers, his employes, and pay them in goods. H. agreed to pay these orders, which were to be taken out of money coming to him by virtue of his contract with the railway company; or if not so paid, it was agreed that the merchants should have the same rights against H. or the company which the laborers themselves had. *Held*, that the cashing of an order: "Please deliver to bearer \$2 (two dollars) in goods, and charge the same to account of yours," etc., signed by a subcontractor, and addressed to a merchant, does not of itself establish an assignment of the "laborers'" claim, under the Michigan statute for the protection of laborers in the employ of railroad companies. *Martin v. Michigan & O. R. Co.*, 26 Am. & Eng. R. Cas. 351, 62 Mich. 458, 29 N. W. Rep. 40.—DISTINGUISHING *Missouri, K. & T. R. Co. v. Brown*, 14 Kan. 557.—FOLLOWED IN *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884.

A railroad subcontractor gave to men in his employ orders on a merchant for goods to a fixed amount, who delivered the same, the drawer charging the orders directly to the men as so much money paid them. *Held*, not an assignment of the claim of the men for labor performed for the subcontractor, who treated the orders as payment to the laborer, which, when paid, extinguished the laborer's claim. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884.—FOLLOWING *Martin v. Michigan & O. R. Co.*, 62 Mich. 458.

92. Missouri.—The act of April 23, 1877, entitled "An act to better secure the wages of laborers and operatives," is not unconstitutional as special legislation; nor as impairing the obligation of contracts; nor for failing to sufficiently express its object in its title. *Luther v. Saylor*, 8 Mo. App. 424.—QUOTING *Peters v. St. Louis & I. M. R. Co.*, 23 Mo. 111.

A laborer under a subcontractor engaged in building a railroad is entitled to the benefit of section 12 of the Act of Feb. 24, 1853, entitled "An act to authorize the formation of railroad associations and to regulate the same." *Peters v. St. Louis & I. M. R. Co.*, 24 Mo. 586.—FOLLOWING *Kent v. New York C. R. Co.*, 12 N. Y. 628.—RECONCILED IN *Wells v. Mehl*, 25 Kan. 205.

The general railroad act of 1855, § 12, is constitutional when applied to companies chartered before the passage of the law. *Grannahan v. Hannibal & St. J. R. Co.*, 30 Mo. 546.

Notwithstanding a provision in a contract subletting railroad work that the work shall not be further sublet, yet if the contractors, knowing that the work is further sublet, acquiesce in the work being done, they are bound to pay for the work, and a laborer may maintain an action against the railroad company, under the General Railroad Act, § 12. *Grannahan v. Hannibal & St. J. R. Co.*, 30 Mo. 546.—FOLLOWED IN *Conner v. Hannibal & St. J. R. Co.*, 30 Mo. 549.

A notice to a railroad that a contractor on their road is in arrears to his hands, which substantially complies with the statute (Wagn. St. 302, § 10), so as to prevent any misapprehension, is sufficient. *Cosgrove v. Tebo & N. R. Co.*, 54 Mo. 495.

The term "laborer," as used in a Wagn. St. 887, § 6, making railroad companies lia-

ble to laborers engaged in constructing a road, does not include those who furnish teams and wagons and drivers hired by them to haul and deliver stone or other material in the construction of the road. Such a one is not a day "laborer" within the meaning of the statute. *Groves v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 304. —APPROVING *New York & H. R. Co. v. Kip*, 46 N. Y. 551. QUOTING *Mooney v. Hannibal & St. J. R. Co.*, 28 Mo. 570.

A railroad company, having become liable to pay the wages of workmen employed by contractors (Wagn. St. 302, § 10), deducted, on their pay-rolls, charges for sundry goods theretofore furnished the men by a merchant under an agreement entered into by him with the contractors. On the rolls, and pursuant to the agreement, the amounts purchased were entered as payments made on the wages account and as due from the contractors to the merchant. *Held*, that, being a stranger to the agreement, the company was not liable to the merchant under it for such advances; and its deductions of the amounts due the merchant from the wages of the men would not of itself raise an assumption in his favor against it; and it would be liable, notwithstanding, to the employees for the unpaid balances. But they having acquiesced in that mode of settlement, the merchant could recover those sums from the company on an implied undertaking to pay the same. *Schuster v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 290.

93. New York.—(1) *Under Laws of 1850, § 10.*—The protection given by the General Railroad Act of 1850, § 10, making the stockholders liable for debts owing for the construction of the road, only extends to "laborers and servants," and does not include the company's contractors. *Aikin v. Wasson*, 24 N. Y. 482. — FOLLOWED IN *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521.

Section 10 does not extend to laborers employed by contractors, but only to the immediate employees of the company itself. The protection to employees of contractors is provided for in § 12 of the act. *Gallagher v. Ashby*, 26 Barb. (N. Y.) 143.

A complaint under § 10, seeking to make stockholders liable for labor performed in constructing a road, which states that the company was liable to certain laborers under whom plaintiff claims, is defective

unless it states that such laborers were of a class protected by the statute. *Boutwell v. Townsend*, 37 Barb. (N. Y.) 205.

(2) *Under Laws of 1850, § 12.*—The protection given by the General Railroad Act, § 12, does not extend to laborers employed by subcontractors. *Miller v. Lake Ontario, A. & N. Y. R. Co.*, 9 How. Pr. (N. Y.) 238. —DISAPPROVED IN *Kent v. New York C. R. Co.*, 12 N. Y. 628.

The protection given laborers by § 12 is not limited to persons employed by contractors, but extends to persons employed by subcontractors. *Kent v. New York C. R. Co.*, 12 N. Y. 628. —APPROVING *Warner v. Hudson River R. Co.*, 5 How. Pr. (N. Y.) 454. DISAPPROVING *Miller v. Lake Ontario, A. & N. Y. R. Co.*, 9 How. Pr. 238. DISTINGUISHING *McCluskey v. Cromwell*, 11 N. Y. 593. —APPROVED IN *Branin v. Connecticut & P. R. R. Co.*, 31 Vt. 214. FOLLOWED IN *Peters v. St. Louis & I. M. R. Co.*, 24 Mo. 586. RECONCILED IN *Wells v. Mehl*, 25 Kan. 205.

The liability is the same whether the work be performed under a contract at a stipulated price or on a *quantum meruit*. *Chapman v. Utica & B. R. R. Co.*, 4 Lans. (N. Y.) 96.

Section 12 only extends to personal manual labor, and does not extend to labor performed by a team and an assistant, and will not include the personal services of the owner of the team unless the price thereof has been separately agreed to. *Atcherson v. Troy & B. R. Co.*, 1 Abb. App. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329. *Cummings v. New York & O. M. R. Co.*, 1 Lans. (N. Y.) 68.

If the laborer has so mixed his labor with others, or with a team, that he cannot make a demand from the company under the statute, then his only remedy is against the contractors. *Atcherson v. Troy & B. R. Co.*, 1 Abb. App. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329. *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521. —FOLLOWING *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Ericsson v. Brown*, 38 Barb. 390; *Coffin v. Reynolds*, 37 N. Y. 640; *Aikin v. Wasson*, 24 N. Y. 482. —QUOTED IN *Lehigh C. & N. Co. v. Central R. Co.*, 29 N. J. Eq. 252.

The notice provided by the section to be served on the company may be served within twenty days from the time the work is ended. The services may be on the company's chief engineer, though the part of

the road where the labor is performed be under the charge of an assistant engineer. *Chapman v. Utica & B. R. R. Co.*, 4 *Lans. (N. Y.)* 96.

Several different actions were commenced by laborers employed by subcontractors against a railroad company to recover for work done. The company entered into a written agreement that the proceedings should be stayed in all of the causes except one, and they were to abide the result of a final judgment in the one action, "in which verdict is to be taken on written stipulation as to facts, subject to the opinion of the general term." *Held*, that a final judgment in the one suit established the claims in the other suits, except as to the amount only, and the company could not controvert the claims except on the one point of amount. *Houlahan v. Sackett's Harbor & S. R. Co.*, 24 *How. Pr. (N. Y.)* 155.

(3) *Under charter of Hudson River R. Co.*—Under the Act of 1850, § 5, amending the charter of the Hudson River R. Co., the company is liable to any "laborer" for his services, whether it be done with his own hands or whether he uses tools, or a team, or whether the labor be performed in person or by a servant, or whether he superintend others who labor. *Warner v. Hudson River R. Co.*, 5 *How. Pr. (N. Y.)* 454.—APPROVED IN *Kent v. New York C. R. Co.*, 12 *N. Y.* 628.

The term "contractors" includes all persons who assume to perform a specified portion of work, whether they are direct contractors or subcontractors; and the term "laborers" includes all persons who actually engage in the construction of the work under such contractors. *Warner v. Hudson River R. Co.*, 5 *How. Pr. (N. Y.)* 454.

04. Pennsylvania.—Subcontractors and laborers employed by subcontractors are not within the protection of the resolution of 1843, forbidding corporations indebted for labor to divest themselves of their property in fraud of such indebtedness. The act of April 14, 1862, does not enlarge the class of persons protected by the resolution of 1843; it merely aids in the remedy. *Hart's Appeal*, 96 *Pa. St.* 355.

05. Vermont.—The general railroad act (Comp. St. ch. 26, § 60), making railroad companies liable for labor performed under its contractors, is not unconstitutional as impairing the obligation of con-

tracts. *Branin v. Connecticut & P. R. R. Co.*, 31 *Vt.* 214.—APPROVING *Kent v. New York C. R. Co.*, 12 *N. Y.* 628. QUOTING *Dartmouth College v. Woodward*, 4 *Wheat. (U. S.)* 518; *Peters v. St. Louis & I. M. R. Co.*, 23 *Mo.* 107.

Under section 60 the company is liable to laborers employed by subcontractors, as well as by contractors direct; and the liability extends to labor performed by teams, as well as to direct personal manual labor. *Branin v. Connecticut & P. R. R. Co.*, 31 *Vt.* 214.—REVIEWING *McCluskey v. Cromwell*, 11 *N. Y.* 593.

An action cannot be maintained which is founded on § 3372, R. L., which makes railroads liable to day laborers employed by contractors, for labor in constructing their roads, when the work was done, and the contract was made and to be performed in New York and governed by its laws. If New York has a statute imposing a similar liability on railroads the action should have been based upon that statute. *Cartwright v. New York & M. R. Co.*, 30 *Am. & Eng. R. Cas.* 234, 59 *Vt.* 675, 4 *N. Eng. Rep.* 361, 9 *Atl. Rep.* 370.

Where contractors, by an express provision in their contract with the company, authorized the corporation "to retain in their hands, for the payment of the workmen, such an amount of the monthly estimates as the engineer may deem proper for that purpose, and the engineer is authorized to adopt such measures for the disbursement of the money as he may consider judicious"—*held*, that the parties would be bound by any act of the engineer in retaining and disbursing the money in payment of the laborers on the road, and the contractors could enforce no claim against the company on the contract, except for the balance due, after sufficient had been retained by the engineer for the above purpose; and the money so retained would not be taken upon their debts, as it would be in the hands of the company or engineer, as trustee for the laborers. *Jostyn v. Merrow*, 25 *Vt.* 185.

06. West Virginia.—Subcontractors made an agreement with a merchant to furnish their hands with groceries, the cost of which the contractors agreed to retain out of their monthly wages when they paid the hands out of the monthly estimates to be paid them by the company. During the month the company's engineer declared the

contract forfeited, and did not pay directly to the contractors the monthly estimates, but proceeded to pay the hands in their employ. The merchant applied to the engineer to obtain his pay out of the wages of the hands, and was told to attend the place of payment, and the amount of his account would either be retained out of the money due the hands or, if they were paid in full, then he could collect his accounts from each. The engineer in paying the hands deducted from the amount due each the merchant's account, amounting in all to \$849.48, but then refused to pay this, or any other sum, over to the merchant. *Held*, that the merchant might maintain an action against the company for money had and received. *Handley v. Chesapeake & O. R. Co.*, 9 W. Va. 474.

97. Wisconsin.—The protection given by Act of 1857, ch. 27, includes laborers under subcontractors as well as direct contractors with the company. *Mundt v. Sheboygan & F. du L. R. Co.*, 31 Wis. 451.

A notice to a railroad company, under the statute, that plaintiff has a claim against it for labor in the construction of the road, and specifying the dates between which the labor was performed and the amount of the claim, is sufficient, and need not state the name of the contractor under whom the labor was performed. *Mundt v. Sheboygan & F. du L. R. Co.*, 31 Wis. 451.

Where a statute provides that, in order to hold a railroad company liable for labor performed under one of its contractors, notice must be given to the company within thirty days after the claim shall "accrue," it is sufficient to give notice within thirty days after the next regular pay-day, although that be a month after the labor was performed. *Mundt v. Sheboygan & F. du L. R. Co.*, 31 Wis. 451.

Act of 1872, ch. 119, § 10, as amended in 1873, ch. 246, provides that when any railroad contractor shall be indebted to any laborer engaged in the construction of the road for thirty or any less number of days, such laborer may give notice of such indebtedness to the company, whereupon it shall become liable to pay the amount due him for such labor. *Held*, that the effect of the statute is to make the company a guarantor of payment for such work, and a laborer may sue as upon contract before a justice for any amount within his jurisdiction. *Redmond v. Galena & S. W. R. Co.*,

39 Wis. 426, 13 Am. Ry. Rep. 400.—RECONCILED IN *Wells v. Mehl*, 25 Kan. 205.

The principal contractors for the construction of a railroad agreed to save the railroad company harmless from the payment of laborers' wages. In paying laborers working under a subcontractor they retained the amount owing by each laborer for board, it being a custom and the understanding of all parties that such amounts should be retained and paid directly to the boarding-house keeper. *Held*, that the boarding-house keeper, who had furnished the board, relying upon such custom, might recover from the principal contractors the amounts so retained, although the subcontractor was indebted to them in a sum exceeding such amounts. *French v. Langdon*, 76 Wis. 29, 44 N. W. Rep. 1111.—FOLLOWING *Sterling v. Ryan*, 72 Wis. 36, 7 Am. St. Rep. 818.

98. Manitoba.—After a railway had incurred some liabilities its name was by statute changed. The act provided that "the existing liabilities of the company for work done for said company shall be a first charge upon the undertaking." A further act provided that "the company shall remain liable for all debts due for the construction of the railway, and if such debts are due to contractors, shall cause all just claims for labor, etc., to be paid by such contractors." Afterwards a charter was issued to a third company in which that railway covenanted with her majesty to pay all debts due by the above-named railways, "and will cause all just claims for labor, etc., due by contractors, to be paid by such contractors." *Held*: (1) that the railway was liable only to the extent to which the previous railway was liable to its own contractors, and not for such sums due by such contractors to workmen beyond the amount of that liability; (2) if otherwise, the workmen ought to be parties in the bill. *Attorney-General v. MacDonald*, 6 Man. 372.

6. Actions Growing out of Construction Contracts.

a. What Remedies are Available.

99. Right to sue, generally.—(1) *General rules.*—Where a contractor agrees to erect several railroad bridges, to be paid for part in cash and part in the stock of the company, at a certain sum per foot, but where the contract is silent as to the time of payment, no payment can be demanded until the work is completed, or at least un-

til each bridge is completed; and then no recovery can be had, so far as payment is to be made in stock, until a demand is made and a refusal to deliver it. *Boody v. Rutland & B. R. Co.*, 3 Blatchf. (U. S.) 25.

A suit by a subcontractor against a contractor to recover for work done on a railroad in which the railway company is garnished as the supposed debtor of the contractor, does not estop the plaintiff from bringing another suit against the railway company founded on the same claim, unless it is shown that the first suit resulted in a judgment in favor of the plaintiff. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. Rep. 295.

Where it was agreed in a contract for the construction of a railroad that the company's engineer should certify to the performance of the work and should determine all questions in dispute between the parties—held, that this did not preclude the builders from maintaining an action in court to recover of the company the balance due them under the facts certified by the engineer. *Flynn v. Des Moines & St. L. R. Co.*, 63 Iowa 490, 19 N. W. Rep. 312.

A party entering into a contract with a railroad company to complete a certain building according to plans and specifications thereto attached, at a specified price, and upon the approval of a particular person, cannot, after he has upon the certificate of that person received the amount contracted for, maintain an action on the original contract for "extras." Nor can he set aside the contract and sue for work and labor. *Patterson v. Great Western R. Co.*, 9 U. C. C. P. 229.

(2) *Illustrations*.—A construction contract contained the provision that if the contractors failed to complete the road within a specified time they would pay all damages sustained by the company. The work was not completed within the time and the company sustained damages amounting to \$3800. Subsequent to the making of the original contract a further contract was entered into by which the company agreed to accept the road and to release the contractors from certain work then unfinished, and to deduct an amount from the original contract price supposed to be equal to the cost of finishing the road. Held, that the second agreement was not a waiver of a claim for damages for failing to complete the road within

the time limited under the original contract. *Cannon v. Wildman*, 28 Conn. 472.

A construction contract provided that the contractor should be liable in damages if the work was not completed within a specified time, and that the engineer might dismiss the contractors and terminate the contract for a failure, from time to time, to comply with the contract, in which case any amounts due the contractors should be forfeited; or the engineer might deduct such sums from the monthly payments as he should deem reasonable for such breaches. Held, that the provisions relating to discontinuing the contract by the engineer, and making deductions from the monthly payments, had reference only to such defaults as should occur from time to time, and not to a failure to complete the work within the time limited; and a failure of the engineer to take advantage of such breaches was not a waiver of a claim for damages arising from a failure to complete the road on time. *Cannon v. Wildman*, 28 Conn. 472.

S., K. & A. contracted with the D., U., B. & P. R. R. Co. to construct and equip its road. They were to receive as part payment when the iron was laid \$1500 per mile in county, city, and town bonds. S., K. & A. gave to plaintiff an order on the company directing it to deliver to him out of such payment, when due, \$36,666.66 of said bonds and charge to their account. This order was accepted by the company. S., K. & A. assigned their contract, before such payment became due, with the assent of the company, to G., its president and one of its directors, who went on and finished the contract. At the time of the assignment G. knew of the order and acceptance. The company delivered the bonds to G. In an action to recover the value thereof—held, (Grover, J., dissenting) that from the relation which G. bore to the company it had the option to treat his dealings as upon its account and for its benefit, or to treat him as contractor on his own account; that having elected to waive the fiduciary relationship as to G. by recognizing him as contractor, allowing him to go on and complete the contract and paying him the contract price, it could not set it up to defeat plaintiff's claim; at least it could not be done on appeal where no defense based thereon was set up in the answer or urged on the trial; also that the order operated as an equitable assignment of so much of the contract price

when it became payable; that although S., K. & A. did not complete the contract, their assignee having so done, the contract price became payable; that G., having notice, took the contract subject to plaintiff's right, and had no right to receive, nor had the company to pay to him, the portion so assigned to plaintiff; and that therefore he could maintain his action therefor. *Risley v. Indianapolis, B. & W. R. Co.*, 62 N. Y. 240; reversing 1 Hun 202, 4 T. & C. 13.

A construction contract provided, among other things, that the contractor would bear all expenses of litigation growing out of the construction, and that he might use the company's name in necessary litigation. One of the company's five directors, who was also the agent of the contractor, employed plaintiffs, who were attorneys, who rendered services in litigation both for and against the contractor, without any knowledge of the above agreement, and charged it to the company. The object of the litigation was largely to protect the interest of the company. *Held*, that plaintiffs were entitled to recover against the company. *Foot v. Rutland & W. R. Co.*, 32 Vt. 633.

Plaintiff agreed "to construct all the culvert masonry, cattle-passes, paving, and excavation foundation pits" on certain sections of railroad, for which defendants agreed to pay at prescribed rates. Defendants discharged plaintiff from performance before it was completed, and plaintiff brought an action for loss of prospective profit on that part of the work that he was not permitted to do; but in alleging the agreement to do the work, he omitted to include the paving in the enumeration of the several kinds of work, so that it was not alleged that he agreed to do the paving, nor that defendants agreed that he might do it, but merely that defendants agreed to pay him at a certain rate for what he did. On that declaration plaintiff was adjudged entitled to recover for loss of profit on culvert masonry, etc., but not on paving; and for the latter he thereupon brought another action. *Held*, adjudicated. *Morey v. King*, 51 Vt. 383.

A construction contract provided that "for a failure to complete the work within the time fixed, or in case it should appear to the engineer that the work is not progressing with sufficient rapidity to secure its completion within a specified time," the company might employ additional help to

hasten its completion, at the expense of the contractors, or might declare the contract ended and contract with other persons for the completion of the work. *Held*, that the company was not restricted to the remedies provided in the contract, but might sue and recover damages for failure to complete the work. *Jackson v. Cleveland*, 19 Wis. 400; former appeal, 15 Wis. 107.

100. Assumpsit.—Under Comp. Laws N. Mex., §§ 2623, 2664, relating to "corporations," the governing board of directors alone can alter the common seal of the company and adopt a new one. The scroll or private seal of the chief engineer of a railroad corporation of that territory, affixed to a grading contract, is, therefore, not the seal of the company, and the contract is not a specialty, and assumpsit will lie against the company for its breach. *Saxton v. Texas, S. F. & N. R. Co.*, 4 N. Mex. 201, 16 Pac. Rep. 851.

A written contract for the grading and masonry of a railroad between designated *termini* is not so altered and modified by a change in the route between such *termini* as to enable the contractor to recover for the work done, upon a *quantum meruit*, irrespective of prices designated in the agreement. *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 82.

The contract provided that the alterations directed by the engineer should "be made as directed." Such alterations are within the jurisdiction of the engineer to determine and estimate. Alterations directed did not abrogate the contract or substitute a new one; they were within the original contract. But work done after the job had been taken off the contractor's hands by the company was not done under the contract, and payment for it might be recovered in assumpsit. *O'Reilly v. Kerns*, 52 Pa. St. 214.

101. Equitable suit for rescission.

—Where a party contracted to construct and equip a railroad, and received, on the hypothecated bonds of the road, as much money as he had expended in and about the contract, and afterward abandoned it, the court may decree the contract as to such party rescinded, and reconstitute the original stockholders with their stock and franchises yielded to the defaulting contractor. But the default of the contractor could not operate to impair or affect the rights of

innocent holders of the bonds. *Grant v. Green*, 46 Ill. 469.

102. Injunction.—Where a construction contract provides for an extension of time for the completion of the work, to be determined by the engineer, upon the contractor giving immediate notice in writing, the fact that the work was impeded by the conduct of the company and engineer, who arbitrarily and unjustly refused to allow any extension, will warrant equitable interference in favor of the contractor. *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583, 6 So. Rep. 467.

Where, under the terms of a contract between a railway company and a contractor, the company resumes possession and takes the works out of the contractor's hands, the court will not grant the contractor an injunction upon allegations of impropriety of conduct and duress, where the contractor can, if the company is wrong, be amply compensated in damages; whereas if the contractor is allowed to resume work the court cannot enforce specific performance in order to compel the completion of the works. *Garrett v. Banstead & E. D. R. Co.*, 4 De G., J. & S. 462.

There is no case for an interlocutory injunction where a railway company, on the ground of an alleged default on the part of the contractor for constructing the road, claims the right of completing the works itself, and thereupon the contractor files a bill against such company, asking for an injunction to restrain it from declaring the construction contract void as to work remaining to be done, and from declaring the amount remaining due for work already done forfeited, and from taking possession of the materials and implements in his possession or belonging to him. *Munro v. Wivenhoe & B. R. Co.*, 4 De G., J. & S. 723.

The complainants contracted with the defendant (a railroad company) to furnish and lay down the iron for its road, to erect the necessary buildings, and to build the bridges, etc., and were to be paid in mortgage bonds and stock; but the complainants (in consequence, as alleged, of defendant's fault) had not entered upon the work; the roadbed to be graded and prepared by the company was not ready for the iron, nor the route fully located. The court sustained a demurrer to a bill by the contractors, seeking to enjoin the company from making a contract with others to iron

and equip the road, and praying a specific execution of their contract with the company, and refused to retain a bill for compensation. *Fallon v. Missouri & M. R. Co.*, 1 Dill. (U. S.) 121.—APPROVED IN *McCann v. South Nashville St. R. Co.*, 2 Tenn. Ch. 773.

A firm of loggers agreed to build a tram-railway, and contracted with the corporation controlling it to carry their lumber at certain rates. The corporation afterwards assigned, and its assets went into the hands of one of the parties with whom the agreement to build was made, and through him became the property of a railway company in which he was a principal stockholder. This company refused to fulfil the agreement for transportation, and the loggers sued out a preliminary injunction restraining it from running over so much of the road as they had built, except on condition of carrying their lumber at the rates agreed on. Held, that the agreement was no more than an ordinary executory contract, was not enforceable in equity, and gave complainants no more control than other contractors over the roadbed; that the preliminary injunction was a final order, and void, and that mandamus would lie to set it aside. *Tawas & B. C. R. Co. v. Iosco Circuit County Judge*, 11 Am. & Eng. R. Cas. 584, 44 Mich. 479, 7 N. W. Rep. 65.

Railway contractors agreed to build a road to completion by a certain date. During the progress of the work they became financially embarrassed, and made an assignment. After the time when the work should have been completed, the contractors and the assignee filed a bill against the railway company, offering to complete the work, and asking an order to restrain the company from making any new contracts with others for the work. Held, on demurrer, that the bill would not lie, (1) because the contractors and their assignee could not be co-plaintiffs; (2) because a chancery court will not decree specific performance of work which the court is unable to superintend. *Johnson v. Montreal & O. J. R. Co.*, 22 Grant's Ch. (U. C.) 290.

103. Specific performance.—Where a bill was filed to compel a railway company to carry out a contract entered into by their agent for constructing a road, and the evidence taken in the cause showed that, at the prices agreed upon, which the company insisted were most exorbitant, a bal-

ance of £12,500 was due the contractor, the court, at the hearing, ordered that amount into court without waiting for the master's report. *Whitehead v. Buffalo & L. H. R. Co.*, 7 *Grant's Ch. (U. C.)* 351.

104. Suit for accounting.—A court of equity will not order an accounting between a railroad company and its contractor where the work is not fully completed, which was to be paid for in the bonds and stocks of the company, which are of no certain value, and where there are outstanding accounts for material bought by the contractor on the credit of the company. *Wood v. Boney*, (N. J. Eq.) 21 *Atl. Rep.* 574.

An order directing a railway to pay money due its contractors into court, pending a reference to the master to take accounts, etc., is an order upon which the court will stay proceedings upon the perfecting of security, in the event of the order being appealed from. *Whitehead v. Buffalo & L. H. R. Co.*, 7 *Grant's Ch. (U. C.)* 578.

b. Procedure.

105. Parties.—A contract for constructing a railroad, after the contractor's death must be enforced by his personal representative, and not by his heirs at law, though part of the consideration was to be paid in lands. *Crane v. Kansas Pac. R. Co.*, 131 *U. S.* 168, *app'x.*

Where a firm takes a contract from a corporation to construct an improvement, and subcontracts to another firm, which does a large amount of work, and the first firm fails and cannot pay the subcontractors, and to induce the subcontractors to go on with the work the corporation assumes to pay the old debt due the subcontractors, and releases the contractors from all obligations to pay such old debt, the first contracting firm is not a necessary party. *Chapman v. Pittsburgh & S. R. Co.*, 9 *Am. & Eng. R. Cas.* 484, 18 *W. Va.* 184.

106. Declaration or complaint.—In an action by a contractor for the construction of a branch road, alleging the execution of the contract and its breach by the defendant, it is not necessary further to allege that the construction of the branch road was authorized by resolution of the board of directors, ratified and approved by a vote of a majority of the stockholders in value; that being merely defensive matter, and the presumption being that such preliminary action was had before the work of

construction was entered on. *Arrington v. Savannah & W. R. Co.*, 95 *Ala.* 434, 11 *So. Rep.* 7.

The averments that the engineer fraudulently failed to make the required measurements are not sufficient to enable plaintiff to impeach the measurements, on the ground that they were made in a fraudulent manner, and in disregard of the contract. The facts constituting the fraud in the measurements should be set out in order to impeach them. *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463, 20 *S. W. Rep.* 631.

In an action to recover for the construction, in a certain township, of certain sections of a railroad, under a written contract providing that payment for part thereof should be made from the collection of certain stock subscriptions, and the residue on the collection, and payment to the railroad company of a certain tax voted for such railroad, the complaint alleged that such services had been performed, and that more than sufficient of such stock and tax, to pay for such services, had "been collected and paid over to" such company. *Held*, on demurrer, that the complaint is sufficient. *Clark v. White*, 59 *Ind.* 435.

A complaint in an action against a railroad company by the contractors set out that by the contract fifteen per cent. of the monthly estimates was to be retained by the company until completion of the work; and that if it appeared to the engineer that the work was not progressing rapidly enough he might employ additional labor at the expense of the contractors; that he might determine that the contract had been abandoned and declare it void; that after the work had progressed for several months he declared the contract abandoned, after plaintiffs had received \$8200 on monthly estimates, and afterward the engineer made estimates showing that the work amounted to \$3350 more than plaintiffs had received. *Held*, that the complaint stated a good cause of action. *Jackson v. Cleveland*, 15 *Wis.* 107; *further appeal*, 19 *Wis.* 400.

Plaintiffs sued in covenant on an agreement to construct for defendants the road-bed in a section of a railway line. It was provided that the whole should be in strict conformity with the specifications of the defendant's chief engineer; that the payments stipulated for should be made upon his written certificate; that he should have

power to take the work out of plaintiffs' hands and relet it to others at plaintiffs' expense, in which case plaintiffs should forfeit all moneys due to them on account of the contract. Specifications were added in which it was expressed that the foundation should be of such description as the work should require, and might in some cases be constructed by means of piles driven in and arranged according to the directions of the engineer. In assigning breaches plaintiffs averred that, although they did on, etc., drive certain large quantities of piles, and although the chief engineer did, before taking the work out of plaintiffs' hands, by his written certificate specify the amount of the said piling, yet that the defendants had not paid therefor according to the rates agreed on. *Held*, on demurrer, that the breaches were not well assigned, as plaintiffs averred that the engineer had taken the works out of their hands, and as, under the agreement, they had thereby forfeited all claim, they should also have shown that their dismissal did not arise from any fault on their part; that it should have been averred that the quantity of piling done entitled the plaintiffs to a certain specified sum, and the non-payment of that sum should have been stated as a breach; also that the piling should have been shown to have been done in "piling in foundations," as it was only for such piling that any price was specified. The fact of the engineer having given his certificate, being a material fact, should have been stated positively, and not merely by way of recital; and the name of the engineer should have been given. *Moore v. Great Western R. Co.*, 10 U. C. Q. B. 243.

The plaintiffs also averred that, after the agreement, certain explanations, plans, etc., became necessary to enable them to carry on the work, but that the engineer, though requested, refused to furnish the same. *Held*, bad; for as the declaration showed that certain specifications were annexed to the contract, according to which the plaintiffs were to construct the work, it should have been shown in respect to what part or description of the work they required additional directions; and also, the name of the engineer should have been stated. *Moore v. Great Western R. Co.*, 10 U. C. Q. B. 243.

Plaintiffs also averred that, after they had commenced the work according to the agreement, and while they were carrying on

the same, the defendants wrongfully and unlawfully ordered them not to proceed, and then wholly dismissed them. *Held*, not necessary to show a more formal dismissal. *Moore v. Great Western R. Co.*, 10 U. C. Q. B. 243.

Plaintiff was to do all the work on the extension of defendants' railway. Defendants covenanted to provide all the rails required, and, when required by plaintiff, to supply engines, etc., for the purpose of ballasting; to pay plaintiff for the work and materials the scheduled price by monthly payments in certain proportions specified, and within a time named after the giving of a certificate by defendants' engineer, the plaintiff to accept, during the first five months, defendants' notes at three months, defendants agreeing to place at the order of plaintiff, until the notes were paid by them, bonds to the value of said notes, and after the first five months agreed to pay cash (time to be of the essence of the contract). *Held*, that the general allegation of the declaration that the plaintiff did all things necessary on his part to entitle him to have the contract performed, would only cover acts to be done by the plaintiff, and therefore sufficiently averred the request by the plaintiff to provide the engines, etc., but not that the engineer had granted the certificate; but that this defect was covered by defendants' pleading over. *Shanly v. Midland R. Co.*, 33 U. C. Q. B. 604.

Plaintiff contracted to build a railroad depot building, the company reserving the right to discontinue the work at any time, upon compensating plaintiff for any damages caused thereby. The contract was not under seal, and it was not shown that the person executing it had authority to bind the company. The work was discontinued, and plaintiff sued to recover a balance due for work done, and for damages for the discontinuance. *Held*, that under the common courts, plaintiff might recover for the work done, and might prove the value of the work, and that its value had been enhanced by the company in delaying it by leaving cars on the track and in other ways. *Stock v. Great Western R. Co.*, 7 U. C. C. P. 526.

107. Matters of defense. — The builder of a railroad bridge cannot avoid liability for the imperfect condition of the structure by showing that the fault was in the piers, where he superintended the erec-

tion of the piers and adopted them as sufficient. *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255, 7 Am. Ry. Rep. 382.

Where a railroad company is sued for work in the construction of its road, the action cannot be maintained on proof showing that the work was done, but under a contract with third persons. *Floyd v. Indianapolis & C. R. Co.*, 8 Ind. 469.

A railroad contractor, when sued by the company on a contract, is estopped from setting up as a defense the fraudulent organization of the company. *State v. Bailey*, 16 Ind. 46.—CRITICISED IN *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. (U. S.) 78. FOLLOWED IN *Matlock v. Indiana & I. C. R. Co.*, 16 Ind. 176.

Where a complaint charges that a railroad company promised to pay for goods which should be furnished to a subcontractor, an answer that the railroad company was not indebted to the subcontractor was held no defense on demurrer. *Chicago, C. & L. R. Co. v. West*, 37 Ind. 211, 3 Am. Ry. Rep. 239.

When, under the terms of a construction contract, the award of an engineer upon disputed matters submitted to his arbitration is to be conclusive, it is not a defense to an action thereon that, after the award was made, the engineer ordered a rehearing, upon the application of the defendant. *Robinson-Rea Mfg. Co. v. Mellon*, 139 Pa. St. 257, 21 Atl. Rep. 91.

Where a railroad company sues its contractors for a failure to complete its road as contracted, it is not a good defense that the company had not made payments from time to time as agreed, where it does not appear that making such payments was a condition precedent to the completion of the work, but where it does appear that such payments were made in part. *Port Whitby & P. P. R. Co. v. Dumble*, 22 U. C. C. P. 39.

Neither is it a defense to such suit that the construction of the road was sublet by the consent of the company, where it was expressly provided that such subletting should not be taken in any way to prejudice the rights of the company as to any claim against the defendants for damages for the non-completion of the road. *Port Whitby & P. P. R. Co. v. Dumble*, 22 U. C. C. P. 39.

A railroad company sued sureties for a breach of a contract whereby its contractors agreed to purchase the land required and

build a railroad, and to deliver it over by a day named, free from all claims. The defendants set up the defense that the company mortgaged and otherwise encumbered the road, and thereby released the sureties. *Held*, no defense, in the absence of anything to show how the encumbrances prejudiced the contractors in the performance of their contract. *Grand Junction R. Co. v. Pope*, 30 U. C. C. P. 633.

In such case the sureties set up the further defense that the company altered the conditions of the contract, whereby the sureties were released. *Held*, no defense without showing how the contract was altered. *Grand Junction R. Co. v. Pope*, 30 U. C. C. P. 633.

A railway company and an improvement company contracted with plaintiff to deliver him first-mortgage bonds of the road as soon as they could be issued, in payment for work in the construction of the road. *Held*, that subsequent legislation whereby the bonds could not be delivered, which legislation was procured by defendants, could not be set up as a defense to a suit against the two companies for a failure to deliver the bonds. *Gregory v. Halifax & C. B. R. & C. Co.*, 16 Nov. Sc. 436.

108. Plea or answer.—A railroad contractor sued at law on a contract providing that the estimates of the engineer should be final, charging that the estimates were void for fraud between the company and the engineer. The company pleaded denying the fraud, and defended on the theory that the stipulation of the contract was binding until set aside in equity. The court below held that the fraud could be proven in this issue. Affirmed on appeal by a divided court. *Louisville, E. & St. L. R. Co. v. Meyer*, 30 Law. Ed. U. S. Sup. Ct. Rep. 689.

A subcontractor sued the railway company and the contractors jointly for excavations, and they both answered that, according to the classification under the contract, which was to be final, plaintiff had been fully paid; plaintiff replied to this that the classification was fraudulent, therefore the settlement was not final. Thereupon the contractors filed a supplemental answer denying the fraud, and still insisting that the settlement was final; and, believing that the classification was correct, they settled with the company on that basis. They then prayed that if the classification should be

decided fraudulent and the plaintiff entitled to recover, that they might in that event have judgment over against the company. *Held*, that such supplemental answer was good as against the general demurrer of the company. *Gulf, C. & S. F. R. Co. v. Ricker, (Tex.) 17 S. W. Rep. 382.*

Plaintiff and defendants, a railroad company, entered into an agreement, the former to perform certain works for the latter upon certain conditions. Plaintiff executed the contract and defendants' engineer signed it on their behalf, without attaching the seal of the company. Upon an action brought by plaintiff for work and labor performed, defendants put in a plea denying the contract. *Held*: (1) that having by their pleading denied the contract, they cannot invoke its aid to prevent the recovery of damages by plaintiff; (2) that the contract being void for want of mutuality, the plaintiff might recover for work done. *Stock v. Great Western R. Co., 9 U. C. C. P. 134.*

109. Counterclaim—Recoupment.—In an action against a railroad to recover the contract price of a bridge it is competent for the company to prove, by way of recoupment, all damages directly arising from the imperfect character of the structure. Therefore it was competent to prove by a train-hand the detention of cars by the imperfect working of the draw and the extra men required to work it. *Florida R. Co. v. Smith, 21 Wall. (U. S.) 255, 7 Am. Ry. Rep. 382.*

The plaintiff sues the defendant for damages on an alleged breach of a contract when by the former agreed, in consideration of certain payments to be made as the work progressed, to construct fifty-two miles of railway for the latter. The defendant sets up a counterclaim for the failure to construct the road and claims damages therefor: (1) for the loss of the use of the road; (2) for the loss of certain freight which it had made "arrangements" to carry over the road; and (3) for the sum it will cost to complete the road in excess of the contract price. On motion of plaintiff the last two clauses were stricken out of the counterclaim, the one as arising on a collateral contract not within the contemplation of the parties, and the other as being uncertain, and also contingent on the future construction of the road by defendant. *Hunt v. Oregon Pac. R. Co., 13 Sawy. (U. S.) 516, 36 Fed. Rep. 481, 1 L. R. A. 842.*

110. Demurrer.—In July, 1836, the plaintiff contracted with the defendant to construct a railroad according to certain specifications, to complete one mile by October 15 and the residue by November 1 following. The defendant agreed to pay in monthly payments, according to the measurement and valuation of his engineer, retaining from each payment fifteen per cent. until the final completion of the work, and was authorized in certain cases to declare the contract forfeited, from which the plaintiff should have no appeal. The plaintiff averred that he diligently prosecuted his work, etc., until September 17, when he was prevented by a writ of injunction, served on him until October 30, from going on; that the engineer of the defendant had not complied with his duty, stating the particulars of his breach thereof under the contract; that he proceeded after November 1, under the orders of the defendant, to prosecute the work until January 19, and that the work done under the agreement in December, 1836, was estimated by defendant's engineers at, etc., which sum not being paid, the defendant, on January 19, fraudulently, and for the illegal purpose of imposing better terms on the plaintiff, etc., declared the contract forfeited. The defendant pleaded that the contingencies (stating them) on which the right to forfeit the contract depended had occurred, and that on January 19 he had, in virtue of his reserved power, forfeited the agreement. To this the plaintiff demurred generally. *Held*, that the illegal and fraudulent purpose for which the contract was alleged to have been annulled was admitted, and that the annulling the contract under the circumstances was a breach thereof. *Howard v. Wilmington & S. R. Co., 1 Gill (Md.) 311.*

Plaintiff sued on the common counts for work and labor performed in building a railroad. Defendants filed pleas averring that the work was done under a sealed contract, by which a part of the price was to be retained until the completion of the work and then paid, together with any claim for "extras," on the certificate of the engineer, and that whatever was due was for extras, and the sum so retained, and that plaintiff had procured no certificate from the engineer. *Held*, on demurrer to the pleas, that the demurrer admitted that the work was done

under the sealed contract, and that therefore no recovery could be had without the stipulated certificate. *Ferguson v. Gall*, 23 U. C. C. P. 66.

111. What evidence is admissible.*

—When plaintiff claims damages of defendant company for a breach of contract in refusing to let him build certain trestles which he had agreed to build and in failing to furnish the necessary timber and materials within the time specified, whereby he "was delayed and put to great expense and trouble in the maintenance of necessary teams," the bill of particulars, furnished on demand, containing items for "corn, oats, and bran consumed," it is permissible for plaintiff to prove that it was necessary and proper to have teams for use on the work. *Mobile & B. R. Co. v. Worthington*, 95 Ala. 598, 10 So. Rep. 839.

When a material issue is whether plaintiff performed work for the defendant railroad company as an original contractor or as a subcontractor under another person, the defendant may prove the fact that he gave no bond for the faithful performance of the work, bonds being required of contractors and of them only. *Mobile & B. R. Co. v. Worthington*, 95 Ala. 598, 10 So. Rep. 839.

The question at issue being whether plaintiff, in performing work on railroad trestles, was an original contractor with the railroad company or a subcontractor under one P., the defendant company may prove the fact that, during the performance of the work, he received instructions and directions from P. without objection. *Mobile & B. R. Co. v. Worthington*, 95 Ala. 598, 10 So. Rep. 839.

Where plaintiff sues for the breach of an alleged contract for the construction of trestles, and the defendant denies that any contract was ever consummated between them, the publication for bids for the doing of the work, signed by the chief engineer, is admissible as evidence for either party; for the plaintiff, as showing that the approval of the contract by the president of the company was not required; and for the defendant, as showing that security was required for the prompt and faithful performance of the work, which plaintiff had

never given. *Mobile & B. R. Co. v. Worthington*, 95 Ala. 598, 10 So. Rep. 839.

In a suit to recover for work done on a railway it is proper to admit testimony that one of the directors of the corporation for which the road was built saw the plaintiff engaged in the work of construction, and testimony of the value of such work is admissible. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. Rep. 295.

In an action of covenant by railroad contractors against the company on a contract to construct a section of road, where the declaration alleges full performance on the part of plaintiffs and a breach on the part of defendants, evidence is admissible to show that plaintiff was prevented from full performance by the default of defendants. *Huntingdon & B. T. R. Co. v. McGovern*, 29 Pa. St. 78.

In a suit by a contractor against a railroad company for damages for breach of contract it is admissible for the railroad company to show the inability of the contractor to perform his obligations and that he was unable to respond in damages for the purpose of showing that the loss of the profits which would have been realized by a completion of the contract by the contractor was attributable, in part at least, to such inability. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ry. Rep. 233.

It is not in all cases required that a railroad company wait until it is too late to have work stipulated to be done by a contractor completed by the desired time in order that the contractor's inability to comply with his contract be demonstrated, on peril of paying him all the profits to be realized from a performance of his contract; but before taking action in breaking off the contract the failure of the contractor must be shown to have been imminent. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ry. Rep. 233.

Plaintiffs had a contract for constructing a railroad parallel with an existing road, and being charged with the distribution of the material, contracted with defendant company to distribute the material along the line of its road at a price only sufficient to cover actual cost. After distributing a small part of the materials it refused to further carry out the contract, and plaintiffs sued for the breach. Held, that evidence of the increased cost of distributing the materials by laying a temporary track

* Denial of construction contract by company. Evidence of independent contract, see 52 Am. & Eng. R. Cas. 13, *abstr.*

was admissible, and all of the additional expense thus incurred might be recovered as damages. *Wilson v. New York C. R. Co.*, 4 *Abb. App. Dec. (N. Y.)* 618, 3 *Keyes* 381.

112. What evidence is inadmissible.—Plaintiff claiming damages of a railroad company for not letting him do work which he had contracted to do, and in other particulars connected with the work done, and the defense being that he was only a subcontractor under another person with whom the company had settled in full, a letter written by that person to him saying, "They paid it without regard to you, ignoring you except as a subcontractor, and it leaves your claim for changing work and giving you more expensive to do as it stood before," is not admissible as evidence for plaintiff, though it might be admissible against him. *Mobile & B. R. Co. v. Worthington*, 95 *Ala.* 598, 10 *So. Rep.* 839.

In an action for breach of contract in the construction of an electric railway, where the defense is an abandonment by the plaintiff of the contract before the completion of a road, and there is evidence showing that the road was sold in an uncompleted state, it is error to admit evidence of the price for which it was sold, such evidence not affecting the damages for which plaintiff could recover by reason of the failure to complete the road. *Electric Imp. Co. v. San Jose & S. C. R. Co.*, (Cal.) 31 *Pac. Rep.* 455.

The private agreement between a railroad and a third party for the use of the company's road, provided it is finished by a given time, is not competent evidence as to the value of the use of the road as against a contractor, in a suit for damages occasioned by his failure to finish the road by the time contracted. *Snell v. Cottingham*, 72 *Ill.* 161.

Where plaintiff contracted with a railroad to construct a part of its road, to be estimated by the superintendent, and the contention was as to whether ties used conformed to the specifications of the contract, it was error to allow the superintendent to testify as to whether the ties were, according to the usage of engineers, suitable for the purpose for which they were intended and conformed to the contract. *Alton, M. C. & N. A. R. Co. v. Northcott*, 15 *Ill.* 49.

In an action for services in building a railroad, entries in the contractor's books of prices paid to his workmen are not evidence against him of the prices he was to receive. If the question is of the reasona-

ble value of his services they are admissible, because they tend to show the worth of one item of his claim, that is, of the muscular power employed. *Currier v. Boston & M. R. Co.*, 31 *N. H.* 209.

The complaint alleged that the plaintiffs entered into a contract with the S. & M. R. Co. (afterward merged into and consolidated with the defendant) for the construction of a tunnel, the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company and for the purpose of defrauding the plaintiffs, omitted certain work from his estimates. Upon the trial one of the plaintiffs offered to prove that he did extra work, on the promise of the engineer (subsequently ratified by the president of the company) that they should be paid for it, as for similar work under the contract. *Held*, that as the plaintiffs had not sued for extra work, but for work done under the original contract, the evidence was not admissible. *Hinkle v. San Francisco & N. P. R. Co.*, 55 *Cal.* 627.

Defendant contracted to do the work and furnish materials in constructing tracks for the N. Y. C. & H. R. R. Co. The contract provided "that all stone taken from excavations which may, in the opinion of the engineer, be suitable for masonry shall be deposited in some convenient place * * * to be designated by him, and shall be the property of the company." Plaintiff entered into a subcontract with defendant for a portion of the work. In an action to recover a balance alleged to be due thereon, defendant offered to prove that plaintiff took from excavations and used 1149 yards of stone, and that in defendant's final settlement with the company he was charged with the value thereof—\$1546.80. This was objected to and excluded. *Held*, no error; that the provision contemplated that the engineer should point out such stone as he deemed fit for masonry and designate the place to which he desired it removed; that plaintiff was entitled to use stone as to which no such designation was made, and as defendant did not offer to prove that plaintiff used stone so pointed out, the first part of the offer was insufficient, and so properly rejected; and that the fact that a charge was made by the company against defendant for the stone was not competent proof of his liability for it. *Read v. Decker*, 67 *N. Y.* 182; *affirming* 5 *Hun* 646.

113. Sufficiency of evidence.—When grading is done for a company upon a road that has already been partially graded, and the only evidence before the jury as to the amount of the new grading is the estimates made by the engineer of the contractor, and the company refuses to have any estimate made and offers no evidence, the jury must be guided by the evidence before them, and the fact that it may be difficult for the engineer to distinguish between the old work and the new cannot be ground for disregarding his testimony. *Snell v. Cottingham*, 72 Ill. 161.

T. & W. M. did some fencing for the Canada C. R. under the following agreement: "Memo. of fencing between Muskrat river, east, to Renfrew, T. & W. M. to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for \$1.25 per rod, company to furnish cars for lumber. Signed, T. & W. M. A. B. F." F. controlled nine tenths of the stock, and publicly appeared to be, and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. *Held*, in an action for money claimed to be due on the fencing, that it properly left to the jury to decide whether the work performed, of which the C. C. R. Co. received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract; and that a verdict for the plaintiff could not be set aside on the ground of being against the weight of evidence. (Ritchie, C.J., and Taschereau, J., dissenting.) *Canada C. R. Co. v. Murray*, 8 Can. Sup. Ct. 313.

Although the contract entered into by F. for the company was not under seal, the action was maintainable. *Canada C. R. Co. v. Murray*, 8 Can. Sup. Ct. 313.

114. Burden of proof.—In a suit for work and labor done in constructing a railroad under an alleged contract with its chief engineer, the burden of proof that the engineer had authority from the board of directors of the railway company to make the contract is on the plaintiff. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. Rep. 295.

Where a subcontractor sues the company for extra work claimed to have been done under an agreement with the company, the

burden of establishing such agreement and of such claim is upon the plaintiff. *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39, 12 N. Y. S. R. 821; reversing 38 Hun 636, *mem.*

115. Questions of law and fact.—The construction of a contract for the erection of railroad bridges is for the court; but whether the work as finally done was within its scope is for the jury. And where the contract reserves the right to make additions to the work at the same rate as the original cost, it is for the jury to say, from the evidence, whether alterations were within the scope of the contract or not; or, in other words, whether they were such as the company had a right to make under the contract. *Annapolis & B. S. L. R. Co. v. Ross*, 68 Md. 310, 10 Cent. Rep. 546, 11 Atl. Rep. 820.

A contract between a railroad and its contractors provided that the engineer might change the relative amount of trestle and earthwork at his option. He abandoned all trestles and substituted a continuous embankment, which made a draining-ditch along the road necessary, which was not provided for in the original contract. *Held*, that the engineer had the power to contract for the ditch at a specified price; but where there was a dispute as to whether he did contract, it was proper to leave it to the jury. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. Rep. 730.

In such case the continuous embankment rendered approaches for certain highways, crossing the railroad, necessary, which were not provided for in the original contract. *Held*, that a contract by the engineer to pay what the approaches were reasonably worth made it immaterial whether he was authorized so to contract or not, as the company was bound to pay that amount in the absence of a contract. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. Rep. 730.

116. Instructions to the jury.—The chief engineer of a railroad corporation, which is sued by a subcontractor for work done in its construction, being a director of the corporation and also member of a firm which contracted to construct it, a charge that knowledge on the part of the directors that the work was done under a contract with the chief engineer, and acquiescence therein, was binding on the corporation, is erroneous in failing to assert that the direct-

ors knew that the contract was made in the name of the corporation. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. Rep. 295.

In an action to recover for extra work performed at the request of the defendant, the defendant requested the court to give an instruction to the jury based upon the assumed position that the plaintiff was required to show, before he could recover, that the defendant's engineer had certified under the contract that the contract had been completely performed. *Held*, that as the action was for work performed outside of the contract, it could not be governed by the contract, and that the instruction was correctly refused. *Ohio & M. R. Co. v. Crumbo*, 4 Ind. App. 456, 30 N. E. Rep. 434.

The instructions offered by the defendant, which assumed as matter of law that the alterations in a contract for the construction of railroad bridges were such as the defendant had the right to make under the contract, and that the award of its engineer was therefore conclusive, were properly refused. *Annapolis & B. S. L. R. Co. v. Ross*, 68 Md. 310, 10 Cent. Rep. 546, 11 Atl. Rep. 820.

The account for work done under a contract to grade a railroad came into dispute, the owner and the contractor having different views as to the mode of ascertaining the amount of money earned by the contractor. Payment was made from time to time upon the owner's view as to the mode of measurement. There being evidence that the contractor protested when receiving the money, it was not error to refuse a charge to the effect that if the contractor received the money without protest he was estopped to dispute the construction put upon the contract by the owner. *Galveston, H. & S. A. R. Co. v. Johnson*, 74 Tex. 256, 11 S. W. Rep. 1113.

An instruction that contractors for the construction of a railroad are, during the execution of said work, the servants of the company, and that the tortious acts of the contractors, while about the business of the company, are properly chargeable to it, is erroneous. *Houston & G. N. R. Co. v. Van Bayless*, 1 Tex. App. (Civ. Cas.) 247.

Where subcontractors sue a railroad company and the contractors jointly, to recover extra compensation for work that had been fraudulently classed as loose rock where it should have been classed as solid rock ex-

cavations, in a proper case made, it is proper to charge the jury that if they find for the plaintiff, then they may find the same amount in favor of the contractors over against the railroad company. *Gulf, C. & S. F. R. Co. v. Ricker*, (Tex.) 17 S. W. Rep. 382.

117. Verdict—Findings.—Where, on issues raised by the allegations in two causes of action—one on a special contract and the other on a *quantum meruit*—with the corresponding denials in the answer, the jury found that plaintiffs had not complied with the terms of the written contract and defendant was not indebted to them thereon, but that defendant was indebted to them for work and labor done for the amount claimed, the findings were not inconsistent or contradictory. *Simpson v. Carolina C. R. Co.*, 112 N. Car. 703, 16 S. E. Rep. 853.

118. Rules for computing damages.—If alterations made by the company were not within the scope of the contract, the plaintiffs were entitled to recover a fair compensation for the increased cost of construction by reason of the alterations thus made, and in estimating which the jury were to be guided by the prices named in the original contract, so far as they were applicable to the labor and materials furnished on account of such alterations. *Annapolis & B. S. L. R. Co. v. Ross*, 68 Md. 310, 10 Cent. Rep. 546, 11 Atl. Rep. 820.

In an action by one party to an executory contract for work and labor against the other, to recover the damages sustained by the plaintiffs in consequence of the suspension of the work by the defendants, the market price or fair value of the work agreed to be performed by the plaintiffs on the day of the breach is to govern in the assessment, and not the market price at the time fixed for full performance, nor the difference between the price which the plaintiffs were to receive from the defendants and the price which they were to pay their subcontractors for doing the work. *New York & H. R. Co. v. Story*, 6 Barb. (N. Y.) 419; reversed on another point in 6 N. Y. 85.

119. Measure of damages.—(1) *In general.*—In an action of covenant, the plaintiff having been wrongfully prevented by the defendants from completing a work, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost the

plaintiff to complete it. *Myers v. York & C. R. Co.*, 2 *Curt. (U. S.)* 28.—QUOTING *Philadelphia, W. & B. R. Co. v. Howard*, 13 *How. (U. S.)* 344.

The measure of damages, upon the failure of a contractor to finish a railroad within the time fixed by contract, is the value of the use of the road from the time it should have been completed to the time when it is completed. *Snell v. Cottingham*, 72 *Ill.* 161.

Where a railroad company fails to deliver its contractors certain certificates of stock upon demand in part payment for their work, according to contract, the measure of damages is the market value of the stock. *Porter v. Buckfield Branch R. Co.*, 32 *Me.* 539.

If the right of election to pay in money or stock, at the option of the company, exists, and the stock is not delivered, the plaintiff recovers the amount of the debt and interest; but if no such election is expressed or implied, the plaintiff is entitled to the market value of the stock, with interest. *Cleveland & P. R. Co. v. Kelley*, 5 *Ohio St.* 180.

A recovery on the *quantum meruit* count cannot be for more than the contract price, since the contract must control as to the price and all other matters fixed by it. *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463, 20 *S. W. Rep.* 631.

In an action against a railroad company to recover damages on account of their preventing the performance by the plaintiffs of a contract for the construction of their roadway, the difference between the amount of the principal contract and of subcontracts, entered into by the plaintiffs with other persons for the performance of the same work, does not constitute the proper measure of damages. Evidence of such subcontracts is not competent in reference to the amount of damages. *Story v. New York & H. R. Co.*, 6 *N. Y.* 85; reversing 6 *Barb.* 419.—FOLLOWING *Masterton v. Mayor, etc.*, of Brooklyn, 7 *Hill (N. Y.)* 61.

As to the proper measure of damages against a railroad for preventing the performance of a contract for grading its road-bed, *quere*. *Vischer v. Talbot Branch R. Co.*, 34 *Ga.* 536.

(2) *Illustrations.* Under a stipulation to pay for building a railroad by monthly payments, twenty-five per cent. to be paid in stock of the corporation, "reserving one

half the stock as indemnity for the fulfillment of this contract until said division of said road shall be completed," the corporation having wrongfully interrupted the work before the completion of the said division—*held*, that the stipulation as to the stock was executory, and the covenantee had not obtained a title thereto, and consequently should be allowed in damages the value thereof. *Myers v. York & C. R. Co.*, 2 *Curt. (U. S.)* 28.

Under a contract to do certain work for a railroad company, part payment therefor to be received in the bonds of the company, the contractors sued and recovered for a breach of the contract and for extra work performed. *Held*, that in the absence of proof as to the market value of the bonds, the measure of damages was the difference between the value, under the contract, of the work done and materials furnished by the contractors, and the amount paid to them. *Orange, A. & M. R. Co. v. Placide*, 35 *Md.* 315.

Under a contract to do certain work for a railroad company, part payment therefor to be received in the bonds of the company, the contractors sued and recovered for a breach of the contract and for extra work performed. *Held*, that if the contractors were delayed in the execution of their contract by the default of the company, or its failure to comply with its contract, and they were thereby damaged, they were entitled to recover to the extent of such damage. *Orange, A. & M. R. Co. v. Placide*, 35 *Md.* 315.

The parties entered into a contract, by which plaintiff agreed to construct a railroad for defendant, the latter to pay in monthly instalments for work done as the work progressed, on certificate of the engineer, at the rates specified, less ten per cent. thereof, which was to be reserved until the final completion and acceptance of the work. Plaintiff agreed to make no claim for damages or extra compensation for any hindrance or delay, or in case the work for any reason should be suspended. Defendant reserved the right to dissolve the contract at any time, and plaintiff agreed to discontinue the work, upon five days' written notice to discontinue from defendant, the power to dissolve to be exercised only by defendant upon such notice, and the payment of all sums due for labor performed, and of the \$3000 agreed upon as liquidated damages; the

same to be in full for all work, material, and damages. In an action upon the contract it appeared that the work was suspended by defendant in March, 1890. Plaintiff was requested to keep his men and teams upon the work so as to be ready to resume when required, and he so kept them until notified not to do so longer; plaintiff repeatedly applied for permission to resume work, and in September of that year applied for payment of the amount due him. *Held*, that plaintiff was entitled to recover the amount unpaid for work and materials, including the ten per cent. reserved, also the expenses incurred in keeping men and teams in readiness, but was not entitled to recover the \$3000 liquidated damages. *Curnan v. Delaware & O. R. Co.*, 138 N. Y. 480, 53 N. Y. S. R. 25; *modifying 63 Hun* 628, 44 N. Y. S. R. 923, 17 N. Y. Supp. 714.

The plaintiff entered into a written contract with the defendants to make certain excavations for them on a section of a railroad bed, at eleven cents per cubic yard. The plaintiff did the least expensive part of the work, and received payment according to the contract price. Before the plaintiff finished the job the defendants terminated the contract and employed others to finish the work. The plaintiff thereupon brought assumpsit to recover twenty cents per cubic yard for the work done, upon proof that it was worth that price. *Held*, that the contract was *prima facie* the measure of damages as to the work done under it; and the court erred in charging the jury that they might find the value of the work done without reference to the contract. The measure of damages for a breach of a contract is, as a general rule, the loss which has been sustained thereby. *Doolittle v. McCullough*, 12 Ohio St. 360.—RECONCILING *Merrill v. Ithaca & O. R. Co.*, 16 Wend. (N. Y.) 586.

The plaintiffs, by their contract, were to receive in payment a certain proportion of the defendant's stock. Upon finishing their work they demanded their pay, claiming that their contract had been performed; this was denied by the defendants, and payment, on that account, refused. The market price of the stock, at this time, was 33 per cent. only of its par value. It being determined that the plaintiffs were entitled to recover a sum less than the whole stipulated price, not upon a strict and literal performance of the contract on their part, but upon equitable grounds—*Held*, that upon similar equita-

ble grounds their recovery, for that portion of their claim which was made payable in stock, should be limited to the market value of the stock at the time of their demand. *Barker v. Troy & R. R. Co.*, 27 Vt. 766.—CRITICISING *Boody v. Rutland & B. R. Co.*, 24 Vt. 660.—DISTINGUISHED IN *Bates v. Cherry Valley, S. & A. R. Co.*, 3 T. & C. (N. Y.) 16.

120. Remoteness—Prospective profits.—Where a railroad company neglects to secure the right of way, and thereby compels its contractors to abandon the construction of the road, they may recover as damages such profits as they would have realized if they had been permitted to carry out the contract. *Elizabethtown & P. R. Co. v. Pottinger*, 10 Bush (Ky.) 185.

Where an action is brought by the contractor, before completion of the contract, to authorize a recovery of prospective profits, a willingness on his part to complete the work, and a refusal of defendant to be further bound by the contract, or an abandonment of it by him, must appear. *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. Rep. 589.

Mere delay, however, in making the payments may be so inexcusable or unreasonable, or so indicative of an utter inability to perform the entire contract, as to be equivalent to a refusal to perform and a denial of plaintiff's right to proceed under it. *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. Rep. 589.

The plaintiffs contracted with the defendant (a railroad company) to construct its railroad for a fixed sum. While the plaintiffs were waiting for the defendant to procure a part of the right of way, which they claimed was represented by the president of the defendant to be already secured, the price of rails took a sudden rise in the market, so that the plaintiffs were obliged to pay more for them, when they concluded to purchase, than they could have gotten them for had the work not been delayed. In an action for deceit brought by the plaintiffs against the defendant—*Held*, that the loss thus sustained by the plaintiffs was a damage too uncertain, remote, and contingent to constitute a ground of recovery. *Phelps v. George's Creek & C. R. Co.*, 16 Am. & Eng. R. Cas. 600, 60 Md. 536.

121. Judgment, and how enforced.

—A railroad company placed certain of its bonds with a trust company to be issued to

a construction company on the completion of certain work. They were issued to the construction company, but retained by the trust company to secure advances made. Subsequently the construction company became insolvent, and persons who had constructed a part of the road, under a contract with the construction company, obtained a judgment against the railroad company for a balance due them. *Held*, that such parties could not subject the bonds in the hands of the trust company to payment of their judgment. *Coe v. East & W. R. Co.*, 52 *Fed. Rep.* 531.

III. CONSTRUCTION COMPANIES.

122. Rights and powers of officers.

—The president of a construction company was intrusted with the full management of the location and construction of railroads, and was authorized to draw checks and drafts. *Held*, that notes given by him, without express direction by the directors, for moneys used in the business, were not in excess of his powers. *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 *U. S.* 98, 11 *Sup. Ct. Rep.* 36.—FOLLOWED IN *Augusta, T. & G. R. Co. v. Kittel*, 52 *Fed. Rep.* 63, 2 *U. S. App.* 409, 2 *C. C. A.* 615.

One who was a stockholder and director in a construction company, and who, with the president, was manager of the business, at the request of the president indorsed a note given for moneys used in the business. *Held*, that on the note falling due, and not being paid, he had a right to take it up and have it assigned to himself. *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 *U. S.* 98, 11 *Sup. Ct. Rep.* 36.

123. Liability of stockholders.—

A corporation organized with the power of constructing and operating a railway, although nominally a construction company, is a railway company within the meaning of § 1068 of the Iowa Code, regulating stockholders' liability. *Langan v. Iowa & M. Constr. Co.*, 49 *Iowa* 317.—FOLLOWING *First Nat. Bank v. Davies*, 43 *Iowa* 424.

124. Rights of, under contract with railway company.—Where a railway company employs a construction company to build certain portions of its track, agreeing to issue bonds in payment therefor, to a certain amount per mile of track, in instalments as sections of the railroad shall be completed, and by a subsequent agreement such bonds are delivered in ad-

vance of the construction of the track, the construction company agreeing to take care of and pay all interest accruing previous to the railway becoming in a condition for traffic, and the railway company agreeing to reimburse the construction company for all interest paid on the principal chargeable to it out of the first earnings of the road, the construction company is bound to pay interest only on so many of the bonds as it received and used, to which it was not entitled under the construction contract. *Foster v. Mansfield, C. & L. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 281, 36 *Fed. Rep.* 627.

Where a bill against such railway company for the foreclosure of a mortgage to secure such bonds and coupons is brought by the trustees in the mortgage at the instance of the corporation to whom the bonds were negotiated, the agreement of the construction company to pay the interest is not a valid defense. *Foster v. Mansfield, C. & L. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 281, 36 *Fed. Rep.* 627.

Where ten years after a purchase of the property at foreclosure sale by another railway company, which held the bonds, a bill is filed by a stockholder of the mortgagor company to set aside the sale as fraudulent, predicated the fraud on an alleged defense to the foreclosure bill which the directors, of whom a majority were alleged to be connected with the creditor company, ordered withdrawn, a decree by confession being thereupon entered, the facts alleged in the bill appearing on the face of the foreclosure proceedings to have been accessible, if not known to the complainant and known to the officers of the corporation, and the bill not charging any concealment of any of the transactions, nor showing any reason for the delay, equity will refuse relief on the ground of laches. *Foster v. Mansfield, C. & L. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 281, 36 *Fed. Rep.* 627.

A bill on behalf of the corporation to have such a sale set aside as fraudulent may be filed by a stockholder after refusal of the stockholders to do so. *Foster v. Mansfield, C. & L. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 281, 36 *Fed. Rep.* 627.

A construction company became bound to construct and put into place, for a traction street-railway company, the ironwork and appliances for the curves, as per drawings and specifications, at a certain price per linear foot on the centre line of the

track. After the work was begun a change was made in the plans by which three curves, at a certain point, were made practically into one, by lengthening the radii and placing lighter and less complicated castings between the boxes described in the specifications. In an action for the price of the work, it was not error to instruct the jury that the plaintiff could recover for the filling-pieces only their actual value, "unless when the change was made there was an agreement, express or implied, that it was part of the curved work to be paid for at the contract price." *Marshall F. & C. Co. v. Pittsburgh Traction Co.*, 138 Pa. St. 266, 22 Atl. Rep. 23.

125. Right to continue work after becoming insolvent.—Plaintiff, a construction company, agreed to furnish the materials and to erect on masonry, to be furnished by defendant, an elevated iron railway, conforming in all particulars to plans and specifications approved by engineers named. Plaintiff agreed to commence at such point as might be named by defendant's president, and to commence work preparatory to such erection as soon as that officer should notify it that defendant's capital stock was subscribed and thirty per cent. paid. Defendant agreed to pay therefor a specified price per mile in monthly payments for the work done the preceding month. Plaintiff was not required to prosecute the work any faster than money to pay therefor should be furnished by defendant. Defendant subsequently, and after plaintiff had become insolvent, without giving plaintiff the prescribed notice, entered into a contract with another corporation for the construction of the work. *Held*, that although defendant did not, in express terms, undertake to do the act or give the notice required to set the plaintiff in motion, a promise to do so, or at least a promise that plaintiff should have the building of the railway in case that enterprise was prosecuted by defendant, was implied. *New England Iron Co. v. Gilbert El. R. Co.*, 16 Am. & Eng. R. Cas. 609, 91 N. Y. 153.—*QUOTED IN* *Mansfield v. New York C. & H. R. R. Co.*, 102 N. Y. 205; *Abendroth v. New York El. R. Co.*, 33 N. Y. S. R. 475.

Provision was made in the contract for subletting all or any part of the work, but it was declared that such subletting should not release plaintiff from its obligations, and that the subcontractors should be re-

garded as plaintiff's agents. After the same was executed, and before defendant entered into the new contract, plaintiff became insolvent and assigned all of its property to trustees for the benefit of creditors, the trustees having power to make such arrangement and disposition of the company's contracts as they should deem judicious. The assignment, after providing for payment of all of plaintiff's debts, directed the trustees to pay over any surplus to its treasurer. Plaintiff had expended, before the assignment, several thousand dollars in preparation for executing it. *Held*, that the insolvency and assignment did not justify defendant in treating the contract as abrogated, or give cause for rescinding it, and did not discharge that company from its obligations; that the contract was assignable, but conceding it was not, then it was not embraced in the trust deed. *New England Iron Co. v. Gilbert El. R. Co.*, 16 Am. & Eng. R. Cas. 609, 91 N. Y. 153.

Plaintiff is a Massachusetts corporation. After the execution of the assignment it filed certificates in the office of the secretary of that state, under oath of its officers, to the effect that it had ceased operations, assigned its entire property, and had "only a nominal organization for the purpose of liquidation, being wholly insolvent." The court decided these certificates to be conclusive against plaintiff. *Held*, error; that while they were proper evidence, they were not conclusive in an action such as this; that as the corporation was not in fact dissolved or relieved from the obligations of the contracts, it was a question of fact upon the whole evidence whether it was able and willing to perform. *New England Iron Co. v. Gilbert El. R. Co.*, 16 Am. & Eng. R. Cas. 609, 91 N. Y. 153.

126. Lien.—Where a construction company has notice of an existing contract for the sale of a railroad, before it *bona fide* begins work, the construction company acquires no lien on the roadbed and other property as against the purchasers. *Wright v. Kentucky & G. E. R. Co.*, 24 Am. & Eng. R. Cas. 312, 117 U. S. 72, 6 Sup. Ct. Rep. 697.

127. Liability of railway company to persons employed by.—Plaintiffs, who were subcontractors under a construction company, claimed for extra work done under the order of the construction company's engineer, but no authority

on the part of the engineer to bind the railway company appeared. *Held*, that the fact that the latter company took possession of the work after its completion was not, in the absence of evidence of any knowledge on its part of the agreement with the engineer, a ratification of such contract so as to render the railway company liable. *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39, 14 N. E. Rep. 832, 13 N. Y. S. R. 901, 10 Cent. Rep. 442.—APPLYING *Homersham v. Wolverhampton Waterworks Co.*, 6 Ex. 137; *Thayer v. Vermont C. R. Co.*, 24 Vt. 440; *Vanderwerker v. Vermont C. R. Co.*, 27 Vt. 125; *Herrick v. Belknap*, 27 Vt. 673.

CONSTRUCTIVE.

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CONTEMPT.

By interference with receivers, see **RECEIVERS**, V.; **STRIKES**, 5.

In violating injunctions, see **INJUNCTION**, IV.

1. What constitutes, generally.—

An engineer of a railroad company which has been enjoined from refusing to haul the cars of a boycotted connecting line, of which injunction he has notice, although he has not been made a party thereto, and who, while on his run, refuses to attach such a car to his train, and declares that he quits his employment, but nevertheless remains with his engine at that point for five hours, until he receives a telegram from his labor union to haul the car, and who thereafter continues in his employment, is guilty of contempt for violating the injunction, although engineers who refuse to haul such cars, in obedience to a rule of the labor union, and in good faith quit their employment before starting on their run, may not be in contempt. *Toledo, A. A. & N. M. R.*

Co. v. Pennsylvania Co., 53 Am. & Eng. R. Cas. 293, 54 Fed. Rep. 746.

A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such notice proceed from a source entitled to credit, and inform the defendant clearly and plainly from what act he must abstain. *Cape May & S. L. R. Co. v. Johnson*, 9 Am. & Eng. R. Cas. 476, 35 N. J. Eq. 422.

An injunction, gained in an order for the examination of a judgment debtor in supplementary proceedings, restraining him from transferring or making any disposition of his property "until further order in the premises," is sufficiently broad to enjoin a transfer by the debtor of an interest he has in the estate of a deceased son, which consisted of a cause of action against a railroad for damages for negligence causing the death of said son, and a transfer by him by such interest, after the service of such order, is a contempt for which he may be punished. *Wynkoop v. Myers*, 17 Civ. Pro. (N. Y.) 443, 7 N. Y. Supp. 898, 26 N. Y. S. R. 81.

2. Interfering with property in hands of court.—Whoever unlawfully interferes with property in the possession of a court is guilty of contempt of that court, and whoever unlawfully interferes with officers and agents of the court in the full and complete possession and management of property in the custody of the court is guilty of a contempt of court; and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation and threats. *In re Higgins*, 27 Fed. Rep. 443.

3. Interfering with receiver.*—

Where a railroad is in the hands of a receiver, and the employés of another road, who have struck, or any other persons, prevent the employés of the receiver from working, they commit a contempt of court and are to be treated in as summary a manner as if the contempt were committed in the actual presence of the court. *Secor v. Toledo, P. & W. R. Co.*, 7 Biss. (U. S.) 513.

After a receiver of a railroad has been appointed, a collection, by the vice-president, of money due the company under a mail contract, and depositing same in bank to the company's credit, and attempting to

* Receivers; interference with, as contempt of court, see note, 45 AM. & ENG. R. CAS. 104.

dictate what disposition the receiver should make of it, constitute contempt. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 52 *Fed. Rep.* 937.

4. — or causing his arrest.—It is contempt of court to cause the arrest of a receiver appointed by the United States circuit court to take possession of and operate a steam-motor road, on a complaint charging him with the violation of a criminal statute of the state declaring anything a public nuisance which obstructs the free use of a street, and this although the ordinances under which the road was constructed and operated are void. *United States v. Murphy*, 45 *Am. & Eng. R. Cas.* 100, 44 *Fed. Rep.* 39.

5. What does not constitute, generally. — Where defendant's employes, without orders, drove across complainant's road after the award of an injunction to restrain trespass on its roadway, and defendant disclaimed all evil intent, it is error to impose a fine for the contempt. *Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 88 *Va.* 929, 14 *S. E. Rep.* 691.

A receiver of a railway was in the habit of making deposits with a bank designated by the court as a bank of deposit in such cases. The officers of the bank wrecked it, being guilty of gross malfeasance in office, and these deposits were lost. *Held*, that the officers were not liable for contempt of court. *Southern Development Co. v. Houston & T. C. R. Co.*, 27 *Fed. Rep.* 344.

6. Acts done under advice of counsel.—The officers and employes of a railroad are not liable for contempt in violating an injunction, where they have acted under the advice of able and reputable counsel, and where it was chiefly desired to obtain a construction of the injunction order. *Dinsmore v. Louisville, N. A. & C. R. Co.*, 3 *Fed. Rep.* 393.

After a decree had been entered ordering the A. railroad company not to discriminate against the D. railroad company, the A. refused to check baggage beyond its own line. *Held*, that this was a violation of the decree; but it having been done under advice of counsel, no penalty should be imposed as for a contempt. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 12 *Am. & Eng. R. Cas.* 1, 5 *McCrary (U. S.)* 287, 16 *Fed. Rep.* 853.

The decree above named does not, either by its terms or by necessary implication,

forbid a change in the division of freights and fares between the Atchison, T. & S. F. R. Co. and the Denver & R. G. R. Co., so as to decrease the share of the latter. Courts ought not to interfere for the purpose of preventing any reduction in rates which result from competition between rival lines merely. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 12 *Am. & Eng. R. Cas.* 1, 5 *McCrary (U. S.)* 287, 16 *Fed. Rep.* 853.

7. Failure to obey subpoena.—N. Y. Laws 1868, ch. 442, gives the Livingston county board of supervisors no power whatsoever over the railroad commissioners. Hence disobedience to a subpoena of the board, requiring attendance upon an investigation to ascertain who were the railroad commissioners of a town, was no contempt. *In re Bradner*, 87 *N. Y.* 171.

8. — subpoena duces tecum.—A foreign railroad corporation, having its principal office in Chicago, had an office in New York, where certain books and papers were kept under the control of the vice-president, who was also its secretary and treasurer. By the practice of the corporation these books and papers when no longer required in New York were sent to the Chicago office, the laws of Illinois requiring books of account of all the business of the corporation to be kept at its principal office, subject to the inspection of its stockholders. The secretary being served with a subpoena duces tecum, requiring him to produce some of these books and papers which had been so forwarded to the Chicago office four years before, failed to produce the same, and it appeared on his examination that the assistant secretary at Chicago, who had the immediate charge of them, was a co-ordinate officer not under his direction or control, and that by the by-laws of the company the witness could not demand a delivery to him of the books and papers to be produced in obedience to the subpoena, although they would probably be sent to him at his request, as required to be used by him in the business of the corporation. Upon motion to punish the witness as for contempt in not producing the books and papers—*held*, that they were not in his custody, within the meaning of § 868 of the N. Y. Code of Civ. Pro., providing that the subpoena duces tecum must be directed to the officers in whose custody the book or paper desired is. *In re Sykes*, 10 *Ben. (U. S.)* 162.

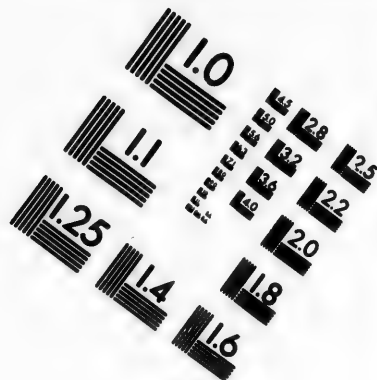
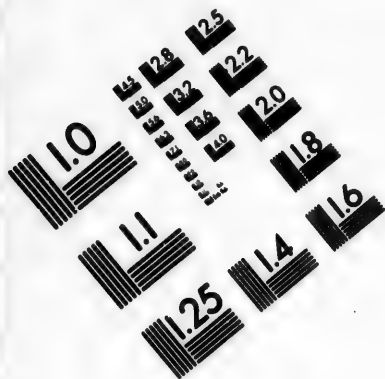
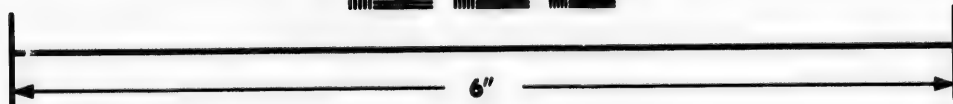
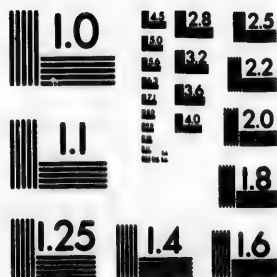


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9. Power to punish, generally.—

The court has power to punish a corporation for a wilful disobedience of the order of the court. *People v. Albany & V. R. Co.*, 12 Abb. Pr. (N. Y.) 171, 20 How. Pr. 358.

10. — by fine and imprisonment only.—

The power of the United States court in matters of contempt is limited, by U. S. Rev. St. § 725, to punishment by fine and imprisonment. It has no power to impose any punishment by way of damages or compensation to the plaintiff in the original action. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 32 Am. & Eng. R. Cas. 1, 5 McCrary (U. S.) 37, 16 Fed. Rep. 853.

11. Punishment of corporation.—

Under the statutes of the United States a corporation may be fined for a breach of an injunction, and the court is not limited to proceedings against the individual directors or other responsible agents. And where a foreign corporation is doing business in another state, in which the courts of the United States acquire jurisdiction over it to issue an injunction, it is proper to punish a contempt of the court's authority by a fine, as well against the corporation itself as the subordinate agents found within the jurisdiction. *United States v. Memphis & L. R. R. Co.*, 6 Fed. Rep. 237.

On motion for attachment against a railroad company and its officers for contempt in violating a temporary injunction and an order appointing a receiver, an objection that the motion does not specify any person by name, whom it is sought to attach, cannot avail, when such officers are well known to the court, have been served with a copy of the petition, have appeared in their official capacity and as counsel in litigation connected with the road, and when a proper order, if necessary, may be made from the record. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 52 Fed. Rep. 937.

A corporation may be punished for its violation of an injunction order if its chief officers have knowledge of the issuance of the order and of what is commanded and forbidden thereby, although strict service was not made of the order. *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 48 Hun (N. Y.) 190, 15 N. Y. S. R. 686, 14 Civ. Pro. 262.—APPLYING *Abell v. New York, L. & W. R. Co.*, 18 Wkly. Dig. 554; affirmed in 100 N. Y. 634.

12. — of city authorities.—The punishment of city authorities for contempt in disobeying a decree of court, believing it their duty to do so under resolutions and ordinances of the city, will be merely nominal, upon condition that they will in future comply with the decree; but they will be required to pay costs. *Des Moines St. R. Co. v. Des Moines B. G. St. R. Co.*, 36 Am. & Eng. R. Cas. 132, 74 Iowa 585, 38 N. W. Rep. 496.

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CONTRACT LABOR LAW.**1. What is a violation of the law.**

—The alien contract labor law (Act of Cong., Feb. 26, 1885, § 3) is not violated by a railroad company knowingly employing in New York a person who resides in Canada and comes daily to his work at the company's office in New York. *United*

States v. Michigan C. R. Co., 53 *Am. & Eng. R. Cas.* 28, 48 *Fed. Rep.* 365.

2. Action to recover penalty—Complaint.—In an action at law by the United States to recover the penalty for a violation of the contract labor law (Act of Cong., Feb. 26, 1885), a complaint alleging that defendant offered to one of its employes in Canada to continue his employment if he would come to the United States, and that in consideration of such promise, and in pursuance of such agreement, he did come to the United States and work for the defendant, is sufficient to show the acceptance of the offer in Canada, under the Montana rule that pleadings shall be liberally construed with a view to substantial justice. (*Comp. St. Mont.*, div. 1, § 100.) *United States v. Great Falls & C. R. Co.*, 53 *Fed. Rep.* 77.

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I. THE POWER TO CONTRACT.*

1. **In general.**—The contract of a corporation is presumed to be *infra vires* until the contrary is made to appear. *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191.

While corporations have no powers except those specifically granted, or such as are necessary for carrying into effect the powers expressly granted, yet the presumption of law arising in favor of their con-

tracts is always in favor of their validity; or, in other words, it will be presumed that the debt was due or the obligation or other consideration was given in the lawful course of business, until the contrary is shown. The presumption, however, only arises in cases where it appears the corporation is empowered to contract under the authority of its charter or the laws of the state. *Toppin v. Cleveland, C. & C. R. Co.*, 1 Flipp. (U. S.) 74. *Ellerman v. Chicago J. R. & U. S. Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287.

A chartered railroad company may contract jointly with individuals in settlement of litigation to which it is a party, and bind itself jointly with them to construct, keep up, and perpetual, maintain stock-gaps and road crossings across the track of the company upon the premises involved in the litigation. *Chattanooga, R. & C. R. Co. v. Davis*, 89 Ga. 708, 15 S. E. Rep. 626.

A declaration alleging such joint contract and a breach thereof is, after all the defendants except the railroad company have been stricken, to be read as if it alleged a several contract by the company alone, and may then be amended by averring that the agreement was embraced in a deed of conveyance made by the plaintiff to the company, by which the right of way through the premises was conveyed, and under which the company built its railroad through the premises, and has since maintained and operated the same. *Chattanooga, R. & C. R. Co. v. Davis*, 89 Ga. 708, 15 S. E. Rep. 626.

While it is true that railway corporations can only make such contracts as the legislature may authorize, yet when made within their powers, their contracts, in legal effect, are the same as like contracts made by natural persons under similar circumstances. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657.

While corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others, yet, although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of its charter or of any statute, and the corporation has by its promise induced a party relying upon such promise, and in execution of the contract, to expend money and perform his part of the contract, the corporation is liable. *State*

* See also **CORPORATIONS**, 7-13; **ULTRA VIRES**.

Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407.

Corporations may contract, under their corporate seal, by a vote of the directory entered on the books of the corporation, or by their agents acting within the scope of their authority; and binding contracts may be implied from their corporate acts without either a vote, deed, or writing. *Petrie v. Wright*, 14 Miss. 647.

Corporations, like individuals, may be bound by implied contracts, to be deduced by inference from corporate acts, without either remote writing or deed; but this is subject to the qualification that the act must be within the power of the corporation and the scope of its authority. *New York & H. R. Co. v. Mayor, etc., of N. Y.*, 1 Hill. (N. Y.) 562.

The public has a right to say that railroad companies shall not be permitted to make any contract which would prevent them from accommodating the public, when entitled to it, in the matter of transportation and travel. *Pueblo & A. V. R. Co. v. Taylor*, 6 Am. & Eng. R. Cas. 474, 6 Colo. 1, 45 Am. Rep. 512.—QUOTING *St. Joseph & D. R. Co. v. Ryan*, 11 Kan. 609.

A railway company has no power to contract to pay a large sum of money to a person upon the understanding that he shall not oppose the passing of the company's bill in parliament. *Preston v. Liverpool, M. & N.-upon-T. J. R. Co.*, 5 H. L. Cas. 605, 2 Jur. N. S. 241, 25 L. J. Ch. 421.

An action may be maintained against a corporation for the breach of a covenant to repay money borrowed for its purposes, although there is no specific statutory provisions enabling the corporation to bind itself by such covenant. *Eastern Union R. Co. v. Hart*, 8 Ex. 116, 17 Jur. 89, 22 L. J. Ex. 20.

The *prima-facie* power of corporations to contract cannot be insisted on as to matters where, from the nature of the corporate body or the object of its incorporation, it is expressly or impliedly prohibited from contracting. *Shrewsbury v. Birmingham R. Co.*, 6 H. L. Cas. 113.

2. Contracts made prior to organization.*—In order to recover against a corporation in an action at law for services

rendered before its being, plaintiff must prove either an express promise of the new company or that the contract was made with persons then engaged in its promotion and taking preliminary steps to organization, and was made on behalf of the new company in the expectation of plaintiff, and with the assurance of the projectors, that it would become a corporate debt; and that the company afterward entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. *Little Rock & Ft. S. R. Co. v. Perry*, 9 Am. & Eng. R. Cas. 610, 37 Ark. 164.—REVIEWING *Edwards v. Grand Junction R. Co.*, 1 M. & C. 650; *Stanley v. Chester & B. R. Co.*, 9 Simons 264, 16 Eng. Ch. Rep. 264.—QUOTED IN *Catlett v. St. Louis, I. M. & S. R. Co.*, 54 Am. & Eng. R. Cas. 113, 57 Ark. 461, 21 S. W. Rep. 1062.—*Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669.

A corporation is not liable under a contract for services rendered, entered into between a third party and a promoter of the corporation, unless the services were rendered for the benefit of the corporation and on its credit, and not that of an individual. *Perry v. Little Rock & Ft. S. R. Co.*, 25 Am. & Eng. R. Cas. 44, 44 Ark. 383.—APPROVED IN *Runt v. Herring*, 21 N. Y. Supp. 244.

A party rendering service and incurring expense for a proposed corporation before its organization, may recover upon an express promise of the company to pay for the same after its organization; yet in the absence of such express promise, no promise to pay will be implied from the fact that the company accepts the benefit of the same. *Rockford, R. I. & St. L. R. Co. v. Sage*, 65 Ill. 328.—QUOTING *Franklin F. Ins. Co. v. Hart*, 31 Md. 59.—FOLLOWED IN *Safety Deposit L. Ins. Co. v. Smith*, 65 Ill. 309.

The promoters of a corporation do not represent it in any relation of agency, and have no authority to enter into preliminary contracts binding the corporation when it shall come into existence; and if its sanction to such a contract is obtained by the act or co-operation of a director who has a private interest, it may resist an action for specific performance, at least in a case where it has not accepted the consideration or taken the benefit of the contract. *Munson v. Syracuse, G. & C. R. Co.*, 29 Am. & Eng. R. Cas. 377, 103 N. Y. 58, 8 N. E. Rep.

* Corporate liability for services rendered prior to corporate existence, see note, 9 Am. & Eng. R. Cas. 629.

355, 7 *N. Y. S. R.* 863. *Stanton v. Missouri Pac. R. Co.*, 15 *Civ. Pro. (N. Y.)* 296, 2 *N. Y. Supp.* 298.

A corporation authorized to be constituted under an act of assembly cannot take a bond, payable to it, until the prerequisites have been performed to give it corporate existence. *Wilmington & M. R. Co. v. Wright*, 5 *Jones (N. Car.)* 304.

A contract by the projectors of a railway company with a landowner, by which he agreed not to oppose their bill in parliament, and by which the projectors agreed on behalf of the proposed company to pay him certain sums for the use of his land, etc., was conditional upon the making of the railway; and the company being unable to raise the funds necessary, the landowner could not recover the money payable under the contract. *Preston v. Liverpool, M. & N.-upon-T. J. R. Co.*, 2 *Jur. N. S.* 241, 25 *L. J. Ch.* 421, 5 *H. L. Cas.* 605.

Where a railway company contracts to purchase certain premises for a certain sum payable on a certain day after the company, on obtaining its act, shall have begun to make the railway, under the powers of such act, and the company obtains its act under which it is empowered to enter upon said premises and to make the line, but never avails itself of such power nor commences making the railway, the landowner cannot enforce the agreement, it being conditional upon the company obtaining the act and beginning to make the railway. *Edinburgh, P. & D. R. Co. v. Philip*, 2 *Macq. H. L. Cas.* 514, 3 *Jur. N. S.* 249.

Where the promoters of a railway company agree with a tenant for life of settled estates to pay him £20,000 for obtaining his support to a scheme, and this agreement is afterwards adopted by the provisional committee of a second company which stands in the place of the first, the contract cannot be enforced, since it is *ultra vires*. *Shrewsbury v. North Staffordshire R. Co.*, *L. R.* 1 *Eq.* 593, 12 *Jur. N. S.* 63, 35 *L. J. Ch.* 156, 14 *W. R.* 220, 13 *L. T.* 648.

Charges against the defendants, an incorporated railroad company, for services rendered by the plaintiff in procuring the passage of their act of incorporation, disallowed, the services appearing to have been voluntarily rendered, and there having been no subsequent promise to pay them. No previous promise could be implied when, at the time the services were rendered, the

defendants were incapable of making an express contract. *Hall v. Vermont & M. R. Co.*, 28 *Vt.* 401.—DISTINGUISHED IN *Low v. Connecticut & P. R. R. Co.*, 46 *N. H.* 284.

Charges for services of the plaintiff, who was one of the incorporators named in the defendant's act of incorporation, in procuring the stock subscriptions necessary for a full organization of the company, allowed, though there was no express promise for their payment. The services being necessary, a promise for their payment would be implied. *Hall v. Vermont & M. R. Co.*, 28 *Vt.* 401.

3. Contracts made by officers and agents.*—The president and one director of a railroad employed plaintiff as the manager of the company's road at a fixed salary, and provided that he was not to be removed except for a good and sufficient cause. The president and director constituted the majority of the executive committee of the road. *Held*, that such officers had not the power, in the absence of authority conferred by a by-law or a vote of the directors, to make such a contract as would prevent the removal of the manager afterward without cause. *Queen v. Second Ave. R. Co.*, 3 *J. & S. (N. Y.)* 154, 44 *How. Pr.* 281.

4. Ratification and its effect.—A contract made by an officer of a corporation, and ratified by the corporation, becomes the contract of the latter. *Greenleaf v. Norfolk Southern R. Co.*, 91 *N. Car.* 33.

A corporation has power when fully organized to ratify a contract made by its promoters before its organization, when it is one within the purpose for which the corporation was organized, and appears to be a reasonable means for the carrying out of those purposes. *Stanton v. New York & E. R. Co.*, 47 *Am. & Eng. R. Cas.* 390, 59 *Conn.* 272, 22 *Atl. Rep.* 300. *Preston v. Liverpool, M. & N.-upon-T. J. R. Co.*, 5 *H. L. Cas.* 605, 2 *Jur. N. S.* 241, 25 *L. J. Ch.* 421.

The ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. *Stanton v. New York & E. R. Co.*, 47 *Am. & Eng. R. Cas.* 390, 59 *Conn.* 272, 22 *Atl. Rep.* 300.

The promoters of a corporation, previous to its organization, made a contract with

* Liability of company for contracts made by president, superintendent, division superintendent, and general agents or managers, see note, 20 *L. R. A.* 696.

the plaintiff for the purchase by him of a right of way for a contemplated railroad, and after the organization the corporation ratified the contract. After the plaintiff had secured the right of way for several miles the directors of the corporation, in consequence of their failure to get authority to build a necessary bridge across a navigable river, abandoned the enterprise and allowed the corporate powers to expire. The plaintiff was to have been paid in stock of the company to be issued by the directors. In abandoning the enterprise the directors decided to issue no more stock, and called in what had been issued. In a suit by the plaintiff to recover for his services under the contract—*held*: (1) that by the ratification of the contract the corporation became bound by it, and that the plaintiff was entitled to recover for services under it rendered prior to the incorporation; (2) that it was no defense that after failing to get authority to build the bridge it was impracticable to obtain subscriptions to the stock, or to raise money to build the road; (3) that it did not affect the case that the plaintiff knew that the success of the enterprise depended upon getting authority to build the bridge; (4) that the contract being in writing, and specially exempting the plaintiff, as it did, from all duty in the matter of bridges over navigable waters, no parol agreement or understanding inconsistent with it could be shown. *Stanton v. New York & E. R. Co.*, 47 *Am. & Eng. R. Cas.* 390, 59 *Conn.* 272, 22 *Atl. Rep.* 300.

A rolling-mill company contracted to sell a railroad company certain iron. After part had been delivered the latter became insolvent, and by way of compromise the financial agents of the railroad paid a balance on the iron delivered, on condition that the rolling-mill company would execute a release as to further deliveries. The release was executed by the president and superintendent, who seemed, under the by-laws, to have the power to do so. *Held*, that the release was valid; but if it was otherwise, a failure of the board of directors to bring suit for six months, and a failure to formally disaffirm the act for two years, were a ratification of the release. *Indianapolis Rolling Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 *U. S.* 256, 7 *Sup. Ct. Rep.* 542.—FOLLOWED IN *Augusta, T. & G. R. Co. v. Kittel*, 52 *Fed. Rep.* 63, 2 *U. S. App.* 409, 2 *C. C. A.* 615.

5. Contracts beyond the authority given in charter.—A contract made by a corporation in excess of its powers is not enforceable at law or in equity, and a person entering into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity. *Memphis G. & E. Co. v. Memphis & C. R. Co.*, 30 *Am. & Eng. R. Cas.* 522, 85 *Tenn.* 703, 4 *Am. St. Rep.* 798, 5 *S. W. Rep.* 52.

A corporation may bind itself by any contract except such contracts as are prohibited by the statutes creating or regulating the corporation. *Scottish N. E. R. Co. v. Stewart*, 3 *Macq. H. L. Cas.* 382.

A corporation chartered with power to build a railroad from one point to another, and to transport passengers and freight, has no authority to run a line of steamboats in connection with the road; and all contracts beyond the authority given in the charter are void. *Hoagland v. Hannibal & St. J. R. Co.*, 39 *Mo.* 451.—FOLLOWED IN *St. Joseph v. Saville*, 39 *Mo.* 460.

A railroad corporation cannot without special legislation contract to pay interest on stock before the road is completed or any income received; and a contract to do so cannot be enforced against the capital of the company. *Painesville & H. R. Co. v. King*, 17 *Ohio St.* 534.—REVIEWING *Waterman v. Troy & G. R. Co.*, 8 *Gray (Mass.)* 433.

A company authorized to build a railroad, and failing to obtain means, contracted with an individual to build a railroad solely for his own use on part of their route. *Held*, the company had no power to make such contract, and the individual could not build such road. *Stewart's Appeal*, 56 *Pa. St.* 413.

A bill in equity was brought against the individual who had constructed his road under the contract, to restrain him from working it, and to remove it, the company not being made party. *Held*, that the bill would lie against the defendant alone, for creating a nuisance to plaintiff's property. *Stewart's Appeal*, 56 *Pa. St.* 413.

6. Verbal contracts.—The provision of the third section of the Cal. act of 1861, that no contract entered into by a railroad shall be binding unless made in writing, relates only to executory contracts; verbal contracts made by the railroad are voidable only so long as unexecuted. *Pixley v. Western Pac. R. Co.*, 33 *Cal.* 183.—EX-

PLAINED IN *Foulke v. San Diego & G. S. P. R. Co.*, 51 Cal. 365.

Verbal contracts made by a railroad, though voidable so long as unexecuted, are valid and binding upon the company when fully performed by the other party. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183.—QUOTING *Fister v. La Rue*, 15 Barb. (N. Y.) 323.

A railroad incorporated under Cal. act of May 20, 1861, may contract in any mode it sees fit, except so far as it is provided by the 3rd section of such act that no contract shall be binding upon the company unless made in writing; and this clause is no interdiction to making a contract not in writing, which it may perform if it elects to do so. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183.

II. COMMON LAW REQUISITES.

7. What constitutes a contract.—

A proposition made by some corporate act of a railroad corporation to the authorities of a municipal corporation, and an acceptance of the terms thereof by an ordinance of the municipal corporation, constitute a contract between them. *People ex rel. v. Sup'rs of San Francisco*, 27 Cal. 655.

8. Assent.—(1) *Necessity.*—Agreements entered into by one railway with another, and not ratified by a vote of the majority of stockholders, as prescribed by the "railway act," are voidable. *Great Western R. Co. v. Grand Trunk R. Co.*, 25 U. C. Q. B. 37.

In response to an advertisement, plaintiffs submitted proposals for clearing and grading a railroad between specified places. Subsequently the company's directors met, but for want of time referred the proposals to the company's superintendent and executive committee to close a contract with plaintiffs; but it did not appear that the committee ever acted. *Held*, not sufficient to show a contract for doing the work; and the individual declarations of some of the company's directors were not competent evidence to establish such contract. *Soper v. Buffalo & R. R. Co.*, 19 Barb. (N. Y.) 310.

After a railroad had been sold at foreclosure and a new company organized, the purchaser published an offer to exchange new stock for all old stock that might be deposited before a certain date named. Plaintiff, who held certain old stock issued to a third party, but which purported to have a transfer indorsed thereon, offered it, but it was declined on the ground that it

was not good. Nothing further was done until after the time for depositing stock, when plaintiff sued for breach of contract. *Held*, that the action was not maintainable, as no contract had been completed. *Schorestene v. Iselin*, 23 N. Y. Supp. 557, 69 Hun 250.

The Great Western and Grand Trunk R. Cos. on the 27th of February, 1860, with a view to avoid competition, entered into an agreement, under their respective corporate seals, providing for the same rates on through traffic to be charged by each, for the division of the profits from such traffic in specified proportions, and for the rendering mutual monthly accounts, etc. To a declaration by the G. W. against the G. T. on the common counts, defendants pleaded this agreement, alleging that it had not been consented to by two thirds of the shareholders of either company, as required by the statute, and that the moneys sought to be recovered by the plaintiffs accrued to them only under such agreement. *Held*, on demurrer, a good defense, for that the agreement was clearly within "the railway act," C. S. C. c. 66, § 131 (a consolidation of the 22 Vict. c. 4 then in force), which makes such consent a condition precedent to its vitality. *Great Western R. Co. v. Grand Trunk R. Co.*, 24 U. C. Q. B. 107.

(2) *Sufficiency.*—A clause in a letter which, with others, contains all the stipulations of a completed contract, that the writer will at a specified time come and make out a contract, does not prevent such letters from constituting a completed contract, where neither party contemplated the insertion in a formal contract of any stipulation not substantially contained in the letters, and did not believe that any further writing was necessary to create a contract. *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 Wis. 427, 54 N. W. Rep. 797.

The manufacturers of rails quoted prices to a railroad on lots not less than 2000 tons. The railroad company replied ordering only 1200 tons at the same price for a future delivery. This offer was promptly declined. *Held*, that the negotiations were thus ended, and a subsequent acceptance by the railroad of the offer was not binding. *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co.*, 29 Am. & Eng. R. Cas. 583, 119 U. S. 149, 7 Sup. Ct. Rep. 168.

When applied to for freight rates on five hundred bundles of laths, a railroad agent

quoted rates based upon one hundred bundles, having misunderstood the parties as to the amount to be shipped. *Held*, that there was not such a meeting of the minds of the parties as to form a contract, so as to prevent the company from recovering full rates. *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514.

On April 23, 1867, the inhabitants of Unity voted to take stock in the plaintiff company, provided its railroad should be located through the town. June 29, 1868, the directors so established the line of the road as not to pass through that town, and March 15, 1869, the inhabitants rescinded their vote to take the stock. *Held*, that there never was any such proposition by one party, accepted unconditionally by the other, as to constitute a completed contract. *Belfast & M. L. R. Co. v. Unity*, 62 Me. 148.

The agent of a railroad company wrote a letter offering to transport railroad iron between designated points, and during a specified time, at a fixed rate for a certain number of tons. In answer to this, plaintiff, who had iron to ship, answered, accepting the terms, but did not agree to deliver any iron for shipment. *Held*, that there was not a completed contract so as to bind the company. *Chicago & G. W. R. Co. v. Dane*, 43 N. Y. 240.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Flannagan*, 113 Ind. 488; *Riggins v. Missouri River, Ft. S. & G. R. Co.*, 73 Mo. 598; *East v. Cayuga Lake Ice Line*, 21 N. Y. Supp. 887. REVIEWED IN *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 298.

Plaintiffs wrote defendants offering to lease a railroad with the privilege of purchasing it, the rent to commence April 1, if plaintiffs were ready to give possession, the details to be subsequently arranged. Defendants answered accepting, the lease to be perpetual unless terminated by purchase. On April 1 plaintiffs wrote, offering to give possession, and that rent would begin from that date. Subsequently the lease was executed, with a provision that rent begin on May 1, "but without prejudice to either party as to the question of rent prior to May 1st." *Held*, that the correspondence did not make a complete contract, and that no rent could be recovered for the month of April. *Brown v. New York C. R. Co.*, 44 N. Y. 79.

A railroad company, after considerable

3 D. R. D.—13.

negotiations, wrote to plaintiffs that they would sell them so many tons of old iron, describing it, for so many tons of new rails in payment. Plaintiffs answered, acknowledging receipt of the letter "containing the terms of the agreement we have made for the sale of" steel rails, reciting the terms, but describing the old iron as of a better quality than that described in the company's letter. *Held*, no completed contract that would bind the company. *Bickford v. Great Western R. Co.*, 28 U. C. C. P. 516.

9. Consideration.—(1) *In general.*—An agreement by which a railroad company agrees to pay a sum in full of the damage to an animal injured while being transported over its line, the animal thereafter to become the property of the company, is founded on sufficient consideration—viz., the liability of the company in damages and the transfer of the plaintiff's right of property. *Chicago & E. T. R. Co. v. Katzenbach*, 38 Am. & Eng. R. Cas. 375, 118 Ind. 174, 20 N. E. Rep. 709.

Under an asserted claim for damages, unliquidated in amount, resulting from the alleged negligent destruction of property, the claim being made in good faith and upon grounds reasonably inducing the belief that it is enforceable, an agreement on the one hand to pay a specified sum, less than the alleged value of the property, and an agreement by the other party to accept that in full satisfaction, constitute a valid contract. *Neibles v. Minneapolis & St. L. R. Co.*, 37 Minn. 151, 33 N. W. Rep. 332.

In order to render an agreement to forbear, and the forbearance of a claim, a sufficient consideration for a new promise, it is essential that the demand forborne should be sustainable at law or in equity; and the consideration will fail if the demand is without foundation. So where one subscribes to railroad stock and subsequently gives his note for the amount, in consideration that the company extend the time of payment, the note is not collectible unless the original subscription was *Oregon & C. R. Co. v. Potter*, 5 Oreg. 228.

Where a railroad company has contracted to build a switch at plaintiff's mill, a promise by the company to stop a train twice a week at the mill, in consideration that plaintiff will waive the building of the switch, is *nudum pactum*, where it is expressly understood that plaintiff does not waive the building of the switch. *Lydick*

v. *Baltimore & O. R. Co.*, 11 *Am. & Eng. R. Cas.* 336, 17 *W. Va.* 427.

(2) *Illustrations.*—A subscription to stock of a railway, made in consideration that the railroad be constructed to L. by July 1, contained on its back an indorsement: "I hereby agree to extend the time of completing the within road to L. to Sept. 1, and this note shall have the same value as if the road is completed by July 1." *Held*, that the indorsement created a new contract, differing only from the original as to the time of performance, and was based upon a good and valid consideration. *Burlington & M. R. R. Co. v. Penny*, 38 *Iowa* 255.

It was a condition of the settlement of a dispute between a railroad and a county that the railroad company should construct its road through M. county and should locate a station at G. By the act of congress conferring a grant of land upon the company, it was required to extend its line to a point on the Missouri river near the mouth of the Platte river, and this point would necessarily be in M. county. *Held*, that the company was not bound by the act of congress to run its line by the way of G. or locate a station there, and an agreement to do so constituted a valid consideration for the agreement to compromise. *Mills County v. Burlington & M. R. R. Co.*, 47 *Iowa* 66.—*QUOTED IN* *Jefferson County v. Burlington & M. R. R. Co.*, 66 *Iowa* 385.

The running of "scare lines" by the railroad company would not constitute fraud invalidating the settlement, in the absence of proof that the lines were run where the company had not a legal right to locate its line. *Mills County v. Burlington & M. R. R. Co.*, 47 *Iowa* 66.

On April 1, 1870, the Missouri River, Ft. S. & G. R. Co. was building a railroad toward Baxter Springs, but the said company could not conveniently build it to Baxter Springs without crossing a certain quarter-section of land owned by the railroad company, but in the possession of L., who was a mere trespasser thereon. L. opposed the building of the road, and threatened violence and legal proceedings if any attempt should be made to build the road across said land. The defendants were citizens of Baxter Springs, and were very desirous of having the road built without delay, and knowing of said threats of violence made by L., and for the purpose of preventing L. from putting such threats

into execution, they entered into the following contract, to wit: "That in consideration of one dollar this day paid to (the defendant) said parties of the second part, by (L.) said first party, and in further consideration that the said party of the first part will permit the Missouri River, Fort Scott and Gulf railroad company to build and complete said railroad through" said land "without any hindrance or obstruction whatever, the said parties of the second part hereby agree to pay to the said party of the first part forthwith, on demand, all damages which the commissioners of Cherokee county may assess to be done to said land by the building of said railroad through said premises, without any appeal whatever." The railroad company then built its road across said land and to Baxter Springs without any further opposition from L. Said commissioners then assessed the damage done the land at \$650.40. The defendants then paid \$140 thereof, and the balance still remains unpaid. L. then sued the defendants for the balance, and the defendants set up the defense that there was no sufficient consideration for their agreement. *Held*, that the desistance of L. from further opposition to the building of said road across said land was not a sufficient consideration for the defendant's contract, for the reason that the railroad company had an undoubted right to build its road across its own land without any person paying L. therefor. *Botkin v. Livingston*, 21 *Kan.* 232.

A railroad company placed certain bonds in trust to be used in the construction of the road. The trustees delivered a portion of them to the president of the company, to be delivered to certain contractors with whom he had made contracts. After he went out of office he still held some of the bonds, claiming that he was the owner thereof, having received them from the contractors. It appeared that the president, secretary, and one director had been appointed a committee to award contracts, and the president held the bonds under an assignment of a part interest in the contracts to himself, in consideration of his influence and that of the secretary in procuring them. *Held*, that such influence was a void and illegal consideration for such assignment. *Flint & P. M. R. Co. v. Dewey*, 14 *Mich.* 477.

Where it was alleged in a declaration

that an agreement was entered into between a railroad company and an individual, by which the latter stipulated that if the former would locate their road and terminate it at a certain place, and should require certain lands in the vicinity of such termination for the purposes of the road, that he would pay the damages which should be appraised to the owners of the lands; and the plaintiffs then proceeded to aver that the agreement being so made, afterwards, to wit: on, etc., at, etc., in consideration thereof, and that the plaintiffs had promised to perform on their part, the defendant promised to perform on his part—*held*, that the promise of the individual was not binding, inasmuch as by the agreement no obligation was incurred on the part of the company, and that the promise of the company, set forth as made subsequent to the agreement, was not a sufficient consideration to sustain the promise of the defendant. *Utica & S. R. Co. v. Brinckerhoff*, 21 *Wend. (N. Y.)* 139.

Where the charter of a railway company provided that its road should not be run so near an existing turnpike as to injure it, without the consent of the turnpike company, the consent of the latter company—the road being actually located in pursuance of the agreement—was a sufficient consideration to support a promise by the railway company to assign stock in its road in payment therefor. *Bedford County v. Nashville, C. & St. L. R. Co.*, 22 *Am. & Eng. R. Cas.* 75, 14 *Lea (Tenn.)* 525.

10. Mutuality.—The opinion of one party to a contract of carriage as to the liability for loss or delay occurring on a connecting line, such opinion not being known to the other party, does not affect the legal construction of the contract. *Savannah, F. & W. R. Co. v. Pritchard*, 28 *Am. & Eng. R. Cas.* 57, 77 *Ga. 412*, 4 *Am. St. Rep.* 92, 1 *S. E. Rep.* 261.

The necessary mutuality was wanting to constitute a contract, where persons in possession of certain railroad lands had never notified the railroad of their acceptance of its offer of a sale of the same, contained in a general printed circular. *Billings v. Sanderson*, 8 *Mont.* 201, 19 *Pac. Rep.* 307.

An agreement by a party holding a judgment against a railway company to assign such judgment in consideration of an agreement on the part of the assignee to organize a new railroad corporation and to give

the holder of the judgment "securities thereof, and a contract for the construction of a part of said road," is too uncertain, and lacks mutuality to such an extent that a court of equity will not enforce specific performance thereof. *Ballou v. March*, 43 *Am. & Eng. R. Cas.* 709, 133 *Pa. St.* 64, 19 *Atl. Rep.* 304.

Where stockholders in a turnpike company assented to an agreement by which they were to receive stock in the railroad in payment of damages done the turnpike by the railroad, the fact that they were not bound by the terms of the agreement to accept it, is not sufficient to support the defense of want of mutuality. *Bedford County v. Nashville, C. & St. L. R. Co.*, 22 *Am. & Eng. R. Cas.* 75, 14 *Lea (Tenn.)* 525.

When by the terms of a compromise the company binds itself to employ the plaintiff, and it is optional with the latter to serve, there is no mutuality of contract until the plaintiff exercises the right to fix the period for which he will serve; and until he has done so there is no breach for which he can maintain an action. *East Line & R. R. Co. v. Scott*, 38 *Am. & Eng. R. Cas.* 16, 72 *Tex.* 70, 10 *S. W. Rep.* 99, 298.—*REVIEWING Chicago & G. W. R. Co. v. Dane*, 43 *N. Y.* 241.

A contract by which a person agrees to supply a railway company at certain prices with such quantities of iron as it might order from time to time during a limited period is not void for want of mutuality, and is founded upon a good consideration. *Great Northern R. Co. v. Whitham*, 43 *L. J. C. P.* 1, *L. R.* 9 *C. P.* 16.

An officer of a railroad contracted to sell a lot of old rails at so much per ton. Afterward there was some difference of opinion as to what should constitute a ton. The company claimed 2000 pounds and the purchaser 2240 pounds, but before the time for delivery the purchaser was notified that he could have the iron at 2240 pounds per ton. *Held*, to be a completed contract which bound the purchaser to receive the iron. *Wheeler v. New Brunswick & C. R. Co.*, 115 *U. S.* 29, 5 *Sup. Ct. Rep.* 1061, 1160.

11. Execution.—Where the articles of association of a car trust provide that in order to bind the company all contracts for the payment of money shall be in writing and signed by at least three of the managers, the mere acceptance of an order by the company to pay money under an exist-

ing contract does not come within the above provision and need not be so executed. *French Spiral Spring Co. v. New England Car Trust*, 32 Fed. Rep. 44.

In the absence of fraud or coercion a party who can read and write is presumed to know the terms of a contract signed by him, and if he does not it is his own fault, and his ignorance will not avail him. So held, where a party who was a bookkeeper tried to take advantage of the conditions of a receipt given for goods shipped on the ground that he did not read it. *Illinois C. R. Co. v. Jonte*, 13 Ill. App. 424.

Where a suit is brought against a railroad company upon contracts signed by two persons as trustees for its mortgage bondholders, in order to maintain the action and recover it must appear that the company was the principal and that the two persons signing as trustees were its agents in executing the contract, or that the company had become a party to the contract by novation. *Chaffee v. Rutland R. Co.*, 4 Am. & Eng. R. Cas. 212, 53 Vt. 345.

12. Seal.*—(1) Necessity.—The seal of a corporation is equally appropriate as a means of evidencing its assent to be bound by a simple contract or by a specialty. *Central Nat. Bank v. Charlotte, C. & A. R. Co.*, 5 So. Car. 156.

An agreement between a railway company and a landowner fixing the amount to be paid as compensation, signed by the company's agent but not under the seal of the company, cannot be enforced by action. *Reg. v. Bristol & E. R. Co.*, 3 Railw. Cas. 777.

Where a railway company contracts for the substitution of a new line for the old one and for the maintenance by the contractor of all the works for two months after their completion, it is not liable to be sued in respect thereof if the contract was not sealed, such case not falling within the excepted cases where the seal may be dispensed with. *Diggle v. London & B. R. Co.*, 6 Railw. Cas. 590, 5 Ex. 442, 14 Jur. 937, 19 L. J. Ex. 308.—NOT FOLLOWED IN *Henderson v. Australian R. M. S. Nav. Co.*, 5 El. & Bl. 409, 24 L. J. Q. B. 322, 1 Jur. N. S. 830.

Where a railroad company contracted

* Contract with corporate seal annexed, see note, 16 AM. & ENG. R. CAS. 617.

under seal with persons to construct its road, and the contractors claimed to be released by a subsequent contract, they must show that the release was also under seal. *Port Whitty & P. P. R. Co. v. Dumble*, 22 U. C. C. P. 39.

(2) *Authority to affix.*—Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 577, 32 W. Va. 244, 9 S. E. Rep. 180.

The presumption of authority to affix the corporate seal to a contract will not be overcome by the mere fact that no vote of the directors authorizing it is shown. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 577, 32 W. Va. 244, 9 S. E. Rep. 180.

If the seal was fraudulently obtained or the officers acted without authority, either in executing the contract in their official capacity or in affixing the seal, it is with the corporation to establish those facts. *Jourdan v. Long Island R. Co.*, 115 N. Y. 380, 22 N. E. Rep. 153, 26 N. Y. S. R. 138; affirming 42 Hun 657, 6 N. Y. S. R. 89.

A contract under the seal of a company is not valid unless the seal was affixed by the authority of the directors, meeting together as a board. *D'Arcy v. Tamar, K. H. & C. R. Co.*, 4 H. & C. 463, 14 W. R. 968, 36 L. J. Ex. 37, L. R. 2 Ex. 158, 14 L. T. 626.

A bond is not binding on a railway company by whose special act three directors constitute a quorum, where the secretary obtains at one time the authority of two directors to seal the bond and at another time the authority of another director. *D'Arcy v. Tamar, K. H. & C. R. Co.*, 4 H. & C. 463, 14 W. R. 968, 36 L. J. Ex. 37, L. R. 2 Ex. 158, 14 L. T. 626.

(3) *What is a sufficient sealing.*—There is no fixed rule as to the part of the instrument on which a corporate seal shall be affixed. So a seal at the left of the signature is *prima-facie* evidence of validity, and will render the writing a specialty. *Conine v. Junction & B. R. Co.*, 3 Houst. (Del.) 288.

In copying into the transcript of a record

an appeal bond purporting to have been executed by a corporation, the corporate seal, if attached thereto, may be represented by a scrawl; a fac-simile of the seal or device cannot be made in the copy. *Illinois C. R. Co. v. Johnson*, 40 Ill. 35.

Where a corporation makes a contract through an agent, who puts to it a seal, it becomes by law the deed of the corporation, though it was not their common seal. *Porter v. Androscoggin & K. R. Co.*, 37 Me. 349.

A corporation may adopt any seal they choose for the time being, as well as an individual. *Middlebury Bank v. Rutland & W. R. Co.*, 30 Vt. 159.

A fac-simile of the seal of a corporation printed upon blank forms of obligations prepared to be executed by the corporation at the same time when the blank is printed and by the same agency is not a seal at common law, nor will such forms when executed by the corporation be contracts under seal, although their language calls for a seal. *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251.

Mass. St. of 1855, ch. 223, providing that the mere impression of the seal of corporation upon any legal instrument executed by such corporation shall thenceforth be valid, is not retrospective in its operation. *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251.

An impression of the seal of a railroad corporation stamped upon and into the substance of the paper upon which the instrument is written, which is designed to be sealed, is a good seal, although no wax, wafer, or other adhesive substance is used. *Hendee v. Pinkerton*, 14 Allen (Mass.) 381. *Allen v. Sullivan R. Co.*, 32 N. H. 446.

(4) *Proof of the seal.*—The official signatures which accompany the corporate seal of a corporation are, *prima-facie*, the signatures of the persons holding the offices appearing in connection with their names; and the seal, so attested, proves itself as the visible act of the corporation and not of an agent. *Foster v. Atlantic & P. R. Co.*, 3 Mo. App. 566.

Where the question was whether or not the paper declared upon bore the corporate seal of the defendants (an incorporate railroad company), evidence was admissible to show that, in a former suit, the defendants had treated and relied upon the instrument as one bearing the corporate seal. And it

was admissible, although the former suit was not between the same parties, and although the former suit was against one of the three corporations, which had afterwards become merged into one, which one was the present defendant. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307.—QUOTED IN *Scaggs v. Baltimore & W. R. Co.*, 10 Md. 268.

The evidence of the president of the company to show that there was an understanding between himself and the plaintiff that another person should also sign the paper before it became obligatory, was not admissible, because the understanding alluded to did not refer to the time when the corporate seal was affixed, but to some prior time. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307.

In order to show that a paper in question bore the seal of the corporation, it was admissible to read in evidence the deposition of the deceased officer of the corporation who had affixed the seal, and which deposition had been taken by the defendants in a former suit. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307.

(5) *Enforcement of unsealed contracts in equity.*—Where a county and a railroad company, both corporations, enter into a written contract, a court of equity will not declare it void because the corporate seals are not affixed; but on the other hand, if such seals be necessary to the validity of the contract, the court will compel them to be affixed. *Missouri River, Ft. S. & G. R. Co. v. Com'rs of Miami County*, 12 Kan. 482.

An agreement not under seal for a sale to a railway company, for the purposes of a railway, no price being agreed on in pursuance of which agreement the railway company was allowed to take and did take possession, is enforceable in equity. *Pater-son v. Buffalo & L. H. R. Co.*, 17 Grant's Ch. (U. C.) 521.

III. REQUIREMENTS OF THE STATUTE OF FRAUDS.

13. *Necessity of a writing, generally.*—Cal. Act of 1861, concerning railroad corporations, § 10, providing that no contract shall be binding upon the company unless made in writing, is limited to contracts wholly executory; and it does not shield the corporation from liability on a verbal executory contract, where there is an implied promise to the extent of the

benefits it has received. *Foulke v. San Diego & G. S. P. R. Co.*, 51 Cal. 365, 11 Am. Ry. Rep. 494.—EXPLAINING *Pixley v. Western Pac. R. Co.*, 33 Cal. 198.

Plaintiff, a grocery merchant, entered into an agreement with a section foreman who had authority from the railroad company to make arrangements and contracts with merchants on the company's account for provisions, and a boarding-house keeper who boarded the company's section-hands, by which plaintiff was to furnish goods to the boarding-house keeper, but the bills were to be made out in plaintiff's name and sent to the company, and the check for the price to be sent to him, from which he would deduct the amount of his bill and give the rest to the boarding-house keeper. *Held*, that this arrangement was only in the nature of security for the debt of the boarding-house keeper, and did not make the railroad company liable as upon an original contract. *Price v. Chicago, M. & St. P. R. Co.*, 40 Mo. App. 189.

14. What contracts are within the statute, generally.—The promise of a railway company to pay out of what it may become indebted to a contractor for work on its road the sum that such contractor may owe a subcontractor for work done, is within the statute of frauds, and void, if not in writing. *Laidlow v. Hatch*, 75 Ill. 11.

An oral agreement by a railroad company to take all the wood that plaintiff would put out during the season is within that provision of the statute of frauds providing that a contract for the sale of goods, wares, or merchandise to the amount of \$30 or more must be in writing, it appearing that the amount of wood put out was above that amount. *Edwards v. Grand Trunk R. Co.*, 54 Me. 105.

A contract by a railroad company "to take all the wood a person would put on the line of their road during the season, at the same price they had paid him before for wood, or more, if the wood was better," is within the statute. In order to take the case out of the statute there must be not only a delivery but an acceptance of the wood furnished, so that the buyer can take no exception to the quantity or quality. *Edwards v. Grand Trunk R. Co.*, 48 Me. 379.

Where, by the contract, the wood is to be "measured and inspected the next spring," there is no such acceptance as will take the

contract out of the statute, if there had been no such measuring and inspecting. *Edwards v. Grand Trunk R. Co.*, 48 Me. 379.

A parol contract to furnish railroad ties to the amount of \$50 or more in value is a contract for the sale of goods and chattels within the statute of frauds. *Russell v. Wisconsin, M. & P. R. Co.*, 39 Minn. 145, 39 N. W. Rep. 302.

An oral contract granting to a railroad company the right to lay a side-track and to take loose dirt and stone from lands for a number of years, is void under the statute of frauds, but as a license will justify acts done under it. *Cayuga R. Co. v. Niles*, 13 Hun (N. Y.) 170.—APPLYING *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. (N. Y.) 221; *Day v. New York C. R. Co.*, 31 Barb. (N. Y.) 548.

15. What contracts are not within the statute.—Plaintiff's vendor conveyed a right of way over lands to trustees for the benefit of a railroad. After plaintiff purchased the land he sued to recover the land from the railroad, claiming that there had been no conveyance to it from the trustees, or if there had been any conveyance it was not in writing. *Held*, that a formal conveyance by the trustees was not necessary; but even if a conveyance had been made not good under the statute of frauds, plaintiff could not take advantage of it in his action against the company, on the ground that a third party cannot set up the statute of frauds to defeat a contract to which he is not a party. *Burrow v. Terre Haute & L. R. Co.*, 29 Am. & Eng. R. Cas. 574, 107 Ind. 432, 8 N. E. Rep. 167.

If a landowner whose land has been taken for the construction of a railroad, and who has presented a petition to the county commissioners for his damages therefor, has afterwards fixed by a written agreement with the company the sum to be assessed on his petition, with a provision that, if satisfactory to the commissioners, this sum may be entered upon their records without a view, and other proceedings had thereon as if there had been a view, an oral promise, for a sufficient consideration, by a third person to pay to him the interest on that sum until the circumstances of the railroad company shall enable them to pay the amount, is not within the statute of frauds, if in fact the sum so fixed had not been adopted or acted on by the commissioners, and the promise

is made with knowledge of that fact. *Jepherson v. Hunt*, 2 Allen (Mass.) 417.

A contract subletting railway work provided that the contractors should retain a part of the price to the subcontractors as an indemnity to secure the payment of the subcontractors' laborers. Before the work was completed the subcontractors failed, leaving the laborers unpaid. While the work was progressing plaintiff furnished goods to the subcontractors' laborers, with the understanding that the amount was to be deducted from their wages. After the failure, by a mutual arrangement of all the parties interested, the amount of plaintiff's claims was deducted from the wages due the laborers, and the remainder paid to them by the contractors, who at the same time agreed to pay the amount thus deducted to plaintiff. *Held*, that this agreement was not within the statute of frauds, but was valid and binding. *Beach v. Hungerford*, 19 Barb. (N. Y.) 258.

Two persons who had a joint interest in a railroad that was about to be sold at a foreclosure sale agreed orally that one was to refrain from bidding and the other bid in the property for the joint benefit of both. The property was bid in accordingly. *Held*, that the contract was not void under the statute of frauds for not being in writing. *Cornell v. Utica, I. & E. R. Co.*, 61 How. Pr. (N. Y.) 184.

An agreement between the owner of an artificial watercourse and a railroad company, whereby the former consents that the latter, in the construction of its road, may fill the channel and divert the water into a new channel on its own land, in consideration that the railroad company will open the old channel and restore the water thereto whenever requested, is not a contract for an interest in land within the meaning of the statute of frauds. *Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co.*, 29 Ohio St. 341.

16. Contracts for personal services.—A verbal contract for personal services being capable of performance within a year, need not, under the statute of frauds, be reduced to writing. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298.

A verbal promise to give an injured employee a steady job for an indefinite period is not within the statute of frauds; under the statute contracts for personal services

for a term exceeding one year not being required to be in writing. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802.

17. Contracts for sale of land.—A parol agreement for the reservation or exception of a barn and sheds from the operation of a deed is void under the statute of frauds; and the question whether an undertaking sued upon is of that character is to be determined, not by the name given to it by the parties or their respective witnesses, but by the nature and substance of the transaction itself. *Detroit, H. & I. R. Co. v. Forbes*, 30 Mich. 165.

H. and R. being the owners in severalty of a large number of lots in S., which would be greatly enhanced in value by the location of a depot near said lots, entered into a verbal agreement that in case of the location of a depot upon the lots of either, and in case the railroad company demanded a gratuitous conveyance of the same, the other would convey to the party so conveying one half as many lots as had been conveyed to the railway company. *Held*, that H., having conveyed the necessary lots for depot grounds in pursuance of the contract, could maintain an action against R. for the value of one half of the lots conveyed. *Harris v. Roberts*, 12 Neb. 631, 12 N. W. Rep. 89.—QUOTING *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602.

The requirement of the statute of frauds, that a contract for the sale of land shall be in writing, etc., applies only to "the party to be charged therewith;" therefore, where the plaintiff and defendant entered into a parol contract, whereby the plaintiff agreed that defendant might cut from his land a certain quantity of wood, for which the defendant was to execute to plaintiff a deed for a certain tract of land—*held*, that the plaintiff could not recover in an action of assumpsit for the value of the wood taken by defendant, but was bound by the terms of the original contract, the defendant not seeking to avoid the same. *Green v. North Carolina R. Co.*, 77 N. Car. 95.

18. Contracts not to be performed within a year.—A verbal agreement by a railway company to lay a switch for the use of a mill owner, and to maintain it as long as he may need it, is within the statute of frauds, where it appears that the intention and contemplation of the parties was that it should be used for a number of years,

Warner v. Texas & P. R. Co., 54 *Fed. Rep.* 922, 2 *U. S. App.* 647, 4 *C. C. A.* 673.

Where land is conveyed in consideration of a parol promise of a pass for life over a railroad, such pass to be issued annually, the promise is not void under the statute of frauds, because it cannot be performed within one year; when the contract was also fully executed by one party, it does not for that reason come within the statute. *Atchison, T. & S. F. R. Co. v. English*, 38 *Kan.* 110, 16 *Pac. Rep.* 82.

An oral agreement by which a landowner agrees to convey a strip of land to a railroad company, and to erect cattle-yards and pens, and to provide for feeding stock and the entertaining of drovers, and the railroad company on its part agrees, among other things, to deliver to plaintiff all stock brought east over the road, to be fed, is void under the statute of frauds for not being in writing, where it is not to be performed within one year. *Day v. New York C. R. Co.*, 31 *Barb. (N. Y.)* 548.—APPLIED IN *Cayuga R. Co. v. Niles*, 13 *Hun (N. Y.)* 170. DISTINGUISHED IN *Reed v. Canastota Northern R. Co.*, 47 *N. Y. S. R.* 593, 20 *N. Y. Supp.* 241.

An arrangement between a widow of a person killed by a train and the company, whereby the former agrees not to sue for damages, and the company on its part agrees to support her and three minor children during her life, and in the event of her death before the majority of the youngest child, to support the children until then, is within that provision of the statute of frauds requiring contracts to be in writing, which are not to be performed in one year. *Deaton v. Tennessee C. & R. Co.*, 12 *Heisk. (Tenn.)* 650.

A contract is not within the provision of *Tenn. Code*, § 1758, sub-sec. 5, merely because it may continue longer than one year from its date; as, for instance, a contract to employ plaintiff during the time he may remain disabled on account of certain existing injuries. *East Tenn., V. & G. R. Co. v. Staub*, 7 *Lea (Tenn.)* 397.

10. New or original undertakings.

—The statute of frauds does not require the promise of a defendant to be in writing where it is in effect to pay his own debt, though that of a third person be incidentally guaranteed. Hence, where contractors to build a railroad, on settlement with a subcontractor for work done for them, gave

in part payment one of the notes of the company, verbally agreeing to pay it if the company did not, the promise was not within the statute of frauds; and on failure of the company to pay their note, an action would lie against the promisors. *Malone v. Keener*, 44 *Pa. St.* 107.

After a contract had been let for the construction of a railroad and the work partly done, third parties made a verbal agreement with the company and the contractors to pay the debts then contracted by the company and the contractors, in consideration of the cancellation of the then existing contract and the letting to such third parties of a new contract for the construction of the road. *Held*, that such verbal contract was a new and original undertaking, on a valid consideration, and was not within the statute of frauds. *Lookout Mountain R. Co. v. Houston*, 85 *Tenn.* 224, 2 *S. W. Rep.* 36.

20. Effect of part performance.*—

Where plaintiff, who had been furnishing stone for a railroad bridge, was told "to go on drawing until told to stop," an acceptance of stone under this order, and payment of the same, is a sufficient part performance to take it out of the statute of frauds. *O'Brien v. Credit Valley R. Co.*, 25 *U. C. C. P.* 275.

When an action cannot be maintained upon an executory agreement of the defendants to pay for water to be delivered by the plaintiffs, because the agreement is not to be performed within one year and is not in writing, the agreement is not evidence of an implied promise of the defendants to pay the plaintiffs for making preparations to perform the contract, the preparations not being beneficial to the defendants. *Cocheco Aqueduct Assoc. v. Boston & M. R. Co.*, 59 *N. H.* 312.

In such case the defendants' request that the plaintiffs would be ready by a certain time to furnish the water according to the original contract, is not evidence of a promise to pay for such preparations. *Cocheco Aqueduct Assoc. v. Boston & M. R. Co.*, 59 *N. H.* 312.

Plaintiff agreed orally to convey a strip of land to a railroad company and to arrange for feeding stock, and the accommodation of drovers that might pass east over

* Parol agreement to convey land to railroad, conditioned upon its erecting station, etc., at a certain point. Part performance, see 51 *AM. & ENG. R. CAS.* 425, *abstr.*

the road. *Held*, that the contract was void as to its duration, it appearing that it was not to be performed in one year, and no damages could be recovered for the refusal of the company to continue the contract; but damages were recoverable for the value of the land conveyed, after deducting profits received during a partial performance; and in computing the damages it was proper for the jury to consider the amount expended in constructing stock yards, etc.; but as the damages were unliquidated, no interest could be allowed. *Day v. New York C. R. Co.*, 22 *Hun* (N. Y.) 412; *affirmed* in 89 N. Y. 616; *former appeal*, 31 *Barb.* 548.

IV. CONSTRUCTION AND EFFECT; CONDITIONS.

1. How Construed, Generally.

21. General rules of construction.*—Railroads perform a *quasi* public service, and, so far as vested property interests are not impaired, such construction should be given to all contracts and statutes as will make them most fully subserve the interests and welfare of the general public. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 *Fed. Rep.* 546.

A contract entered into with a railroad company for a certain number of its bonds, secured by first mortgage, should be read as if the bonds and mortgage were set out therein at length. *Galena & S. W. R. Co. v. Barrett*, 2 *Am. & Eng. R. Cas.* 520, 95 *Ill.* 467.

An agreement by a railroad company, in part consideration for the grant of a right of way, to pay whatever damages might be done to the grantor's property by the operation of the road, does not bind the company to pay for stock that is injured through the negligence of the owner. *Indianapolis, P. & C. R. Co. v. Brownenburg*, 32 *Ind.* 199.

Where terms, used in a written contract, are of themselves susceptible of a definite legal construction, the fact that the parties have adopted and acted on an erroneous construction of the contract will not preclude them, as to transactions not clear, from insisting on the proper and true legal

construction. *Stewart v. Lehigh Valley R. Co.*, 37 *N. J. L.* 53.

A contract made by a railroad company, which by its terms includes any future extensions of the road, will include in its operations not only such as were authorized by law at the making of the contract, but such as were authorized by subsequent legislation. *Sussex R. Co. v. Morris & E. R. Co.*, 19 *N. J. Eq.* 13; *reversed* in 19 *N. J. Eq.* 574.

Corporations are presumed to contract within their powers; and general words used in a corporate contract which admit a double construction must be construed consistently with the charter. *Morris & E. R. Co. v. Sussex R. Co.*, 20 *N. J. Eq.* 542.

An individual submitted bids for furnishing a railroad company with all its stationery, and in answer was notified by the company's purchasing agent that such bids were accepted. *Held*, that this constituted a contract, binding the railroad company to order its stationery from the individual during the time covered by the contract and to pay therefor, and binding the individual to deliver the goods whenever called upon. *Levey v. New York C. & H. R. R. Co.*, 53 *N. Y. S. R.* 579, 4 *Misc.* 415.

22. Ascertaining the intention of the parties.—In the interpretation of contracts of affreightment courts adopt the rule ordinarily applied to the interpretation of contracts; that is, to look into the circumstances surrounding the transaction and connected with its making, including the object in view and the nature of the performance required. *Leonard v. Chicago & A. R. Co.*, 54 *Mo. App.* 293.

An agreement by a railroad company to cross a stream north of a certain street requires them to cross the stream where a northerly line from such street would intersect it. *New Albany & S. R. Co. v. McCormick*, 10 *Ind.* 499.

If notice of the location according to the conditions were necessary, an agreement that the kind of notice named in the contract should be sufficient would not render invalid any other kind of notice which might be in itself sufficient in point of fact. *New Albany & S. R. Co. v. McCormick*, 10 *Ind.* 499.

The owner of land sold the coal under it and granted the right of way for railways at certain ravine crossings and the right to run coal from other lands through the

*Traffic agreement between companies construed with reference to repayment of money advanced, see 24 *AM. & ENG. R. CAS.* 78, *abstr.*

Merger of oral and written contracts, see 55 *AM. & ENG. R. CAS.* 324, *abstr.*

entries to coal so sold. The topography of the land was such that coal from an adjoining tract could be brought to such entries only by means of a railroad. *Held*, that the parties must have known that such railways were necessary, and the contract must be construed as authorizing their construction. *McCracken v. Gumbert*, 131 Pa. St. 36, 18 Atl. Rep. 1068.

23. When a strict construction is proper.—Contracts in restraint of competition in trade will be strictly interpreted as against the party complaining of their infraction, and will not be enlarged beyond what is written. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 72 Ill. 360.

Where a railway company enters into an agreement with a person for the delivery of a certain quantity of coal, to be carried in the wagons of such person, the company to have the right to detain the wagons on certain defaults, it has no right to retain wagons belonging to a third party, with whom the person contracting with the company had agreed for a supply of a portion of the coal. *North v. Great Northern R. Co.*, 6 Jur. N. S. 98.

A railroad company contracted with a water company for the use of a specified amount of water for a fixed annual sum, but only consumed a part of the amount. *Held*, that it was not authorized to sell the balance. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 27 Fed. Rep. 794.

Two railroad companies entered into a contract for the joint use of a road owned by one of them between designated places. A provision of the contract related to the local freight business "from and to Newark and Columbus, with stations on the line of said road between those points." *Held*, in an action between the companies to compel an accounting, that this did not include the carriage of freight from one intermediate station to another such station. *Baltimore & O. R. Co. v. Pittsburgh, C. & St. L. R. Co.*, 55 Fed. Rep. 701.

24. What may be implied or presumed.—The plaintiff was appointed, in writing, an inspector of watches for the defendant company, subject to certain conditions, among which were that he should examine all watches presented to him accompanied with a written request from defendant's superintendent, and should certify to the latter that they were or were not up to the required standard; that he should

loan (free of charge) to each employé of defendant who should leave his watch to be cleaned and repaired a watch of the required standard, to be used until such cleaning and repairing was done; that if an employé took his watch elsewhere for repairs he must have the watch he proposed to carry in the mean time examined by the plaintiff, who might charge him twenty-five cents for such service; that plaintiff should keep a record of all watches examined, furnish a rate-card to each employé, copy the weekly ratings in the record-book, and furnish transcripts from such book to the general inspector; and that in case a certified watch was found not to come up to the standard, he should withdraw the certificate and report the facts. *Held*, that as to the services for which no compensation was provided, the contract did not exclude the presumption that they were to be paid for by defendant at their reasonable value. *Link v. Chicago & N. W. R. Co.*, 80 Wis. 304, 50 N. W. Rep. 335.

25. References to prior contracts.—A contract by a railroad company to appropriate certain bonds held by it on deposit, to the completion of the railroad of another company, according to a prior contract and specifications made by a certain firm, "and all other work under said contract not by them fully performed," is not an undertaking to complete the railroad further than the bonds on deposit would pay for or supply the means of payment. Nor is said stipulation an undertaking to keep down interest on outstanding bonds whilst the work of completion was in progress, though the firm had agreed to do so in the prior contract to which the stipulation makes reference. *Macon & A. R. Co. v. Georgia R. Co.*, 1 Am. & Eng. R. Cas. 378, 63 Ga. 103.

26. Entire and severable contracts.*—A contract to grade a portion of a railroad and to do all work necessary for laying the ties, according to a fixed price as the estimates shall be made from time to time, is an entire contract, and is not rendered severable by a provision for partial payments from time to time upon the engineer's estimates. *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 5 Am. Ry. Rep. 198.

* Severability of contract contained in an "omnibus agreement," see 52 AM. & ENG. R. CAS. 97, *abstr.*

An agreement to deliver a fixed number of barrels of flour in three equal lots, payment to be made for each lot on delivery, is severable, and the seller does not waive any rights arising out of a wrongful delivery of the first lot by the carrier without payment being made, by accepting payment of the other two lots. *Sawyer v. Chicago & N. W. R. Co.*, 22 Wis. 403.

27. Unilateral and personal contracts.*—The contract between the plaintiff and the defendant company, whereby the plaintiff undertook to cart such goods, etc., as might be presented to him for that purpose, between certain points and at a certain rate per ton, was a unilateral agreement, the only contract on the part of the company being to pay the stipulated price for the carriage of such goods as it might present to the plaintiff for that purpose. *Burton v. Great Northern R. Co.*, 9 Ex. 507, 23 L. J. Ex. 184.—FOLLOWED IN *Rhodes v. Forwood*, 31 L. T. 61.

A railroad company, having power to extend its track from its depot in the plaintiff city through the city of Neenah, so as to connect with the Wisconsin C. R., entered into an agreement with the city, for a valuable consideration, not to make such connection. *Held*, that this (if valid) was a mere personal contract, binding only said company and such persons as may be, in a strict sense, its successors or assignees. *Menasha v. Milwaukee & N. R. Co.*, 5 Am. & Eng. R. Cas. 300, 52 Wis. 414, 9 N. W. Rep. 396.

28. Construction of contract as regards its duration.—A contract of a company to build a bridge over its road at a given point within one year after the completion of the road, imposes no obligation on the company to complete its road within any given period, or within a reasonable time, and the other party to the contract cannot recover upon it for a failure of the company so to do. *St. Louis, J. & C. R. Co. v. Lurton*, 72 Ill. 118.

A contract entered into by a railroad company that "so long as it receives for the transportation of passengers the fare allowed by law on May 3, 1872, and no longer," it will make connections with roads belonging to another company, "and that it will not make any change in such

rates without the consent" of the other company, terminates by force of its own limitation, whenever a statute reducing the fares chargeable by the contracting company is enacted. *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, 37 Am. & Eng. R. Cas. 200, 111 N. Y. 132, 19 N. E. Rep. 63, 19 N. Y. S. R. 574.

E. entered into a contract with the N. O., I. & G. N. R. Co. to furnish cord-wood at a specified price, the wood to be of a certain description and quality. There was no limit as to the duration of the contract, save, as herein indicated, "to commence on or before May 1, 1870, and continue as long as satisfaction be given by the contractors," and "that the company shall retain in its possession, as security for the performance of the contract, out of the price of the wood the amount of 25 cents per cord, until the whole year's supply shall have been delivered." *Held*, that the contract was not perpetual, and that, in view of all the circumstances and the nature of the contract, it was just and reasonable to terminate it at the expiration of one year. *Echols v. New Orleans, J. & G. N. R. Co.*, 52 Miss. 610.

29. Dependent and independent covenants.—Where, by the terms of a contract, the time to perform the covenant on the one side is to happen, or may happen, before the time for the performance of the covenant on the other side, the former is not dependent on the latter. *State v. Winona & St. P. R. Co.*, 21 Minn. 472.

Defendants agreed to build a railroad communicating with plaintiffs' mines, and to furnish plaintiffs "the same transportation facilities and charge them the same price per ton for coal as they may or shall at the same time charge for tolls and transportation" between other named points. Plaintiffs, in consideration, agreed to furnish defendants all the coal they should mine, to the amount of 1,000,000 tons, and not less than 600,000 tons in eight years, and pay to defendants 2½ cents per ton, till the sum should reach \$9000, as security for their covenants. This was a covenant by defendants to receive and transport all the coal plaintiffs should mine and offer to them for transportation, not exceeding the contract limit; and to do this in the same manner and with the same diligence they should do for others, but not limited in quantity by the proportion of others. *Ha-*

* Unilateral contracts, see note, 24 AM. & ENG. R. CAS. 256.

zleton Coal Co. v. Buck Mountain Coal Co., 57 Pa. St. 301.

2. *Interpretation of Particular Words and Phrases.*

30. In general.—However terms may be understood in their ordinary sense, if the parties have attached other, or unusual, or arbitrary meanings to them to be derived from their fair interpretation in the contract, they have the right so to employ them. But to accomplish such purpose, and to vary the common understanding, the meaning ought to be plain and free from reasonable doubt. *McCoy v. Erie & W. Transp. Co.*, 42 Md. 498, 14 Am. Ry. Rep. 317.

31. "Any future extensions."—The words "any future extensions or branches," in a contract between two connecting railroad corporations for a division or drawback of freights and fares over their roads, "or any future extensions or branches of the same," must not be construed, in their general sense, to apply to extensions then unauthorized by the legislature, where there were unexhausted powers in the charter and supplements, at the time of the contract, to build other extensions or branches, sufficient to meet the requirements of the words. *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542.

Extensions afterwards authorized and built will not be substituted for other extensions and modes of transportation authorized at the time of the contract, without an intention to that effect in the contract, even if no question of power to contract concerning them interfered. *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542.

32. "Break ground."—The Bristol & E. R. Co. agreed with the Somerset & D. Co. to pay a certain rent for the power of running through their station yard, such rent to commence when the Bristol Co., in the construction of their railway, began to "break ground" within six feet of the sidings in the station yard. The exercise of the power was prevented for some time by objections of an inspector to the board of trade that plans deposited by the Somerset Co. in parliament were defective, but these objections were known to the Bristol Co. at the time of making the agreement. *Held*, that they were liable to pay the rent from

the time mentioned in the agreement, although they had not enjoyed the easement or the use of the station so soon as they otherwise would have done if the plans had been correct, and that the "ground was broken," within the meaning of the agreement, when they commenced the construction of the line, not when, as preparatory to such construction, they merely removed some rails to take the angles of certain lines which they would have to cross at a level. *Bristol & E. R. Co. v. Somerset & D. R. Co.*, 2 Ry. & C. T. Cas. 82.

33. "Competitive stations."—The Midland and the Great W. R. companies agreed to carry passenger traffic between competitive stations at "equal" fares, the amount of such fares to be determined in case of difference by arbitration. On a reference to the railway commissioners, under the Regulation of Railways Act 1873, § 8, to fix the equal first-class rate between the competitive stations—*held*, that the agreement, so far as it neutralized the benefits of competition, should be construed strictly, and that in defining "competitive stations" a difference of distance was not material, and particular places on the lines of both companies, though the course between them might be much more circuitous in the one case than in the other, were competitive in the sense of the agreement. *Midland R. Co. v. Great Western R. Co.*, 2 Ry. & C. T. Cas. 88.

The company which had the chief control of the traffic, or to which the traffic mainly or properly belonged, by reason of having the shorter and more direct route, or the route being on their main line, or the like, should have the control in fixing the amount of the governing rates, in the absence of any agreement or special circumstances to the contrary; and when a company, from the circumstances of the case, could not carry at a profit, it should not be the company to fix the common rate required by such an agreement as the above, as it could not benefit itself, nor could it be the best judge of what would be beneficial to its neighbor. *Midland R. Co. v. Great Western R. Co.*, 2 Ry. & C. T. Cas. 88.

34. "Control."—A railroad company contracted with a sleeping-car company for the furnishing of cars, to include the road then controlled by the company, and all roads that the company "might thereafter control by ownership, lease, or otherwise."

Afterward the company acquired a majority of the stock of another company, and in voting the stock elected certain persons president, vice-president, and directors of each company, respectively. *Held*, that it did not "control" this company within the meaning of the contract. *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 3 *McCrary* (U. S.) 645, 11 *Fed. Rep.* 634.

35. "Counted" — "Inspected." — In an action to recover an overpayment alleged to have been made to defendants upon a contract for the purchase of railroad ties, it appeared that plaintiff agreed to take, at certain prices for different woods, all ties defendants could get during the season, "ties to be counted and paid for before put in the river." Defendants were not paid more than they were entitled to for ties actually delivered and accepted, reckoning them at the prices fixed by the contract. The referee found that the word "counted," as used in the contract, meant inspected. Plaintiff claimed that, as on inspection part of the ties delivered were classified by plaintiff's inspectors as seconds, and were in fact seconds, he was not bound to pay therefor the price for first-class ties. *Held*, untenable; that the finding that the word "counted" means "inspected," might authorize the rejection of all but first-class ties, but did not, in the absence of a provision in the contract to that effect, justify the conclusion that both firsts and seconds might be accepted and only the actual value of the seconds paid for them. *Larowe v. Lewis*, 128 *N. Y.* 593, 3 *Silo. App.* 503, 27 *N. E. Rep.* 1075, 38 *N. Y. S. R.* 848.

36. "Heirs." — Defendant company agreed to give a person a royalty on each device manufactured by it that he might introduce and sell, with a provision that it should not terminate at his death, but that "his heirs and assigns shall enjoy the benefits in full of whatever business may be in force at that time in his territory." *Held*, that the term "heirs" included whoever was entitled to his personal estate, and that his executor could maintain an action to compel an accounting for business done after the party's death. *Richmond v. Railway R. Mfg. Co.*, 12 *N. Y. Supp.* 358, 35 *N. Y. S. R.* 139, 58 *Hun* 610, *mem.*

37. "New lines." — By the fifth article of an agreement between the Midland and the Great W. R. companies, it was provided that they were "to agree as to the * * *

leasing * * * any new lines which may be necessary to give proper accommodation to the district in which the companies * * * are directly interested." The Midland Co. proposed to lease a line which traversed a district untouched by their railway, but formed a junction with it at a place lying on the boundary of a district in which both the contracting companies were interested. *Held*, that such lease was not within the terms of the article; and that the words "new lines" in this clause of the agreement signified lines proposed but not yet authorized by parliament to be constructed. *Midland R. Co. v. Great Western R. Co.*, 2 *Ry. & C. T. Cas.* 298.

The eighteenth article was as follows: "The Midland to be allowed to make their line from M. to B., but not beyond, and any application to parliament for a bill for that purpose not to be opposed by the Great Western." The nineteenth: "The Midland to complete their proposed junction with the B. and E. railway at B. without opposition, it being understood that Bristol and Bath are the *termini* of the companies (north and south, respectively) in that district." *Held*, that taking into consideration the situation of the parties at the date of the agreement, the words in these clauses referred to a bill at that time contemplated by the Midland Co., and that it was not part of the intent of the agreement to draw a line of separation between the companies, and to bind each to keep to its own side of that line for all time to come. *Midland R. Co. v. Great Western R. Co.*, 2 *Ry. & C. T. Cas.* 298.

38. "Not to exceed 200 tons." — A proposition in writing to deliver a specific article "not to exceed two hundred tons," and with no other stipulation as to quantity, payment to be made on the delivery of designated instalments, which is accepted in writing, confers no right upon the party accepting to enforce delivery to the limit mentioned, and leaves it optional with each party to avoid the agreement, on giving notice to the other, at any period during the time of delivery. *Houston & T. C. R. Co. v. Mitchell*, 38 *Tex.* 85.

The measure of damages under such a contract is the contract price of the amount delivered before notice to stop delivery, and such actual damages as may result from notice to stop. *Houston & T. C. R. Co. v. Mitchell*, 38 *Tex.* 85.

39. "Other portions of the draw-bridge."—In a contract by which a railroad company agreed to keep in repair the roadbed or roadway across the draw in a drawbridge used by it, and a bridge company agreed to keep in repair the highway or roadway across said drawbridge used exclusively by it, all other portions of said drawbridge, its piers and abutments, to be maintained in common by both parties, the wheels supporting the draw, upon which it rested and turned, were included with the "other portions of the drawbridge" mentioned in the contract. *Portage Lake Bridge Co. v. Wright*, 78 Mich. 426, 44 N. W. Rep. 498.

40. "Permanent."—Where a railroad company, in consideration of the donation of lands by a city, agrees to permanently establish its terminus, offices, and principal machine-shops and car-works in the city, the word "permanent" in the contract is to be construed in accordance with its nature and in accordance with the subject-matter of the contract, and the obligation of the company is fulfilled when it has established its terminus and erected and set in operation machine-shops and car-works, without any intention at the time of removing them, and has maintained them for a period of eight years. *Texas & P. R. Co. v. Marshall*, 42 Am. & Eng. R. Cas. 637, 136 U. S. 393, 10 Sup. Ct. Rep. 846.—QUOTED IN *Toronto v. Ontario & Q. R. Co.*, 22 Ont. 344.

41. "Shall be disposed of."—Certain parties agreed with the contractor for building a railroad, to take all the company's bonds that he might receive under his contract at the rate of 75 per cent. upon the par value thereof, the subscription not to be binding, however, "until said bonds, to the amount in the aggregate at par of one million of dollars, shall be disposed of." In a suit upon the contract it was admitted that the aggregate par value amount of the bonds disposed of, at the rate prescribed by the contract, did not exceed \$643,000. *Held*, that the bonds subscribed for were a part of the million to be "disposed of," and the expression "that it should not be binding until a million of the bonds should be taken," might well be construed as one requiring the disposition thus commenced, to be continued, until the amount specified should be disposed of, and that the condition upon which, according to this con-

struction of the contract, the defendant's liability was made to depend, having never been performed, no judgment could be rendered against him. *Dalrymple v. Lauman*, 23 Md. 376.

42. "Solid rock."—Where there is nothing to show that the words "solid rock," in a contract, were used in other than their plain, ordinary, and popular sense, evidence of surrounding circumstances is not admissible upon the question of their meaning. *Fruin v. Crystal R. Co.*, 89 Mo. 397, 14 S. W. Rep. 557.

43. "To be forwarded."—The words "to be forwarded," in a contract of carriage, are not conclusive as to whether the liability is that of a carrier or that of a forwarder. *Fischer v. Merchants' Dispatch Transp. Co.*, 13 Mo. App. 133.

3. Conditions.

44. How construed, generally.—The payment of money cannot be made dependent on the performance of a condition by the party to whom it is to be paid, which condition, by its terms, may not be performed until after the date at which the money is to be paid. *Front St., M. & O. R. Co. v. Butler*, 50 Cal. 574, 12 Am. Ry. Rep. 183.

Defendant, with others, contracted to pay a street-railway company a certain sum if its road was built within a specified time. *Held*, that a failure to complete the road within the time, caused by circumstances apparently beyond its control, is not a defense against paying the amount; but defendant may recoup against the claim to the extent that he has been damaged by the delay. *Front St., M. & O. R. Co. v. Butler*, 50 Cal. 574, 12 Am. Ry. Rep. 183.

If the terms of a contract between two railways be agreed upon by correspondence, a limitation or condition inserted in one or more of the communications need not be repeated or referred to in subsequent ones, in order to preserve its force. *Georgia R. & B. Co. v. Smith*, 40 Am. & Eng. R. Cas. 123, 83 Ga. 626, 10 S. E. Rep. 235.

Where a landowner agreed in writing to convey certain lands to a railroad, in consideration that it would locate a station at a certain place, an oral agreement that the writing should not be binding until the citizens should pay the owner \$350 is not binding on the company, where it had no knowledge of such condition. *Chidester v.*

Springfield & I. S. E. R. Co., 59 Ill. 87, 11 Am. Ky. Rep. 183.

Where a street-railway company is given permission by the board of county commissioners to lay its track along a public highway, and is required to deposit in the county treasury a certain sum of money, which is to be repaid upon the performance by it of certain conditions, it can only recover the money so deposited by showing a performance of the conditions, or a legal excuse for not doing so. *St. Joseph County v. South Bend & M. St. R. Co.*, 118 Ind. 68, 20 N. E. Rep. 499.

The fact that the performance of the stipulated conditions by the railway company will put it to great inconvenience and cause it a large outlay of money is not a sufficient excuse for the non-performance of its agreement. *St. Joseph County v. South Bend & M. St. R. Co.*, 118 Ind. 68, 20 N. E. Rep. 499.

Where the contract is an entirety, and there is in it no means of apportionment, and nothing can be shown *aliunde* to establish an apportionment, nor to show the relative or absolute values of the several conditions, no action can be maintained to recover the consideration, if unpaid, nor upon a *quantum meruit*, until all the conditions are performed; and if the consideration has been paid in advance, and only part of the conditions are performed, the entire consideration can be recovered back. Yet to this conclusion, in any given case, the law reluctantly comes, and only when it is perfectly clear that by no construction or evidence can there be any apportionment or determination of values. *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kan. 435.

In every contract for the conveyance of property there is an implied condition that the subject-matter of the contract shall be in existence when the time for performance arrives. If it has then ceased to exist each party is discharged from the contract. *Powell v. Dayton, S. & G. R. R. Co.*, 12 Oreg. 488, 8 Pac. Rep. 544.

An agreement between the Baltimore & O. R. Co. and the county commissioners of Washington county recited that the company, in prosecution of its business, had been compelled to obstruct a public road where it crossed its tracks; that it had been proposed to change the road so that it would run on the north side of the track and not cross the same, whereby the com-

pany would be relieved from liability to indictment for obstructing the highway; and that it agreed to make the altered road and to put up and to maintain at its own expense a fence or barrier where the proposed road was higher than the tracks of the railroad. The commissioners, instead of closing and discontinuing the old road where it crossed the tracks of the railroad, provided an additional road and left the old one unchanged. *Held*, that the company was relieved from its obligation to erect guards and barriers, the condition upon the performance of which that obligation was expressly made to depend—the entire closing of the old road—not having been complied with by the county commissioners. *Elgin v. Baltimore & O. R. Co.*, 74 Md. 61, 21 Atl. Rep. 688.

The fact that the employes of the company assisted in repairing the new road did not show that the company had unconditionally agreed to erect guards and barriers along such road, or that it had waived the right to insist upon the closing of the old road before it would assume the performance of its agreement in regard to the new one. *Elgin v. Baltimore & O. R. Co.*, 74 Md. 61, 21 Atl. Rep. 688.

45. Conditions precedent.*—(1) *What are.*—Under section 115 of the Railways Clauses Act 1845, approval of the engines to be used by a colliery company on the line of a railway is a condition precedent to the user of the line under section 92. *Powell Duffryn S. Coal Co. v. Taff Vale R. Co.*, 29 L. T. 575, 22 W. R. 182; *affirmed in L. R. 9 Ch. 331*, 43 L. J. Ch. 575, 30 L. T. 208.—DISTINGUISHED IN *Woodruff v. Brecon & M. T. J. R. Co.*, L. R. 28 Ch. D. 190, 54 L. J. Ch. 620, 52 L. T. 69, 33 W. R. 125.

Under a contract to supply coke to a railway to the satisfaction of the company's inspecting officer, it is a condition precedent to the right of the plaintiff to insist upon the acceptance of the coke that it shall be to the satisfaction of such officer. *Grafton v. Eastern Counties R. Co.*, 8 Ex. 699.

Where a railway company contracts to carry a certain quantity of coal within a certain time, and the agreement is founded

* Contract to make a donation upon the completion of a railroad. How far the completion is a condition precedent, see 24 AM. & ENG. R. CAS. 350, *abstr.*

upon the basis that there should be no unreasonable detention of the cars by a connecting line, it is a condition precedent to its obligation to carry the coal that there should be no unreasonable delay by such connecting company. *Johnssohn v. Great Northern R. Co.*, 10 Ex. 434, 24 L. J. Ex. 31.

(2) *What are not.*—Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason of this is that such a construction often prevents the court from dealing out justice. So where a subscription is made to the stock of a railroad, with a condition that the road is to be completed in a specified time, the court will not hold the building of the road a condition precedent to the right of recovery of the subscription, where the road was completed before suit was brought, but not within the specified time. *Front St., M. & O. R. Co. v. Butler*, 50 Cal. 574, 12 Am. Ry. Rep. 183.

By the terms of a contract of sale of a railroad the purchaser was to carry freight for the seller at stipulated rates, with a proviso that the seller should enter into a written contract binding himself to give the purchaser the transportation of all such freight. *Held*, that the execution of such a written contract was not a condition precedent; and that if both acted upon the original contract of sale, without request or demand for such written contract, they would be bound by the terms of the original contract—the one to carry at the stipulated rate and the other to give the transportation of all such freight to the carrier. *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.*, 79 Ill. 121.

In a written instrument, by the terms of which the obligor became bound to pay a certain sum of money to a railroad company when the road was completed and the cars running between designated points, the words, "the road to be finished by September 1, 1872," were held not to imply a condition precedent. The obligor was not released from payment by the fact that the road was not completed at the time fixed in the instrument. *Davis v. Cobban*, 39 Iowa 392, 20 Am. Ry. Rep. 83.—DISTINGUISHING *Burlington & M. R. R. Co. v. Boestler*, 15 Iowa 555.

Where a person agrees to supply coke to a railway company, the readiness and willingness of the company to take from him

all the coke it requires, as provided by the contract, is not a condition precedent to its right to insist upon being supplied with the quantities expressly stipulated for; and the fact that the company has bought coke from other parties, in violation of the contract, affords no answer to the action by the company for the failure to deliver the quantities contracted for. *Eastern Counties R. Co. v. Philipson*, 16 C. B. 2, 24 L. J. C. P. 140.

Where the 18th section of 31 Vict. c. 13 was not embodied in an agreement with one J. I. as a condition precedent to the payment of any sum for work executed, the crown could not afterwards rely on that section of the statute for work done and accepted and received by the government. *Isbester v. Queen*, 7 Can. Sup. Ct. 696, 1 Can. Exch. 358.

(3) *Validity and effect.*—Where a party entered into a contract with a railway to pay all its debts, in which it was provided that the amount to be paid on the debts of the company might be paid out of the proceeds of certain township and county bonds that might be issued in payment of subscription, which such party was to have—*held*, that he could not be held liable to a creditor of the company without proof of the issue and delivery to him of such bonds. *Snell v. Cheney*, 88 Ill. 258.

To assist a railroad company in building its road as proposed, defendant agreed in writing to pay it \$200 upon the arrival at Delphi from Indianapolis of the first train of cars over the road proposed to be built. The road was built from Delphi to within one and a half miles of Indianapolis, but by a different route, and thence to a depot in the latter place the track of another road was used, and by this line a train of cars came from Indianapolis to Delphi. *Held*, that the condition precedent was not performed, and there could be no recovery. *Indianapolis, D. & C. R. Co. v. Holmes*, 101 Ind. 348.

Where a contract between a railroad company and one of its contractors provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract, the contractor cannot recover the amount of the final estimate until he has executed the release; and his attaching creditor has no greater rights

against the company in respect to this final estimate than he has, and therefore cannot recover the amount unless the contractor has executed the release. *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. (Va.) 595.—REVIEWED IN *Baltimore & O. R. Co. v. Gallahue*, 14 Gratt. (Va.) 563.

In such case a common law court has no authority to make its judgment against the company operate as a release under seal by the contractor. *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. (Va.) 595.

46. Conditions subsequent.—In the right-of-way contract between a railroad and an owner of land, which operated to vest at once the easement in the land, and in which it was stipulated that the company should not throw down the grantor's fences and allow his stock to escape, and that he should have the wood on the right of way, such conditions were subsequent ones, for the breach of which an action, either for specific performance or damages, would lie, as the grantor might elect. *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. (Civ. Cas.) 163.

V. VALIDITY.

1. In General.

47. What contracts are valid, generally.—In regard to corporations the rule is that their executed dealings must stand for and against both parties when good faith requires it. *Southern Pac. R. Co. v. United States*, 28 Ct. of Cl. 77.

A contract for the leasing of a road for 999 years is not void because the company's charter is limited to forty years, where such contract provides that it shall be binding upon the parties and their successors and assigns, and where the charter provides that it may be renewed. *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174; affirming 47 Am. & Eng. R. Cas. 340, 47 Fed. Rep. 15.

The owners of a graded railroad bed can sell the same to a railroad company whose officers and directors are composed of the same identical persons who own the roadbed, and issue the capital stock of the company in payment thereof, at a time when those who sell the roadbed and own and control the corporation are the absolute owners of all the stock issued by the company, and when the terms of sale and the issue of stock are matters of record on the books of the company, and when the trans-

action occurred months before any other or additional stock is issued by such company. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.

A bridge company made an agreement with the I. R. Co., a railroad company, by which the latter was granted the right to use a bridge then in course of construction, upon the payment of certain tolls and rent. Subsequently, but before the execution of the formal contract for the use of the bridge, the road of the I. R. Co. was leased to the Pittsburgh Co., which assumed the obligations of the I. R. Co., and performance of the obligations assumed was guaranteed by the Pennsylvania Co. After the execution the Pittsburgh and Pennsylvania companies executed an undertaking by which, in consideration of the execution of the bridge contract by the I. R. Co., they assumed the liabilities under such contract, the same as if it had been specifically named in and made a part of the lease. Held, that the lease and the contract for the use of the bridge were independent contracts, and that the validity of the latter did not depend upon the validity or invalidity of the former. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 Am. & Eng. R. Cas. 213, 131 U. S. 371, 9 Sup. Ct. Rep. 770.

48. Want of contractual capacity.

—If a contract between two corporations is not in violation of some public law or contrary to public policy, it seems that only the immediate parties to it, as the corporations themselves, or the stockholders who are parties by representation, hold such a legal position in relation to the contract as to entitle them to raise the question of its validity on account of the alleged want of capacity of the parties to make it. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

49. Uncertainty.—A contract by which the defendant railroad company employed plaintiff as its land agent, at a stipulated monthly salary, "to travel and work for the road, to induce capitalists to make investments along its line, and excursionists to travel over the road," no period for its continuance being specified, is void for uncertainty, and either party may withdraw from it at pleasure. *Howard v. East Tenn., V. & G. R. Co.*, 91 Ala. 268, 8 So. Rep. 868.

A contract by which a railway company engages to give an employé, injured in the

service of the company, a permanent job as long as he is able to perform the services required, is not so vague and uncertain as to be void. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802.

50. Lack of consideration.—A railroad company agreed with K. and his associates, in consideration that they would build an iron furnace on the line of its road, to transport ore and metal to and from such furnace at a given rate for the term of ten years, "when by them required so to do." And K. and his associates, in consideration of the promise and agreement of the railroad company, erected a furnace according to the stipulations of the agreement. *Held*, that the promise of the company to carry freight at the rates agreed upon is not void for want of a sufficient consideration, nor for want of mutuality of obligation between the parties; and *held* further, that the right thus secured under the contract by K. and his associates was transferable by assignment to a subsequent purchaser of the furnace property. *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 Ohio St. 451.—FOLLOWED IN *Cleveland & M. R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321.

An agreement by a railway company with bankers to issue to them paid-up stock and debentures at a discount, in consideration of a large advance of money by them—*held*, under the circumstances, valid and reasonable. *Webb v. Shropshire R. Co.*, [1893] 3 Ch. 307.

51. Voidable contracts—Ratification.—A part of the directors of two companies were the same persons. *Held*, that a contract entered into on behalf of the corporations by such persons, without consulting the stockholders, is voidable, even if a majority sanctioned the contract, excluding the ones who were directors in each company. And the validity of the contract would not be affected by the fact that the stockholders knew when electing the directors that some of them were directors in the other company. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103.

A railroad company agreed to pay plaintiffs a certain sum if they would secure a responsible construction company to build its road. Plaintiffs negotiated with a construction company, and a contract was drafted but was never executed by the par-

ties, by reason of the construction company not having sufficient funds. Some months later the railroad company secured additional subscriptions to the stock of the construction company, which enabled it to begin the work. *Held*, that plaintiffs, not being instrumental in completing the contract, could not recover. *Smith v. Seattle, L. S. & E. R. Co.*, 55 N. Y. S. R. 627, 72 Hun 202, 25 N. Y. Supp. 368.

In the negotiations between the company and plaintiffs in making the above contract, it was carried on by an agent of the railroad company, who entered into a secret contract with plaintiffs to receive a part of the consideration to be paid for procuring such construction company. *Held*, that such arrangement rendered the contract voidable at the election of the railroad company, if it had never ratified it; and such contract was voidable even if the secret agreement was not entered into until after the contract was executed. *Smith v. Seattle, L. S. & E. R. Co.*, 55 N. Y. S. R. 627, 72 Hun 202, 25 N. Y. Supp. 368.

2. Illegal Contracts.

52. In general.—A contract by a common carrier, which disables it to perform its duty to the public, will not be enforced. *Chouteau v. Union R. & T. Co.*, 22 Mo. App. 286.

The officers and agents of a railroad company have no authority to use the funds of the corporation in running a line of steamers in connection with the road, and all contracts for that purpose are illegal. *St. Joseph ex rel. v. Saville*, 39 Mo. 460.—FOLLOWING *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441; *Hoagland v. Hannibal & St. J. R. Co.*, 39 Mo. 451.

A contract by the directors to use the bonds of a railroad to aid in building the road of another company in another state is illegal. *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. Rep. 32.—DISTINGUISHING *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356.

An agreement that a railroad employé should deposit a certain amount of money as a guaranty for the faithful discharge of his duties, and making the president of the company the sole judge as to whether the company is entitled to retain the money, and declaring his written certificate of forfeiture conclusive upon the parties in all courts of justice, is void so far as it at-

tempts to oust the jurisdiction of the courts. *White v. Middlesex R. Co.*, 135 *Mass.* 216.—CRITICISING *London Tramways Co. v. Bailey*, 3 Q. B. D. 217. REFERRING TO *Wilson v. Glasgow T. & O. Co.*, 5 Sc. Sess. Cas. (4th ser.) 981; *Glasgow T. & O. Co. v. Dempsey*, 3 Coup. Just. 440.

Where a railway company, having no power to borrow money, sells part of its rolling stock and makes a contract with the purchaser for the hire of such rolling stock at a rent which would repay the purchase price and interest in five years, if the transaction is *bona fide*, it is not illegal and void as a cloak for borrowing money. *Yorkshire R. Wagon Co. v. Maclure*, L. R. 21 Ch. D. 309, 51 L. J. Ch. D. 857, 47 L. T. 290, 30 W. R. 761; *reversing L. R.* 19 Ch. D. 478, 51 L. J. Ch. D. 253, 45 L. T. 747, 30 W. R. 288.

The directors of a railway company made a contract with W. to mine coal, highly favorable to said W., said directors arranging at the time that they would subsequently form a corporation, to which W. was to assign his contract, whereby said directors would be enabled to realize a profit. W. accordingly expended some funds in mining coal, and afterwards, the proposed corporation being formed, assigned his contract to it, remaining in the employ of such new corporation as superintendent. Subsequently the directors of the railroad company seized the books and property of the coal company and ceased to employ W. In a suit brought by W. against the railway company for an account, etc.—*held*, that the contract, being tainted with fraud on the part alike of W. and the directors of the company, the former could derive no benefit from the contract nor sustain any claim against the company for its repudiation. *Wardell v. Union Pac. R. Co.*, 1 Am. & Eng. R. Cas. 427, 103 U. S. 651.—QUOTED IN *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 483; *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808. RECONCILED IN *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263. REVIEWED IN *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103.

53. Contracts prohibited by law.—Where buildings were used in promoting the business of a railway company, a contract between the owner and the company,

exempting the company from liability in case the buildings were set on fire by sparks from passing engines, is void under sections 1289 and 1508 of the Iowa Code. *Griswold v. Illinois C. R. Co.*, (Iowa) 53 N. W. Rep. 295.—DISTINGUISHING *Marquette, H. & O. R. Co. v. Spear*, 44 Mich. 170, 6 N. W. Rep. 202. RECONCILING *Warren v. Keokuk & D. M. R. Co.*, 41 Iowa 484. REVIEWING *West v. Chicago & N. W. R. Co.*, 77 Iowa 654, 35 N. W. Rep. 479, 42 N. W. Rep. 512; *Johnson v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. Rep. 829.

Where a contract is for the doing of two or more things which are entirely distinct, and one of them is prohibited by law and the others are legal, such illegality of the one stipulation cannot be set up as a bar to an action for a breach of one of the valid stipulations. *Erie R. Co. v. Union L. & E. Co.*, 35 N. J. L. 240.—FOLLOWED IN *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505. QUOTED IN *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 652.

Under section 818, Mc. Rev. St., providing that no officer or employé of any railroad corporation shall be interested in furnishing supplies to such corporation, nor in the business of transportation, as a common carrier, of freight or passengers over the works owned, leased, or operated by the company of which he is officer or employé, a contract entered into with a railroad company, organized under the Missouri laws, and operating a road in another state, by a stock agent of the company leasing for a term of years certain of the company's stock yards in such other state, in consideration of his receiving from the company one dollar per car-load for loading and unloading stock which he is to feed, and charge and collect the expenses against shippers, is void in its inception and cannot be validated by ratification. *Rue v. Missouri Pac. R. Co.*, 36 Am. & Eng. R. Cas. 449, 74 Tex. 474, 8 S. W. Rep. 533.

54. Wagers.—There is no law in Illinois, either statute or common, prohibiting a wager that a railroad will be completed within a specified time, and an action may be maintained upon it. *Beadles v. Bless*, 27 Ill. 320.

55. Futures and options.—A contract to sell a certain number of shares of railroad stock at a certain price, if taken on or before a certain date in the future, is an option to buy at a future time, and is there-

fore within Ill. Crim. Code, § 130, making it an offense to deal in futures, or to forestall or corner the markets. *Schneider v. Turner*, 27 Ill. App. 220.—QUOTING *Andrews v. Rontue*, 24 Wend. (N. Y.) 289.

56. Contracts void as against public policy.*—(1) *In general*.—A contract undertaking to define the amount of care that a railroad company shall exercise for the personal protection of its employes is void as against public policy, especially where the matter is controlled by statute. *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App. 114.

It is against public policy for a railway company to agree without legislative authority to delegate to another company all its parliamentary powers; equity will not aid such an agreement or promote the object of it. *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare 306, 7 Railw. Cas. 643, 21 L. J. Ch. 837.

(2) *Agreements not to prosecute*.—A track laid and poles erected in the street without authority constitute an illegal obstruction or public nuisance; and where no fact is averred to show special damage to the plaintiff by the obstruction, an agreement not to prevent it is an agreement not to institute a public prosecution, which is against public policy and void, and cannot constitute a consideration for a promise to pay money for not preventing it. *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. Rep. 550.

(3) *Bribes*.—Where an interest in a town site, on the line of a road then building, was to be conveyed to the president and construction company on consideration that they "aid, assist, and contribute to the building up of a town on said lands"—held, void as being a bribe. *Bestor v. Wathen*, 60 Ill. 138.—QUOTED IN *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592.

(4) *Immoral contracts*.—A provision in an agreement on the part of a telegraph company to transmit "the family, private, and social messages" of the executive officers of a railroad company free, is immoral and against public policy, and taints the whole contract, so that a court of equity will not enforce any part of it. *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.)

418, 3 Fed. Rep. 1.—FOLLOWING *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.

(5) *Discriminating rates, drawbacks, etc.*—A contract between a freight agent and a shipper of sand giving the shipper a special rate, lower than that demanded of others, in consideration that the agent share in the profits of the shipments, is void as against public policy, and no share of the profits can be recovered. *Barkley v. Williams*, 26 Ill. App. 213.

A covenant by the Morris Canal and Banking company, not to allow to others a drawback from established rates on the transportation of merchandise over its canal, which it agreed to allow to the covenantee, is against public policy, and void. Such a covenant does not, however, invalidate the entire contract in which it exists, and from the remainder of which it is severable. The agreement to allow the drawback to the covenantee is valid and enforceable, and others are entitled to equally reasonable terms. *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505, 13 Am. Ry. Rep. 54; affirming 36 N. J. L. 259.—FOLLOWING *Erie R. Co. v. Union L. & E. Co.*, 35 N. J. L. 240.—QUOTED IN *Bayles v. Kansas Pac. R. Co.*, 40 Am. & Eng. R. Cas. 42, 13 Colo. 181, 5 L. R. A. 480, 22 Pac. Rep. 341; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52; *Cleveland, C., C. & I. R. Co. v. Closser*, 126 Ind. 348. REVIEWED IN *Willoughby v. Chicago, J. R. & U. S. Y. Co.*, 50 N. J. Eq. 656.

57. Contracts not void as against public policy.—A contract between a city and a railroad company, expressly sanctioned by the legislature of the state and designed to insure the construction of works of internal improvement of importance to the city, and of which the city has secured the advantages, is not against public policy nor without consideration. *Winnona v. Cowdrey*, 93 U. S. 612.

Where an employé, injured in the service of a railway company, sues the company for a breach of contract in failing to give him a steady job as agreed, the company cannot set up as a defense that it is a quasi public corporation, and that such a contract is void as against public policy. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. L. Rep. 802.

Where a railroad company employs a detective, an agreement to furnish him bail

* As to contracts that are void as against public policy, see notes, 9 AM. & ENG. R. CAS. 383; 8 L. R. A. 497.

and to pay all expenses of his defense if he should be arrested while in its employ is not void as against public policy; but the contract does not bind the company to furnish bail where the detective is arrested for assisting in lynching a man after he had procured his arrest on a charge of wrecking trains. *Hewlett v. Cincinnati, N. O. & T. R. Co.*, 65 Miss. 463, 4 So. Rep. 547.

Where defendant railroad agrees to make good any deficiency of the net income of plaintiff company, so as to enable it to meet interest on its bonds, and in consideration plaintiff company agrees to give a lien on its road and to deposit a majority of its capital stock, retaining the right to vote it so long as its road is operated to the satisfaction of defendant company, such agreement is not void *per se* as against public policy. *Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co.*, 1 N. Y. Supp. 363, 16 N. Y. S. R. 208, 48 Hun 621, *mem.*

58. Contracts relative to location of road.—(1) *When illegal.*—A contract made with officers of a railroad, acting in their individual capacity, to induce them to establish the line of a road at a given point, for the purpose of promoting the private advantage of the contracting parties, is against public policy and will not be enforced in equity. *Linder v. Carpenter*, 62 Ill. 309.

An agreement giving the exclusive right of way to a railroad company, in so far as it attempts to exclude other companies from acquiring a right of way over the same tract, upon land not appropriated or required for the use of the former company, is void as against public policy. *Kettle River R. Co. v. Eastern R. Co.*, 40 Am. & Eng. R. Cas. 449, 41 Minn. 461, 43 N. W. Rep. 469, 6 L. R. A. 111.

A contract between rival railroads, by which one agrees not to continue its road beyond a certain point, which is short of its chartered limits, is contrary to public policy, and void. *Hartford & N. H. R. Co. v. New York & N. H. R. Co.*, 3 Robt. (N. Y.) 411.

(2) *When not illegal.*—An engagement to pay a railroad company a certain sum to induce the location of their route at a particular place, is valid and binding, and may be enforced. *Cumberland Valley R. Co. v. Baab*, 9 Watts (Pa.) 458.—APPROVED IN *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97; *Pacific R. Co. v. Seely*, 45

Mo. 212; *Baltimore & O. & C. R. Co. v. Ralston*, 41 Ohio St. 573. DISTINGUISHED IN *Williamson v. Chicago, R. I. & P. R. Co.*, 53 Iowa 126. QUOTED IN *Pittsburgh & S. R. Co. v. Woodrow*, 1 Pittsb. (Pa.) 450. REVIEWED IN *Berryman v. Cincinnati Southern R. Co.*, 14 Bush (Ky.) 755.—*Cedar Rapids & St. P. R. Co. v. Spafford*, 41 Iowa 292.

Where a charter is silent as to the particular points through which a railroad shall run, its location is necessarily left to the officers of the company, and there is no illegality or immorality in awarding the advantages of the location to one contesting place as against another. The general doctrine is that such an agreement is not void *per se* as against public policy. *Baltimore & O. & C. R. Co. v. Ralston*, 41 Ohio St. 573.—APPROVING *Cumberland Valley R. Co. v. Baab*, 9 Watts (Pa.) 458.

59. Contract to locate station at particular place.*—(1) *When void.*—A contract by a railroad company to buy certain lands and to build its road through them, and to locate its stations and depots on or near such lands, is against public policy, and will not be enforced in equity. *Cook v. Sherman*, 16 Am. & Eng. R. Cas. 561, 4 McCrary (U. S.) 20, 20 Fed. Rep. 167.

Contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. Such companies should be left free to establish and re-establish their depots wherever the public welfare or wants of the public may require. *Florida C. & P. R. Co. v. State ex rel.*, 56 Am. & Eng. R. Cas. 306, 31 Fla. 482, 13 So. Rep. 103. *People ex rel. v. Chicago & A. R. Co.*, 40 Am. & Eng. R. Cas. 352, 130 Ill. 175, 22 N. E. Rep. 857.—QUOTED IN *Florida C. & P. R. Co. v. State*, 31 Fla. 482; *Mobile & O. R. Co. v. People*, 132 Ill. 559.

An agreement to deed certain grounds to a railroad company, in consideration that the company locate its station and depot on other grounds of the vendor, is void as against public policy, where it appears that the object of the conveyance is for the mere purpose of speculation, the land not being needed in constructing or operating the road. *Pacific R. Co. v. Seely*, 45 Mo. 212.—

* Agreements with companies to locate depots and stations at designated places, whether void as against public policy, see notes, 38 AM. & ENG. R. CAS. 711; 56 Id. 315; 36 AM. REP. 214.

APPROVING Racine County Bank *v.* Ayres, 12 Wis. 512; McMillen *v.* Maysville & L. R. Co., 15 B. Mon. (Ky.) 218; Henderson & N. R. Co. *v.* Leavell, 16 B. Mon. (Ky.) 358; Carlisle *v.* Terre Haute & R. R. Co., 6 Ind. 316; Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458; Rhey *v.* Ebensburg & S. Plank-Road Co., 27 Pa. St. 261; Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142; Troy & G. R. Co. *v.* Newton, 1 Gray (Mass.) 544; Chapman *v.* Mad River & L. E. R. Co., 6 Ohio St. 119; Fisher *v.* Evansville & C. R. Co., 7 Ind. 407. DISTINGUISHING Taylor *v.* Cedar Rapids & St. P. R. Co., 25 Iowa 371.—DISTINGUISHED IN Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97; First Nat. Bank *v.* Hendrie, 49 Iowa 402. FOLLOWED IN Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755. QUOTED IN Holladay *v.* Patterson, 5 Oreg. 177. REVIEWED IN Workman *v.* Campbell, 46 Mo. 305; West-End N. G. R. Co. *v.* Dameron, 4 Mo. App. 414.

The plaintiffs procured the conveyance to the defendant of certain lots in the city of Des Moines upon consideration of a promise by defendant that it would build thereon passenger and freight depots, which should be the only ones built or maintained by it in said city. Defendant built, and has since maintained, both passenger and freight depots thereon, but having also built a depot in another part of the city, an action was brought by plaintiffs to recover as damages the value of the lots conveyed. *Held*, that such action was based upon the contract, which was illegal and void, as against public policy, and the parties being *in pari delicto*, the action could be maintained. *Williamson v. Chicago, R. I. & P. R. Co.*, 53 Iowa 126, 4 N. W. Rep. 870, 36 Am. Rep. 206.—DISTINGUISHING Cumberland Valley R. Co. *v.* Babb, 9 Watts (Pa.) 458; Jewett *v.* Lawrenceburgh & U. M. R. Co., 10 Ind. 539. FOLLOWING St. Louis, J. & C. R. Co. *v.* Mathers, 71 Ill. 592; St. Joseph & D. C. R. Co. *v.* Ryan, 11 Kan. 602. REVIEWING Southard *v.* Central R. Co., 26 N. J. L. 13.

(2) *When valid*.—A stipulation in a deed conveying a right of way that, in consideration of such conveyance, the railroad company will locate and maintain a depot at a certain place, without any restriction or prohibition against any other location, is not void as against public policy, and for a breach an action for damages will lie. *Louisville, N. A. & C. R. Co. v. Sumner*, 24

Am. & Eng. R. Cas. 641, 106 Ind. 55, 5 N. E. Rep. 404.—DISTINGUISHING State *v.* Johnson, 52 Ind. 197.

A railway company may receive by voluntary grant or purchase, and hold, real estate for the purpose of aiding "in the construction, maintenance, and accommodation of its railway." And a contract to convey real estate to a railway company for said purpose, provided it builds a railway to a certain place and locates its depot within a certain town, is not in contravention of public policy, or void. *McClure v. Missouri River, Ft. S. & G. R. Co.*, 9 Kan. 373.—APPROVED IN Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97. DISTINGUISHED IN Holladay *v.* Patterson, 5 Oreg. 177.

A contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy, unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the company to superinduce the location. *Workman v. Campbell*, 46 Mo. 305.—REVIEWED IN Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97.

60. Contract not to locate station at particular place.—An agreement entered into by a railroad company for a valuable consideration, agreeing to maintain a station at a particular place and not to have or use another station within three miles of the place, is against public policy, and void, so far as relates to the discontinuance of the one station. *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602.—QUOTING Fuller *v.* Dame, 18 Pick. (Mass.) 472.—DISTINGUISHED IN First Nat. Bank *v.* Hendrie, 49 Iowa 402. FOLLOWED IN Williamson *v.* Chicago, R. I. & P. R. Co., 53 Iowa 126. QUOTED IN Pueblo & A. V. R. Co. *v.* Taylor, 6 Am. & Eng. R. Cas. 474, 6 Colo. 1, 45 Am. Rep. 512; Harris *v.* Roberts, 12 Neb. 631.

The directors of a railroad company are the trustees both of the public and of the stockholders of the company, and, in the discharge of their twofold duty, are required to act with reference to the public convenience on the one hand and the private interests of the stockholders on the other; and the interests of both forbid that there

should be a positive prohibition against the establishment of stations at any point on the line of the road. Hence a contract which prohibits the establishment of such stations will not be enforced in a court of equity. *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592.—QUOTING *Bestor v. Wathen*, 60 Ill. 138.—DISTINGUISHED IN *Snell v. Pells*, 113 Ill. 145. FOLLOWED IN *St. Louis, J. & C. R. Co. v. Mathers*, 9 Am. & Eng. R. Cas. 600, 104 Ill. 257; *Williamson v. Chicago, R. I. & P. R. Co.*, 53 Iowa 126, 36 Am. Rep. 206.

Where a party conveyed real estate to a railroad company, chartered by an act of the legislature and invested with the power of condemning private property upon the ground that its road was for the use of the public, upon an agreement or condition that the company would not establish a depot or station within three miles of a particular point, and the company violated the agreement and did establish a station within three miles of the designated point—*held*, that the condition or agreement was illegal, and that a reconveyance of the property could not be decreed on account of the violation of it by the railroad company. *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592.

Where the owner of lots conveyed the same in trust, for the benefit of a railroad company, in consideration of the illegal agreement of the company not to establish any depot or station within three miles of a certain place on its road, and the trustee afterward reconveyed the property back to the grantor—*held*, that the company could not maintain a bill to have the lots sold for its benefit and have the same again conveyed to a trustee for its benefit, nor could it claim the right to have the taxes paid on the lots made a charge thereon for its reimbursement. *St. Louis, J. & C. R. Co. v. Mathers*, 9 Am. & Eng. R. Cas. 600, 104 Ill. 257.—FOLLOWING *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592.

61. Contracts in restraint of trade, generally.*—Contracts which impose an unreasonable restraint upon the exercise of a business, trade, or profession are void, but contracts in reasonable restraint thereof are valid. *Ellerman v. Chicago J. R. & U. S. Y. Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287.

The test to be applied in determining

whether a restraint is reasonable or not is to consider whether the restraint is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public. *Ellerman v. Chicago J. R. & U. S. Y. Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287.

A covenant by parties selling the plant and business of stock yards not to engage in the business for a certain number of years, nor in the place where they are located, or within two hundred miles thereof, is not unreasonable and not an illegal restraint of trade. *Ellerman v. Chicago J. R. & U. S. Y. Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287.

A contract made by a railway company for the building of a hotel by another at its depot, in consideration of which it agreed to encourage the proprietors of the hotel with the patronage of the company, and to dissuade all other parties from erecting a hotel at that depot, is not a contract in restraint of trade nor beyond the power of the corporation. *Texas & St. L. R. Co. v. Robards*, 60 Tex. 545.—QUOTING *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258.

A contract by a railway company with the trustees of a dock, to cause all goods carried over the railway to be shipped or unshipped at such dock and to pay dockage for all goods shipped or unshipped at any other dock, is not in restraint of trade. *Taff Vale R. Co. v. Macnabb*, 22 W. R. 65, L. R. 42 Q. B. 153.

An agreement between two railway companies, containing a stipulation that one of the companies was not to compete for traffic which properly belonged to the other upon parts of its line, is not such a fraud upon the public as renders the agreement invalid. *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 17 Q. B. 652, 16 Jur. 311, 21 L. J. Q. B. 89; *affirming 2 M. & G.* 324, 2 H. & T. 257, 14 Jur. 921, 20 L. J. Ch. 90.

62. Pooling contracts, when lawful.*—A traffic agreement between two railway companies for the purpose of avoiding competition is not void as opposed to public policy. *Hare v. London & N. W. R. Co.*,

* Competition in trade in its legal aspects, see notes, 51 AM. & ENG. R. CAS. 490, 498.

* Constitutional and statutory provisions relating to combinations between railroads to prevent competition, construed, see note, 1 L. R. A. 849.

2 J. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817.

There is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of avoiding competition. Though a public company constituted for a particular purpose will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, the court will not interfere with a traffic agreement between the lines of railway to divide the net earnings in certain definite proportions. *Hare v. London & N. W. R. Co.*, 30 L. J. Ch. 817, 1 Ry. & C. T. Cas. 24.

All contracts between rival railroad corporations, which prevent competition, are not necessarily contrary to public policy, and therefore illegal in themselves. In such cases the illegality depends upon the circumstances. When such contracts prevent an unhealthy competition, and furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accordance with sound principles of public policy. *Manchester & L. R. Co. v. Concord R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 359, 20 Atl. Rep. 383, 9 L. R. A. 689, 3 Int. Com. Rep. 319.

An agreement to form a traffic association by several competing railroad companies, having for its object the furnishing of equal facilities for the interchange of traffic, and preventing unjust discriminations and maintaining just and reasonable rates, is not in violation of the act of congress of July 2, 1890, § 1, as an "agreement, combination, or conspiracy in restraint of trade," where there is nothing in the agreement preventing or illegally limiting competition. *United States v. Trans-Missouri Freight Assoc.*, 51 Am. & Eng. R. Cas. 458, 2 Fed. Rep. 440. *United States v. Trans-Missouri Freight Assoc.*, 56 Am. & Eng. R. Cas. 6, 58 Fed. Rep. 58.

Neither is such contract in violation of section 3 of the above act, providing that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. *United States v. Trans-Missouri Freight Assoc.*, 51 Am. & Eng. R. Cas. 458, 53 Fed. Rep. 440.—DISTINGUISHING *Morris Run Coal Co. v. Barclay Coal*

Co., 68 Pa. St. 173; *Texas & P. R. Co. v. Southern Pac. R. Co.*, 41 La. Ann. 970, 6 So. Rep. 888.

An agreement between competing roads for the formation of a traffic association, which only requires each company to charge just and reasonable rates, and provides for certain changes in existing rates, is not void as against public policy, as a transfer of corporate powers and franchises, where each company maintains its own corporate existence, having its own officers, and no power is granted the association to control the routine business of the companies. *United States v. Trans-Missouri Freight Assoc.*, 51 Am. & Eng. R. Cas. 458, 53 Fed. Rep. 440.—QUOTING *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

The act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," does not include carriers subject to the act of February 4, 1887, known as the Interstate Commerce Act. *United States v. Trans-Missouri Freight Assoc.*, 51 Am. & Eng. R. Cas. 458, 53 Fed. Rep. 440.

The act of congress cannot be construed as prohibiting every contract or combination between competing railroad companies which in any manner restricts free competition, since the test of the validity of such a contract or combination is not the existence, but the reasonableness, of the restriction imposed; and this decision has especial force in view of the Interstate Commerce Act. *United States v. Trans-Missouri Freight Assoc.*, 56 Am. & Eng. R. Cas. 6, 58 Fed. Rep. 58.

The defendants owning a short railway from New Orleans to Lake Pontchartrain, and one Morgan owning a line of steamers plying from the lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by defendants with Morgan, and, temporarily, with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendants therefore entered into an agreement with Morgan by which the latter loaned them \$250,000; and the former agreed to *pro rata* with him the

through freight from New Orleans to Mobile, and to charge all other steamers the tariff rates paid by the public generally. The plaintiffs immediately laid up their steamers and sued for damages, on the ground that this *pro rating* with Morgan and refusing to further *pro rate* with plaintiffs was an illegal combination with Morgan to confer on him an unlawful monopoly and preference. *Held*, that the acts of defendants were not in contravention of any statute of Louisiana or any principle of her jurisprudence; that they might agree or refuse to *pro rate* through freight with anybody, and the plaintiffs could not complain of a refusal to *pro rate* with them; and that as common carriers, in the absence of statutory prohibition, their acts in the premises were not unlawful. *Eclipse Tow-boat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1.

In the absence of any statutory regulations upon the subject, a railway or line of steamboats may agree to share through freight *pro rata*, with a connecting line, to the exclusion of other lines, without incurring any liability for the loss which may result to the other lines by reason of such arrangement. *Eclipse Tow-boat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1.

63. Pooling contracts, when unlawful.*—(1) *General rules*.—An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 9 Am. & Eng. R. Cas. 374, 15 Fed. Rep. 650; reversed in 110 U. S. 667, 4 Sup. Ct. Rep. 185.—*APPLYING* Hartford & N. H. R. Co. v. New York & N. H. R. Co., 3 Robt. (N. Y.) 411; Bennett v. Dutton, 10 N. H. 486. *QUOTING* Twells v. Pennsylvania R. Co., 3 Am. Law Reg. (N. S.) 728.

Railroad companies have a right to unite in continuous lines for greater facilities in the transportation of goods and passengers, but any agreement that a railroad company shall at a certain terminus refuse or discriminate against freight which comes to it over other than its connecting line is void as against public policy. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 9 Am. &

Eng. R. Cas. 374, 15 Fed. Rep. 650; reversed in 110 U. S. 667, 4 Sup. Ct. Rep. 185.—*APPLYING* Bennett v. Dutton, 10 N. H. 481; Chicago & N. W. R. Co. v. People, 56 Ill. 365; Sandford v. Catawissa, W. & E. R. Co., 24 Pa. St. 378; New England Exp. Co. v. Maine C. R. Co., 57 Me. 188. NOT FOLLOWING Jencks v. Coleman, 2 Sumn. (U. S.) 221.

An agreement between railroad companies, the obvious purpose of which is to suppress or limit competition between the contracting parties in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, is contrary to public policy and void. *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 703, 61 Fed. Rep. 993.

It is a part of the public policy of the state of Georgia, as indicated by the charter of several railroads from the seaboard to the interior, to secure a reasonable competition between those roads for public patronage; and it is contrary to that policy for one of those roads to attempt to secure a controlling interest in another. Any contract made with that view will be set aside by a court of equity as illegal beyond the objects of the charter and contrary to the public policy of the state. *Central R. Co. v. Collins*, 40 Ga. 582.

A combination between common carriers to prevent competition is *prima facie* illegal. If such a contract can stand, it must be upon a complete affirmative showing that it was not formed to harm the public by repressing fair competition. The burden is upon the carrier to remove the presumption of the illegality of such a combination. *Cleveland, C. C. & I. R. Co. v. Closser*, 45 Am. & Eng. R. Cas. 275, 126 Ind. 348, 26 N. E. Rep. 159.

A contract entered into between competing common carriers for the establishment and maintenance of freight rates, forming what is known as a "pool," being a combination for no other purpose than that of stifling competition, and providing means to accomplish that purpose, is illegal. Such a combination being void, any one of the associated carriers has a right to provide by special contract for a special rate to a shipper, and such contract will be upheld when no element of partiality, oppression, or improper favoritism entered into the contract. *Cleveland, C. C. & I. R. Co. v. Closser*, 45

* Illegality of combinations to control trade, see note, 8 L. R. A. 500.

Am. & Eng. R. Cas. 275, 126 *Ind.* 348, 26 *N. E. Rep.* 159.—QUOTING *Hooker v. Vandewater*, 4 Den. (N. Y.) 349.

Two railroads, which have each a through and separate line of communication between given points, are competing companies for all traffic between such points, and an arrangement to divide their traffic earnings between these points is against public interests and contrary to public policy, and cannot be judicially enforced. *Texas & P. R. Co. v. Southern Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 475, 41 *La. Ann.* 970, 6 *So. Rep.* 888.—DISTINGUISHED IN *United States v. Trans-Missouri Freight Assoc.*, 53 *Fed. Rep.* 440.

(2) *Illustrations*.—An illegal agreement between railroad companies contemplated two modes of pooling—one by an actual division of the traffic and the other by a division of the gross earnings. *Held*, that the traffic not having been divided, one of the parties to such agreement could not compel the division of the compensation received by another party thereto for freight carried over its line. *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.*, 58 *Am. & Eng. R. Cas.* 703, 61 *Fed. Rep.* 993.

A steamship company that ran a line from a Florida port on the Atlantic to northern ports in the United States agreed to enter a freight pool as a connecting line of several competing railroads in the southern part of the United States and east of the Chattahoochee river, that were attempting to form a freight pool between that section and eastern and northern ports. The arrangement as originally attempted was not carried out, but a pool was formed to the South Atlantic ports, of which the steamship line had notice. *Held*, that the steamship company was not entitled to share in the profits made by the pool, though the railroads may have used the agreement with the steamship company to secure better terms on the railroads. *Cutting v. Florida R. & N. Co.*, 48 *Fed. Rep.* 508.

The city of Savannah and the Central railroad and the Southwestern railroad entered into a contract by which the city transferred to the companies 12,383 shares of stock in the Atlantic and Gulf railroad and 732 shares in three other railroads. The city was one of the original incorporators of the Central railroad, and at the time of the transfer its mayor was a stock-

holder of the road. *Held*, that even if railroad charters are not public laws which all are bound to notice, the city is charged with notice of the powers of the Central and Southwestern railroads and cannot stand upon the footing of an innocent actor without notice. *Central R. Co. v. Collins*, 40 *Ga.* 582.

The B. & M. and E. railroads entered into a contract or arrangement whereby each should retain sixty per cent. of its gross earnings between all competing points of their respective routes and Boston to pay running expenses, and the remaining forty per cent. of such gross earnings should constitute a common fund, to be equally divided between said roads. *Held*, that such contract came within the prohibition of the act of 1867, ch. 8, entitled "An act to prevent railroad monopolies." *Morrill v. Boston & M. R. Co.*, 55 *N. H.* 531, 11 *Am. Ry. Rep.* 484.

The E. railroad was not chartered by the legislature of New Hampshire, but controlled and operated four other railroads which were so chartered. *Held*, that a bill in equity might be maintained, under the provisions of said act, by stockholders in the B. & M. railroad against the B. & M. and E. railroad corporations for an injunction to restrain the operating of such New Hampshire roads under the illegal contract aforesaid. *Held* also, that the fact that such New Hampshire roads were only parts of lines extending into the adjoining states of Maine and Massachusetts, was no bar to the maintenance of the bill. *Morrill v. Boston & M. R. Co.*, 55 *N. H.* 531, 11 *Am. Ry. Rep.* 484.

An agreement between several railroad companies, some of which own and control competing lines, for the appointment of a common governing committee or an association composed of one member from every company, to fix the rates for which freights should be carried to and from points within the state of Texas, is illegal because contrary to art. 10, section 5 of the constitution of Texas, which provides that "No railroad * * * or managers of any railroad corporation shall consolidate the stock, property, and franchises of such corporation with * * * or in any way control, any railway corporation owning or having under its control a parallel or competing line." *Gulf, C. & S. F. R. Co. v. State*, 36 *Am. & Eng. R. Cas.* 481, 72 *Tex.* 404, 1 *L.*

R. A. 849, 10 S. W. Rep. 81, 2 Int. Com. Rep. 335.

The fact that any company or party to the agreement has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, or that it has not been shown that the companies have made charges in excess of the limits allowed by law, does not relieve the agreement from its illegality. *Gulf, C. & S. F. R. Co. v. State, 36 Am. & Eng. R. Cas. 481, 72 Tex. 404, 1 L. R. A. 849, 10 S. W. Rep. 81, 2 Int. Com. Rep. 335.*

64. Monopolies.—Railroad corporations are created for the public good, to increase the facilities and conveniences and promote the great ends of commerce, and they cannot organize monopolies or make contracts injurious to the public interests. *Chicago, D. & V. R. Co. v. Smith, 62 Ill. 268, 6 Am. Ry. Rep. 221.*

All contracts which have a tendency to stifle competition, or to create or foster monopolies, with a view to unreasonably increase the market value of commodities, are against public interest and contrary to public policy, and confer no rights which can be enforced in a court of justice. *Texas & P. R. Co. v. Southern Pac. R. Co., 40 Am. & Eng. R. Cas. 475, 41 La. Ann. 970, 6 So. Rep. 888.*

Unauthorized monopolies are against public policy and, as a general rule, a traffic arrangement by a railroad corporation, the benefits of which are restricted, in whole or in part, to one person or corporation, would, unless authorized by law, be against public policy, and void. *Stewart v. Erie & W. Transp. Co., 17 Minn. 372 (Gil. 348), 5 Am. Ry. Rep. 333, 8 Am. Ry. Rep. 149.*

Where there are void and valid independent stipulations in a contract, a court will

sometimes enforce the one and ignore the other; but where one clause of a contract between a shipper and a railroad company is void because it gives an unjust discrimination and tends to give the shipper a monopoly as to the kind of goods shipped, the contract as a whole will not be separated so as to enforce other provisions which are innocent on their face, where it appears that they were entered into for the purpose of securing the monopoly. *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co., 31 Fed. Rep. 652.*—*QUOTING Erie R. Co. v. Union L. & E. Co., 35 N. J. L. 246.*

An agreement between an elevator company and a railroad company by which the former agrees to erect an elevator and the latter agrees to give it all grain that may be received and discharged from the railroad at a fixed price per bushel, is not void as tending to create a monopoly. *Richmond v. Dubuque & S. C. R. Co., 26 Iowa 191.*—*QUOTED IN Cass County Bank v. Bricker, 34 Neb. 516.*

An agreement between two railway companies, that the one company will not carry traffic over a particular portion of their line—held, *obiter*, not illegal. *Lancaster & C. R. Co. v. North Western R. Co., 2 Kay & J. 293, 1 Ry. & C. T. Cas. 24.*

65. Contracts to influence elections of officers.—It is not, *per se*, unlawful for a number of persons by previous agreement to buy shares of corporation stock for the purpose of controlling its policy and electing its officers. *Beitman v. Steiner, 98 Ala. 241, 13 So. Rep. 87.*

The Northern railroad brought a bill in equity against the Concord railroad to enforce a contract made by a former board of directors of the Concord railroad, substantially transferring the management of the Concord railroad to the Northern railroad for the term of five years. Upon the evidence a majority of the court found that the controlling purpose of the directors of the Concord railroad, in making the contract, was to prevent the management of the road from passing into the hands of a new board of directors, whose election at the next annual meeting was generally anticipated, and that this purpose was known to the Northern railroad. On this state of facts a majority of the court held that the contract was invalid because of the purpose for which it was made. *Northern R. Co. v. Con-*

* The law of monopolies, see note, 9 AM. & ENG. R. CAS. 595.

Monopolizing trade, see note, 51 AM. & ENG. R. CAS. 496.

As to monopolies in trade or business which are illegal as against public policy, see note, 8 L. R. A. 500.

Forming combinations or trusts; ground for forfeiture of charter, see note, 8 AM. ST. REP. 191.

Trusts. Distinction between restraint of trade and monopolizing, see note, 51 AM. & ENG. R. CAS. 480.

Railway traffic associations are not trusts. Construction of congressional anti-trust act, see note, 51 AM. & ENG. R. CAS. 488.

cord R. Co., 50 N. H. 166, 1 Am. Ry. Rep. 164.

66. Engagements to influence legislation.—A contract for contingent compensation for services in obtaining legislation favorable to a railroad, or to use personal, secret, or sinister influences on legislators, is void by the policy of the law. *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.—FOLLOWED IN *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 418. QUOTED IN *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. REVIEWED IN *Chippewa Valley & S. R. Co. v. Chicago, St. P., M. & O. R. Co.*, 40 Am. & Eng. R. Cas. 408, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. Rep. 17.—*Marshall v. Baltimore & O. R. Co.*, *Taney* (U. S.) 204. *Usher v. McBratney*, 3 Dill. (U. S.) 385.

Secrecy, in such case, as to the character under which the agent acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with the railroad company, uses such means, he cannot recover compensation therefor. *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.

A contract between two railroad companies, by which one of them agrees in consideration of the undertaking of the other to convey to it part of a land grant, to refrain from making application to the legislature for such land grant, and to aid the other company in obtaining it, is contrary to public policy and void, although the services to be rendered are expressly limited by the contract to such as are reasonable and proper. *Chippewa Valley & S. R. Co. v. Chicago, St. P., M. & O. R. Co.*, 40 Am. & Eng. R. Cas. 408, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. Rep. 17.—REVIEWING *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.

Where it was understood at the time of making such contract that the company agreeing to render such assistance represented a third company as well as itself, a second contract, substituted for the former one, including such third company as a party, but otherwise substantially the same as the former contract, and made without any other consideration, is equally void, although executed after the legislature had granted the lands to the company which was to be aided in obtaining the same. *Chippewa Valley & S. R. Co. v. Chicago, St.*

P., M. & O. R. Co., 40 Am. & Eng. R. Cas. 408, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. Rep. 17.

The funds of a railway company cannot be applied for soliciting a bill in parliament to confer powers necessary for the carrying on of an undertaking foreign to its original object. *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 10.

A stipulation by a person interested in a railway company, that such company would pay the parliamentary expenses of another company for the establishment of a railway, was a promise that the company would do an act which was illegal and contravened public policy, and no action will lie against him on such promise. *Macgregor v. Dover & D. R. Co.*, 18 Q. B. 618, 17 Jur. 21, 22 L. J. Q. B. 69, 7 Railw. Cas. 227.

67. Agreements to withdraw opposition to legislation.—A contract entered into between certain persons and the original projectors of a railroad, to quiet and withdraw opposition to the passage of its charter through the legislature of the state, will not be enforced in a court of equity. *Martin v. Second & T. St. Pass. R. Co.*, 3 Phila. (Pa.) 316.

It is no defense to a claim made by the agent of a railway for compensation for services, in procuring a change of the company's charter, that the agent threatened to cause its unlawful use of a part of the route of the company to be restrained by injunction, to induce another company to withdraw an unreasonable opposition to such change made upon merely private grounds. *Low v. Connecticut & P. R. R. Co.*, 46 N. H. 284.

Where a landowner is a member of either house of parliament, the promoters of a railway, so long as they do not corruptly influence his vote, may agree personally to pay him a certain sum for withdrawing his opposition, or for supporting the scheme; but such payment is not "expense incurred in obtaining the special act or incident thereto," and cannot be upheld as a liability of the company within § 5 of the Companies Clauses Act 1862. *Shrewsbury v. North Staffordshire R. Co.*, 12 Jur. N. S. 63, L. R. 1 Eq. 593, 35 L. J. Ch. 156, 14 W. R. 220, 13 L. T. 648.

The courts will not enforce an agreement to give a certain sum of money as a bribe for the withdrawal of opposition to a railway bill in parliament. *Scottish N. E. R. Co. v.*

Stewart, 3 *Macq. H. L. Cas.* 382, 5 *Jur. N. S.* 607.

VI. PERFORMANCE; BREACH.

68. Obligation to perform.—In an action to recover damages for breach of contract by a company regarding the sale of railroad lands, if the plaintiff himself is in inexcusable default he cannot recover. *Reynolds v. Burlington & M. R. R. Co.*, 11 *Neb.* 186, 7 *N. W. Rep.* 737.—FOLLOWED IN *Lent v. Burlington & M. R. R. Co.*, 11 *Neb.* 201.

Where parties agree, in consideration that a railroad company will locate one terminus of its road within a fixed distance of a certain point, that they will convey to the acting manager of the company certain lands for the use of the company, and the agreement is carried out and the conveyance made, such trustee cannot refuse to convey to the company, on the ground that the contract was illegal or that its terms had not been carried out. *Union Pac. R. Co. v. Durant*, 95 *U. S.* 576.—QUOTED IN *Robison v. McCracken*, 52 *Fed. Rep.* 726.

Where a railroad company has received from private parties donations of lands, subscription of stock, and payments in money, in consideration that it should locate its road at a particular place and allow a private side-track and warehouse privileges in connection therewith, the company will not be permitted to effectuate a change in fact (though not in name) of the line of its road away from such place by getting up a new corporation and constructing a new road parallel with its old one under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid. *Chapman v. Mad River & L. E. R. Co.*, 6 *Ohio St.* 119.—APPROVED IN *Pacific R. Co. v. Seely*, 45 *Mo.* 212.

69. Demand of performance—Notice to perform.—Where a railway company makes a positive contract with a person to supply it with a certain number of sleepers, to be delivered from time to time in the course of two years as the company's engineer may require, such person is entitled to notice of the times when the sleepers will be required. *Great Northern R. Co. v. Harrison*, 12 *C. B.* 576, 22 *L. J. C. P.* 815.

70. What is a sufficient or substantial performance.—An agreement by a

railroad company to construct its road and a side-track over a certain piece of land is sufficiently complied with by constructing two main tracks, in the absence of evidence showing that they are not sufficient. *Purinton v. Northern Ill. R. Co.*, 46 *Ill.* 297.

A contract by a railroad company to locate a depot at a certain place within six months from the date of the contract is complied with by staking off the ground, building a platform, and actually using the premises for depot purposes, within the time limited, although the depot building is not erected within the time named. *Waldron v. Marcier*, 82 *Ill.* 550.

Where a person agreed in writing to pay to a railroad company a certain sum to aid in the construction of its road, on condition or when the company should build a depot and open its road to a point within one mile of the post-office of a certain town—held, in an action on the agreement, that the building of a side-track, which was operated as such, and a depot at a point within the distance named, was a substantial compliance of the contract on the part of the company, although the main track of the road was not, nor was the whole of the depot building, within the mile. *Cedar Falls & M. R. Co. v. Rich*, 33 *Iowa* 113.—FOLLOWED IN *Courtwright v. Strickler*, 37 *Iowa* 382.

The distance mentioned in the contract should be measured by a direct line rather than by the nearest route. *Cedar Falls & M. R. Co. v. Rich*, 33 *Iowa* 113.

A railway company obligated itself by bond that it should "faithfully perform the matters and things * * * up to and including the intersection at Waxahachie in said contract stipulated for, on or by the first day of August, 1886." Within the time the railway company constructed the road, with intersection (with another railway track), within one hundred yards of the city limits. Held, that such construction was a substantial compliance with the terms of the contract in this particular. *Williams v. Ft. Worth & N. O. R. Co.*, 82 *Tex.* 553, 18 *S. W. Rep.* 206.

71. What does not amount to performance.—Under a contract for the delivery of nine thousand tons of railroad iron, the contract is not complied with on the shipment of the iron. *Thompson v. Cincinnati, W. & Z. R. Co.*, 1 *Bond (U. S.)* 152.

Under a contract between the superin-

tendent of a railroad company and a detective officer, by which the former promised to pay the latter the reasonable value of his services in the discovery and prosecution of persons who had stolen goods from the cars of the railroad company, and the recovery of the goods, a recovery cannot be had on evidence showing that the goods recovered belonged to another railroad company, and that the thieves were convicted of larceny from the cars of that other company. *Louisville & N. R. Co. v. Morgan*, 95 Ala. 608, 10 So. Rep. 834.

A railroad company agreed to give plaintiff \$50,000 if he would procure the passage of a bill through a state legislature granting a right of way for the extension of its road, the terminus to be between designated points. On account of the interest of a commercial city the right of way was granted to it, but outside of the designated points, and against the opposition of plaintiff. *Held*, that plaintiff could not recover on the contract, though the company accepted the right of way thus offered. *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.

Neither could he recover on a *quantum meruit*, as his whole compensation depended on success in obtaining the legislation, which had failed. *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314.

Where a written promise was made to pay a company \$100 if its road was built and equipped, and trains running to a given point by a day named, but if not completed within such time the obligation to be void, and the proof showed that the company ran an engine, tender, one passenger coach and one or two flat-cars over the line two days before the time limited, but places on the road were only half tied, and regular trains were not run over the same until several months after the time—*held*, that no recovery could be had on the obligation. *Paris & D. R. Co. v. Henderson*, 89 Ill. 86.

By the terms of a contract between W. and a railroad company, he became bound to pay the latter fifteen hundred dollars if within a specified time it should have completed its road to West Union and have done half of the grading between that place and the point of intersection with the M. & St. P. railway. *Held*, that the company had not complied with the contract by completing the road between West Union and the point of intersection named, while it failed to construct its road to West Union

from the other direction, and that the road must have been completed to West Union on the one side and half the grading done on the other. *Burlington, C. R. & M. R. Co. v. Whitney*, 43 Iowa 113.

Two persons, one of whom was defendant, had a subcontract for constructing a part of a road, and were to receive twenty per cent. of their compensation in railroad stock at par. One of them being taken sick, it was mutually agreed to release him and substitute plaintiff in his place on the same terms; then it was agreed between the two that plaintiff was to receive his amount in cash. *Held*, that the arrangement required defendant to retain the whole of the railroad stock received and to pay plaintiff in cash, and that a tender of half in stock was not good. *Knapp v. Levanway*, 27 Vt. 298.

72. Time of performance.—Where a contract is given for the construction of a bridge, to be completed by a given time, and afterward the company directs the contractor to make changes and do work not covered by the contract, the contractor is entitled to the additional time necessary to do the extra work in completing the bridge. *Texas & St. L. R. Co. v. Rust*, 19 Fed. Rep. 239.

Where time is made of the essence of the contract by the express terms thereof, and the language of the instrument discloses that a strict compliance with its conditions was the intention of the parties, a failure in performance will entitle the obligor to declare a forfeiture. *Iowa R. Land Co. v. Mickel*, 41 Iowa 402.

The failure of a party to perform within the time limited in a contract will not prevent a recovery upon the performance after the time specified, if he is allowed to go on after the time limited has expired without any expression of disapproval from the other party, for whose benefit the stipulation has been made. The latter is bound to express dissatisfaction at the delay, and if he intends to take advantage of it must act with promptness at the time and not allow the party in default to expend his money in completing the work. *Fowlds v. Evans*, 52 Minn. 551, 54 N. W. Rep. 743.

A contract entered into to furnish articles or supplies, at a specified price, and without limit as to duration, will not be construed as a perpetual contract, and will not be enforced as imposing a never-ending burden.

It must be construed as terminable at the pleasure of either party, or as implying that the thing to be done shall be performed within a reasonable time, and the obligation will cease within the same limitation. What is a reasonable opinion in such cases is a question of law for the court, to be considered with reference to the facts, as affording the basis of its rulings in each particular case, and not a question of fact for the jury. *Echols v. New Orleans, J. & G. N. R. Co.*, 52 Miss. 610.

A contract for drawing timber and loading it upon railway cars provided that the whole job should be finished by the 15th of March then next ensuing, the timber to be loaded on the cars by the party of the first part at such times as the party of the second part should direct after the timber should be drawn, provided the cars should be furnished by the railroad company. *Held*, that the meaning of the contract was that both the drawing of the timber and the loading it upon the cars should be fully completed by the 15th of March. *Chamberlin v. Scott*, 33 Vt. 80.

A railroad company contracted to sell plaintiff a tract of land for \$120, \$40 cash and the remainder in two equal annual payments. The contract expressly provided that the times of payment should be of the essence of the contract, and reserving to the company the right, upon failure to pay when due, to declare the contract forfeited; and it was further provided that the land was sold for improvement and cultivation. There was a three-foot vein of coal on the land, of which plaintiff only had knowledge. There was a default in a payment, and the company declared the contract forfeited. He had never gone into actual possession and had made no improvements. At the time of the trial to obtain specific performance of the contract, the land was worth \$2000, due to the vein of coal and the prospect of a speedy completion of a railroad. *Held*: (1) that the provision making the time of payment of the essence of the contract was valid; (2) that the company could exercise its option by declaring the contract at an end immediately upon the happening of the default or at any time thereafter; (3) that equity will not relieve against a forfeiture in order to enforce a hard and unconscionable bargain, or when the consideration is grossly inadequate; (4) that equity would

not decree the specific performance of the contract under the circumstances, after the company had tendered back the money it had received. *Missouri River, Ft. S. & G. R. Co. v. Brickley*, 21 Kan. 275.—DISAPPROVING *Seton v. Slade*, 7 Ves. 265. QUOTING *Wynkoop v. Cowing*, 21 Ill. 570; *Kemp v. Humphreys*, 13 Ill. 573; *Chrisman v. Miller*, 21 Ill. 227; *Phelps v. Illinois C. R. Co.*, 63 Ill. 469; *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Margraf v. Muir*, 57 N. Y. 155. REVIEWING *Rogan v. Walker*, 1 Wis. 527.

73. Part performance.—Where there is evidence tending to show delivery in part of cross-ties, under a verbal contract, and other part performance (Ga. Rev. Code, § 1941, par. 3), in an action against a railroad upon such contract the case should be allowed to go to the jury. *Byran v. South Western R. Co.*, 37 Ga. 26.

Where a company contracted to complete a road in 5 years and continuously operate the same, in consideration of an annual subsidy for 35 years and a grant of 5000 acres of land for each mile of road completed on the completion of every 5 miles, and after part of the road was completed and part of the subsidy paid and part of the land granted the company broke the contract, and the government refused further payments—*held*, that on the true construction of the contract (1) each claim to a grant of land was complete from the time when the section which had earned it was complete; (2) on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation. *Newfoundland v. Newfoundland R. Co.*, 13 App. Cas. 199.

74. Excuses for non-performance.—If the thing promised be possible in itself it is no excuse that the promisor became unable to perform it by causes beyond his control, for it was his own fault to run the risk of undertaking unconditionally to fulfil a promise, when he might have guarded himself by the terms of his contract. *Pennsylvania R. Co. v. Reichert*, 10 Am. & Eng. R. Cas. 429, 58 Md. 261.

After a railroad company had contracted for the building of bridges, payment to be made in stock, it mortgaged its road to third parties. *Held*, that the making of the mortgage did not make the company liable to pay in money, nor dispense with the ne-

cessity of demanding the stock. *Boody v. Rutland & B. R. Co., 3 Blatchf. (U. S.) 25.*

In February, 1861, a railroad company issued, by authority of law, notes to circulate as money, by which it covenanted to pay on demand a specific sum in gold, silver, Confederate treasury notes, or current bank-notes. No demand was made until 1865, when Confederate notes had ceased to circulate. *Held*, that it was not necessary to then demand Confederate notes, as a non-performance of the contract is always excused when occasioned by an act of the law. *Mississippi & T. R. Co. v. Green, 9 Heisk. (Tenn.) 588.*

75. Waiver of strict performance.

—Though there have been repeated violations of a contract by both parties, yet if neither elects to consider it broken and they proceed under it, neither can be considered as having been in default. *McCord v. West Feliciana R. Co., 3 La. Ann. 285.*—REAFFIRMING *Seaton v. Second Municipality, 3 La. Ann. 44.*

Plaintiff bought of defendant company a large amount of coal at auction, and according to the terms of sale deposited fifty cents per ton as a guaranty that the coal would be removed during the coming October, the contract providing that the company might at its option at any time thereafter discontinue further deliveries and retain the fifty cents per ton deposited. Various deliveries were made for some five months after October, when plaintiff demanded the balance of the coal and the amount of his deposit, which were refused. *Held*, that a removal in October, according to the terms of sale, was a condition precedent, but that the company had waived the right to demand a forfeiture. *Gray v. Delaware, L. & W. R. Co., 16 J. & S. (N. Y.) 121.*—LIMITING *Simpson v. Crippen, L. R. 8 Q. B. 14.*

76. What constitutes a breach.*—

A railroad company sold land in 1855, the purchase money being payable in five instalments, in two, three, four, five, and six years, for which notes were given, time of payment being made expressly of the essence of the contract, and the contract providing that in case of a failure of payment of any one of the notes at maturity or of the taxes when due, the obligation to convey should cease, and all payment made

and improvement put upon the land should be forfeited to the company, notice of which was waived, and A. assigned his contract to C. in June, 1857, who died in June, 1863, leaving as complainants widow and heirs. *Held*, on bill to compel the execution of conveyance, the proof showing that only two of the notes had been paid and a failure to pay the taxes, that the company had a right to declare a forfeiture and resell the land. *Cunningham v. Illinois C. R. Co., 77 Ill. 178.*

A tender for the erection of an engine house and its acceptance by the commissioners constitutes a valid contract between the crown and party making the tender, and delay and neglect on the part of the commissioners acting for the crown to provide and fix cast-iron columns, etc., which were, by the specifications, to be provided and fixed by them, is a breach of the contract, and the crown is liable for the damages resulting from such breach. *Isbester v. Queen, 7 Can. Sup. Ct. 696, 1 Can. Exch. 358.*

Where the extra work claimed for was for a sum less than \$10,000—*held*, that the commissioners had power to order the same, under the statute 31 Vict. c. 13, § 16, and the contractor could recover by petition of right for such part of the extra work claimed as he had been directed to perform. *Isbester v. Queen, 7 Can. Sup. Ct. 696, 1 Can. Exch. 358.*

The defendants covenanted by deed with the plaintiffs, for valuable consideration, that all their passenger trains should run to and from a small station in C. street, in the city of S., for the purpose of checking baggage and of accommodating passengers. For about a year they ran the trains pursuant to their covenant, but subsequently ceased to do so. It appeared that in order to continue to perform the contract the defendants would either have to obtain running powers from the C. S. R. company, who owned the station in C. street, or else to build a new line for a considerable distance, involving great expense and difficulty, the crossing of two railways, and the doing of such continuous daily acts as are usually done at a railway station for passengers. *Held*, that there had been a breach of the agreement. *St. Thomas v. Credit Valley R. Co., 7 Ont. 332.*

Held, however, that under the above circumstances specific performance could not be granted, and the plaintiffs must be left

* Breach of contract to build depot or station, see note, 26 AM. & ENG. R. CAS. 593.

to their remedy in damages. *St. Thomas v. Credit Valley R. Co.*, 7 Ont. 332.—DISTINGUISHING *Lytton v. Great Northern R. Co.*, 2 Kav & J. 394; *Wallace v. Great Western R. Co.*, 3 Ont. App. 44. QUOTING *Powell Duffryn S. Coal Co. v. Taff Vale R. Co.*, 9 Ch. 331.

The defendants contracted to purchase a quantity of old iron rails from the plaintiff company, to be paid for as each 100 tons were delivered. The plaintiffs consigned 1150 tons out of 1300 tons stipulated for, and drew for the amount thereof at the agreed price, which draft the defendants refused to accept, under the erroneous belief that a portion of the iron charged for had not been received by them, and informed the plaintiff company of the ground of their refusal to accept the draft. *Held*, that this refusal to accept was not, under the circumstances, such an act as to warrant the plaintiffs in treating it as a repudiation of the contract, or such as would release the plaintiffs from a further performance of it. *Midland R. Co. v. Ontario Rolling Mills*, 10 Ont. App. 677; *affirming* 2 Ont. 1.

77. Consequences of a breach.—

Where a railroad company enters into an agreement to pay a certain stipulated amount in freight and passage over its road, the amount becomes due and payable at once in money upon its making itself unable to perform in carrying, by a sale of its road. *Branson v. Oregonian R. Co.*, 10 Oreg. 278.

Where a person agrees to construct and maintain a river embankment, and the circumstances show that the parties intended that the embankment should be so maintained as to prevent overflows, and so that it might be used as a roadway, the promising party is answerable for the consequences resulting from freshets and floods. *Indiana, B. & W. R. Co. v. Adamson*, 34 Am. & Eng. R. Co. 127, 114 Ind. 282, 12 West. Rep. 708, 15 L. E. Rep. 5.

VII. MODIFICATION; RESCISSION.

1. Modification.

78. Alteration of the contract.—

Where a railroad company lets a contract for the construction of a building, according to plans, which were afterward changed by mutual agreement, so as to require additional labor and materials, the original price will govern in determining the compensation, where no agreement is made re-

3 D. R. D. —15.

specting the price of the extra work and materials. *Chicago & G. E. R. Co. v. Vosburgh*, 45 Ill. 311. *Boody v. Rutland & B. R. Co.*, 3 Blatchf. (U. S.) 25.

Where two railroad companies enter into a contract under seal, whereby one is given the right to lease certain freight grounds, which right is confined to definite grounds, the contract cannot be afterward varied by parol so as to give the right to lease different grounds. *Illinois C. R. Co. v. Baltimore & O. & C. R. Co.*, 23 Ill. App. 531.

Where a stipulation in a contract between two companies for the erection of a central passenger station has been abandoned by mutual consent, and all the other work contemplated in the contract has been performed, the plaintiffs have the same rights in the works actually constructed at the joint expense as they would have had if the proposed central depot had been constructed within a reasonable time. *Portland, S. & P. R. Co. v. Grand Trunk R. Co.*, 63 Me. 90.

On October 24, 1865, a railroad company gave D. an order for a quantity of timber for building cars. On the 9th of March following, none of the timber having been delivered, the company countermanded the order and stated that D. might deliver the "sticks" he had then ready, but need not saw any more. D. having logs then on hand, sawed them and delivered all the timber to the company, which refused to receive that part thereof which had been sawed after the original order was countermanded. *Held*, that the contract between the parties, made by the original order and countermanding order, did not embrace the lumber sawed by D. after the revoking order was received by him. *Cincinnati, H. & D. R. Co. v. Dickey*, 30 Ohio St. 16.

79. Substitution of a new contract.—A contract to forbear suit upon a cash subscription to the capital stock of a railway company till the completion of the road, is waived by a subsequent agreement, made matter of record, to confess judgment, waiving valuation and appraisement laws, and for a stay of execution for eighteen months. *Indiana & I. C. R. Co. v. Seearce*, 23 Ind. 223; *former appeal*, 17 Ind. 193.—DISTINGUISHING *Robison v. Godfrey*, 2 Mich. 408.

Where, contemporaneously with the execution and acceptance of a deed to a right of way, the parties orally agree that the

consideration for the deed is the payment of a certain sum of money by the railroad company, and the performance by it of certain conditions within a reasonable time, the railroad company is liable according to the terms of that contract (which is assumed to be valid, as the question is presented), and a prior written contract between it and the landowner becomes immaterial. *Indiana, B. & W. R. Co. v. Fennell*, 116 Ind. 414, 19 N. E. Rep. 204.

Where the parties entered into a contract to construct a railroad between two given points, which from its nature was an entire indivisible contract, and afterwards entered into another agreement for the performance of the same work, either in part or in whole, at a different price, the latter is an extinguishment of the first contract. *Howard v. Wilmington & S. R. Co.*, 1 Gill (Md.) 311.

Defendants, who had a contract for building a railroad, entered into an agreement with plaintiff to do part of the excavating. Soon after he had commenced the work he encountered hard strata, and notified defendants that he could not complete the work at the contract price; thereupon a new agreement was entered into by which defendants agreed to pay a reasonable compensation. *Held*, that the new agreement was valid and binding, and worked a rescission of the original contract. *Hart v. Lauman*, 29 Barb. (N. Y.) 410.

The provisions in a contract by a railway company with a contractor for the construction of a railway, giving the company the right, on the default of the contractor, to enter and complete the work, using the contractor's plant, and to have a lien on the same, with power to sell to reimburse themselves for any loss or damage, were done away with by the provisions of a second contract which was entered into when the contractor became embarrassed, and wherein new provisions were made for the reimbursement of the company which were in substitution of the corresponding provisions in the first contract. *Hunt v. South Eastern R. Co.*, 45 L. J. C. P. D. 87.

2. Rescission.

80. The right to rescind.*—To set aside a contract, largely performed on both

* Traffic contract between railroads. Right to rescind, see 45 AM. & ENG. R. CAS. 333, *abstr.*

sides, on the ground of fraud, misrepresentation, or concealment, where a rescission would involve the upsetting of many large and important transactions, the proof must be very clear. It must be clear that there has been such a misstatement of the facts as to mislead the injured party and to induce him to enter into the transaction; and he must be prompt to avail himself of the objection as soon as it is discovered. He must not wait to experiment and see whether the transaction may not, after all, turn out well. Acquiescence for a little time, in such cases, is condonation. *Morgan v. New Orleans, M. & T. R. Co.*, 2 Woods (U. S.) 244.

Where a contract is made for work to be done at a stipulated price, and it is discovered before the work is commenced that a misrepresentation has been made in respect to its value, the party engaging to do the work may repudiate the contract; if he does not do so, but goes on and performs it, he can demand no more than the contract price. *Saratoga & S. R. Co. v. Row*, 24 Wend. (N. Y.) 74.

Whenever one party to a contract refuses to execute any substantial part of his agreement he thereby gives to the other party the option to rescind the entire contract and to recover damages for the breach. *Clark v. Philadelphia & R. C. & I. Co.*, 16 Phila. (Pa.) 135.

Where two railroad companies enter into an agreement by which one is to be allowed the use of the other's tracks and depot at a compensation dependent upon the amount of freight carried and number of cars run, it may be rescinded upon reasonable notice by either party, where the contract is silent as to the time that it should remain in force. *Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. R. Co.*, 44 Fed. Rep. 456.

One who erects a depot and eating house upon the land of a railroad, under contract for mutual occupation and use, may sue for breaches of the contract, but cannot seek a rescission of it and a recovery of the cost of the building upon the *quantum meruit*, unless there be a covenant of purchase. A reserved right to purchase does not create an obligation to do so. *Toledo, W. & W. R. Co. v. Jacksonville Depot Bldg. Co.*, 63 Ill. 308.—QUOTED IN *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 360.

Where a railway company contracts to sell superfluous land free from encumbrance,

under an agreement providing that if the purchaser should decline to waive any valid objection to the title the company might rescind the contract if the abstract of title shows that the land is subject to a rent charge, the purchaser cannot require the company to procure the release of the land from such charge, but the company is entitled to rescind the contract under the condition in the agreement. *In re Great Northern R. Co., L. R. 25 Ch. D. 788, 53 L. J. Ch. D. 445, 50 L. T. 87, 32 W. R. 519.*

81. — Illustrations.—A person who was practically the owner of a railroad entered into an agreement with a finance company, looking to the organization of a new company, that such person should be elected president and should name a majority of the directors, and that the bonds of the company should be sold by the finance company. At a subsequent meeting such person was not elected president, and was not permitted to name the directors. *Held*, that this would not justify him in rescinding the contract, where he was present at the meeting and voted for the persons who were elected president and directors. *American L. & T. Co. v. Toledo, C. & S. R. Co., 47 Fed. Rep. 343.*

The owner of a railroad entered into an agreement with a finance company for the organization of a railroad company, and that the finance company should sell the railroad bonds, but no time was agreed on in which they should be sold. *Held*, that a failure to sell the bonds within sixteen months was not grounds for rescinding the contract. *American L. & T. Co. v. Toledo, C. & S. R. Co., 47 Fed. Rep. 343.*

The plaintiff was employed by the defendant to procure donations, right of way, etc., under the contract embraced in the following resolution of the executive committee, and acceptance by plaintiff: "Resolved, That P. S. shall be allowed two fifths in value and kind of all donations to be obtained on account of any extension of the C. F. & M. R. Co. beyond W., to be in full for his services in procuring said donations and superintending the getting of the right of way, etc.; provided, that he shall be allowed actual cash expenses while in the employ of the company. But there is no understanding that he shall receive compensation for other services, unless the board shall, under the circumstances of any particular case, see proper to make an al-

lowance." Acceptance by plaintiff of the above proposition, as follows: "I will accept the above on condition that the road shall be completed as far as N. by the 1st day of January, 1868, and to C. within one year thereafter." *Held*, that the agreement was, in effect, an employment of plaintiff, indefinite as to time, that might be revoked or terminated at the pleasure of the company, and that plaintiff could not recover therefor damages for compensation he might have received if he had been permitted to continue under the contract. *Smith v. Cedar Falls & M. R. Co., 30 Iowa 244.*

A railroad company contracted for the construction of its road, to be paid for in its bonds and stock, to be issued on the completion of each twenty miles. It was provided that if the contractors should desire the issue and delivery of the bonds in advance of the payment for work done, for the purpose of the more rapid completion of the work, the company should deliver the same in sufficient amounts, on satisfactory security being given. The president of the company approved of a contract between the two contractors for a division of their profits, and an arrangement for a delivery to one of them of the bonds and stock as fast as issued. Thereupon such contractor arranged to sell them to plaintiffs and gave an order on the president for a delivery of the bonds out of the first issue, which order the president accepted. The contractors failed to do the work and their contract was annulled. *Held*, in an action by the plaintiffs for the recovery of the bonds: (1) that the president's acceptance of the order must be taken as agreeing to deliver the bonds upon their being earned, and no recovery could be had without showing this fact, or that it was prevented by the wrongful act of the company; (2) that the bonds issued by the president to the contractors to enable them to sell their contract, and without security, were not issued under the contract, within the meaning of the order and acceptance; (3) that the company was not prevented by any act of the parties from annulling the contract. *Titus v. Cairo & F. R. Co., 46 N. J. L. 393.*

The parties entered into a written contract by which plaintiff for a stipulated consideration, payable monthly, was granted the exclusive privilege of placing advertisements in defendants' cars for two years

from a certain date. The contract was performed for the two years, and for a considerable time thereafter, without further agreement, the monthly consideration being paid. *Held*, that this would not continue the contract from year to year, but the railroad company might discontinue it at any time after termination of the contract. *Chase v. Second Ave. R. Co.*, 97 N. Y. 384, 49 Am. Rep. 531; reversing 16 J. & S. 220. —FOLLOWING *Chamberlain v. Pratt*, 33 N. Y. 47.

82. What amounts to a rescission.—Where a railroad company and a landowner agreed for an exchange of lands, and possession is taken by the railroad company and its track laid, the obligation of the contract is not impaired by a letter of the president notifying the other party that the company would not carry out the exchange, and a reply asking when the company would be ready to settle for the use of the land, and to remove its tracks therefrom. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. Rep. 286; affirming 23 Fed. Rep. 168.

Defendants purchased certain shares of railroad stock from plaintiff at a fixed price, with the agreement that if either of them should pay anybody else any higher price for other stock in the company, then they would pay plaintiff the difference between the sum paid him and the highest price paid for other stock, with the further agreement, "in case, during or after the then contemplated visit to C. of one A., plaintiff should be dissatisfied with the sale of the stock," defendants should return the shares upon receiving back the price paid. While A. was in C. plaintiff demanded the stock and offered to return the price. *Held*, that the demand by plaintiff of the stock was an effectual rescission of the contract, and a failure to return it was a breach of contract. *Stewart v. Huntington*, 4 N. Y. S. R. 760, 43 Hun 635, mem.

83. Rescission must be total, not partial.—The president of a railroad contracted with defendants to build a part of the road, and agreed to a deposit of bonds of double the amount of the contract price, and in default of payment, defendants should take the bonds in payment at fifty cents on the dollar. Two years after the bonds were delivered to the contractors the company filed a bill repudiating the contract, and asking that the bonds be declared

void. In the mean time the company had taken possession of the road and had brought a suit against the contractors for non-completion of the work, and had procured an enabling act from parliament which recited the completion of the work. *Held*, a sufficient ratification of the contract, and that plaintiffs could not accept the benefits of part of the contract and reject other parts. *Winnipeg & H. B. R. Co. v. Mann*, 7 Man. 81.

84. Restoration of the consideration.—Where the contract of compromise is absolutely void, there may in some jurisdictions be no need of a rescission or a restoration of the *status quo ante* in order to sue on the original contract; but where the compromise is not void but merely voidable, a tender must be made. *Alexander v. Grand Ave. R. Co.*, 54 Mo. App. 66.

VIII. LAW OF PLACE.

85. When the *lex loci* governs.—The law is well settled that contracts are to be construed according to the laws of the state where made unless it is presumed, from their tenor, that they were entered into with a view to the laws of some other state. This rule applies to the contract of a carrier to transport goods marked to a party residing in a different state. *Pennsylvania Co. v. Fairchild*, 69 Ill. 260. *Mills v. Dow*, 133 U. S. 423, 10 Sup. Ct. Rep. 413.

A written contract for carriage of property is to be interpreted according to the law of the place in which the contract was made. *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Pa. St. 527, 24 Atl. Rep. 79.

Where a railroad company of one state sues in that state to annul a lease of its road to a railroad company of an adjoining state, the action is governed, so far as regards the validity of the contract, not by the law of the forum, but by the law of the contract. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 Am. & Eng. R. Cas. 68, 145 U. S. 393, 12 Sup. Ct. Rep. 953; affirming 33 Fed. Rep. 440.

Where a railroad is incorporated and has its principal office in a state and contracts with reference to personal property in that state, the contract will be construed according to the law of the state where made. *Samuel v. Holladay*, 1 Woodw. (U. S.) 400.

A contract made in Canada, and mentioning no place where the payments were to be made, must be governed by the Canadian

law. *Niagara Falls I. Bridge Co. v. Great Western R. Co.*, 22 U. C. Q. B. 592.

86. When law of place of performance governs.—A subscription made in one state to the capital stock of a railroad chartered and having its road and treasury in another state, is to be construed according to the laws of the latter state. *Penobscot & K. R. Co. v. Bartlett*, 12 Gray (Mass.) 244.

There is no presumption that the statute law of Missouri exists in another state (Illinois); and, in the case of a shipment made wholly without the limits of Missouri, the liability of the carrier is not governed by her statute, which, moreover, applies in terms only to contracts of transportation made in the state. *Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

When a contract is made in one state to transport goods over a line extending through two or more states, and the goods are lost, the rights of the parties will be governed by the laws of the state where the loss happened. *Barter v. Wheeler*, 49 N. H. 9.

Where a railroad company, incorporated in and under the laws of another state, enters into a contract in this state, which, by its terms, is to be performed here, and is legal under the laws of the state, prohibitions in its charter, which would render the contract illegal in the state where the corporation was organized, do not render it illegal here; their only effect here is as restrictions upon the corporate power. *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553; *affirming* 33 Hun 7.

It seems that where, by the statute law of a state, a railroad company in the state is prohibited from limiting by contract its common-law liability, the statute has no effect upon a contract made in such state and in reference to goods shipped therein, but which limits the liability of a railroad company in another state for the transportation of such goods in that state. *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660; *affirming* 20 J. & S. 496.

The provision in a contract of shipment as to notice of a claim for damages being given within a specified time, or the consignor is precluded from a recovery, while valid and binding in contracts to be partly performed without the state, is not valid

or binding where the contract is to be wholly performed within the state. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

87. When the lex rei sitæ governs.—As a rule contracts are governed by the law of the place where they are made; but if a contract be made in one state and is to be performed in another, it is governed by the law of the place of performance; but if it is to be partly performed in different states, it is governed by the law of the place where made; but if in carrying out the contract conveyances of property become necessary, they must be executed according to the law of the place where the property is. *Morgan v. New Orleans, M. & T. R. Co.*, 2 Woods (U. S.) 244.

88. When the lex fori governs.—The law of the country in which it is sought to enforce a contract governs in all questions as to remedy and mode of proceeding, including the form of action, process, limitation, and execution. *Morgan v. Camden & A. R. Co.*, 18 Phila. (Pa.) 384.

89. What law governs as to the validity of the contract.—Where a railroad company enters into a contract in one state to carry goods from that state into another, and the contract is valid where made, but not in the other state, its validity will be determined by the law of the place where made. *Ryan v. Missouri, K. & T. R. Co.*, 23 Am. & Eng. R. Cas. 703, 65 Tex. 13.—REVIEWING *Brown v. Camden & A. R. Co.*, 83 Pa. St. 316.—*Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470. *Texas & P. R. Co. v. Davis*, 2 Tex. App. (Civ. Cas.) 156.

Where a contract of affreightment is made in one state for the transportation of goods from a point therein to a place in another state, the validity and effect of the contract, and of provisions therein limiting the common-law obligations of the carrier, are determined by the law of the place of contract. *Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.—REVIEWING *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa 412; *Talbott v. Merchants' Despatch Transp. Co.*, 41 Iowa 247, 20 Am. Rep. 589; *Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574.

A contract to carry a passenger and his baggage is not invalid because the journey

continues beyond the limits of the state where the contract is made. The question of validity does not depend upon the state line, but upon corporate power. So long as the existence of the corporation and power to contract within the limits fixed by its charter are conceded, the same force and effect must be given to its contracts as if it had been created by the laws of the state where the contract is sued on. *Cary v. Cleveland & T. R. Co.*, 2 *N. Y.* 35. —DISTINGUISHING *Mayor v. Norwich v. Norfolk R. Co.*, 4 *El. & Bl.* 397; *East Anglican R. Co. v. Eastern Counties R. Co.*, 11 *C. B.* 775; *Caledonia & D. J. R. Co. v. Helensburgh Harbor Trustees*, 39 *Eng. L. & Eq.* 28. NOT FOLLOWING *Hood v. New York & N. H. R. Co.*, 22 *Conn.* 1; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 *Conn.* 468.

IX. ACTIONS FOR BREACH OF CONTRACT.

90. The right of action.—Where an action is pending to recover against a railroad company for stopping up plaintiff's sewer-pipe, and defendant agrees that if plaintiff will dismiss the same it will pay the costs and keep the pipe open, and the action is dismissed and costs paid, but defendant refuses to keep the pipe open, an action will lie at the instance of the plaintiff against the defendant for breach of this contract. *Gainesville, J. & S. R. Co. v. Martin*, 84 *Ga.* 61, 10 *S. E. Rep.* 542.

Where a railroad company contracts with a landowner in procuring the right of way to construct and maintain crossings, with cattle-guards, and to fence its track, these things must be done in a reasonable time; and if not done within a reasonable time the landowner may sue and recover the cost of doing the work. *Indiana, B. & W. R. Co. v. Koons*, 24 *Am. & Eng. R. Cas.* 376, 105 *Ind.* 507, 5 *N. E. Rep.* 549.

The defendants, intending to put an end to a contract with the plaintiffs, proposed to pay a certain sum for a release from the contract. In an action by the plaintiffs for a breach of the original contract—*held*: (1) that the proposition was an offer of a compromise which was not binding unless accepted; (2) that, if accepted, the consideration which gave it validity as an agreement was the release and extinguishment of the former contract; (3) that if the plaintiffs intended to hold the defendants to the terms of the offer they should have sued on

the agreement of compromise, if an agreement was concluded; (4) that they could not sue on the original contract, and use the offer of the defendants as a liquidation of the damages they had sustained by a breach of the original contract. *Union L. & E. Co. v. Erie R. Co.*, 37 *N. J. L.* 23.

91. Who may sue—Joinder of plaintiffs.—A third person cannot maintain an action for injuries resulting from a breach of contract arising purely out of the terms of the agreement between the contracting parties. *Roddy v. Missouri Pac. R. Co.*, 104 *Mo.* 234, 15 *S. W. Rep.* 1112.

Two of several parties to a joint and several agreement, they being the only parties entitled to compensation, may sue without joining all the other parties to the contract. *Titus v. Catawissa R. Co.*, 5 *Phila. (Pa.)* 360. —QUOTING *Eccleston v. Clipsham*, 1 *Saund.* 153.

The purchaser of a large number of excursion tickets to sell again, who had sold some of them, may sue the company for failure to complete the delivery to him of the whole number of tickets purchased without joining the subpurchaser as a party plaintiff. *Houston & T. C. R. Co. v. Hill*, 34 *Am. & Eng. R. Cas.* 363, 70 *Tex.* 51, 7 *S. W. Rep.* 659.

In an action upon a covenant contained in an agreement between the covenantor, a railroad company, and "S. and such other parties as he may associate with him under the name of S. & Company," signed and sealed by the covenantor and signed "S. & Co." by the hand of S., acting in behalf and by the authority of the partnership, to pay to "the said S. & Company, parties of the second part," for work to be done by them, all those who are partners at the time of the signing of the agreement may join. *Seymour v. Western R. Co.*, 106 *U. S.* 320, 1 *Sup. Ct. Rep.* 123.

92. Action on promise for benefit of third person.—A contract made by two companies under their seals for the benefit of the stockholders of one of the contracting companies, upon the one side, may be enforced by such beneficiaries. *Bedford County v. Nashville, C. & St. L. R. Co.*, 22 *Am. & Eng. R. Cas.* 75, 14 *Lea (Tenn.)* 525.

A railroad corporation agreed with the authorities of a city to pay a certain proportion of the salary of a policeman to be assigned to duty specially at its depot, and

the plaintiff was employed. *Held*, that he could sue the corporation on the contract for a failure to pay him the part of his salary which it had agreed to do. *Porter v. Richmond & D. R. Co.*, 34 *Am. & Eng. R. Cas.* 137, 97 *N. Car.* 46, 2 *S. E. Rep.* 374.

93. Demand or tender before suit.—Where a railroad company issues negotiable certificates of indebtedness payable on demand, a demand at an office outside of the state which granted the company's charter is sufficient, if not objected to on that ground. *Pusey v. New Jersey W. L. R. Co.*, 14 *Abb. Pr. N. S. (N. Y.)* 434.

In an action for breach of a contract to sell a large number of excursion tickets, proof of a tender of 15 tickets at the rate agreed upon will not have the effect of reducing the plaintiff's claim as to the tickets tendered, to the difference between the contract rate and the regular fare, the railroad company having contracted to issue a number very largely in excess of the number tendered. *Houston & T. C. R. Co. v. Hill*, 34 *Am. & Eng. R. Cas.* 363, 70 *Tex.* 51, 7 *S. W. Rep.* 659.

By an obligation payable to a certain person or bearer, the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a certain railroad company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum, which he promised to pay in instalments as the construction of the roadbed progressed, in proportion to monthly estimates thereof, and that the whole should be paid on the completion of such roadbed. In an action on such obligation, by an assignee against the maker—*held*: (1) that no tender of such stock need have been made to maintain an action for any single monthly instalment, and that an action for the whole sum cannot be maintained without such tender having first been made; (2) that the one dollar, confessed in such obligation to have been received by the defendant, is too insignificant a part of the consideration to waive a tender of such stock in an action to recover the whole principal. *Clark v. Continental Imp. Co.*, 57 *Ind.* 135, 18 *Am. Ry. Rep.* 505.

94. Plaintiff's pleadings.—From every breach of a contract by one of the parties thereto a right of action results to the other party. *Ga. Code*, § 2946. Hence a declaration which alleges that the defend-

ant, a common carrier, contracted with the plaintiffs that a consignment of cotton would be carried out of a certain port on a certain day, and that the vessel did not leave until a subsequent day, whereby the plaintiffs were damaged, sets forth a cause of action. *Richmond & D. R. Co. v. Bedell*, 88 *Ga.* 591, 15 *S. E. Rep.* 676.

When a contract is to be completed before a fixed day, and many things are stipulated to be done, without any designation of time, it is sufficient to aver that they were not done at the time they ought to have been. *Smith v. Boston, C. & M. R. Co.*, 36 *N. H.* 458.

If parties, in making a contract under which disputes are contemplated as possible, agree under seal to submit any such disputes to private arbitration, as e.g., to the award of some third person, so that his decision shall be final and conclusive on them both, it is a bar to any action on the contract, that the plaintiff does not either aver and prove such award, or aver and prove such facts as excuse it. *Fox v. Hempfield R. Co.*, 1 *Pittsb. (Pa.)* 372.—QUOTING *Monongahela Nav. Co. v. Fenlon*, 4 *Watts & S. (Pa.)* 205.

95. Matters of defense.—Where a pooling contract between two roads has been fully executed and the defendant road has availed itself of all the benefits to be derived from it, it is estopped to deny its validity. Still less can the agents of the parties set up a defense of this character when it is not open to their principals. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 16 *Am. & Eng. R. Cas.* 488, 19 *Fed. Rep.* 804.

In an action by the shipper of stock against a railway company to recover damages for negligence and delay in transportation, where a special written or printed contract is set up to defeat the action for a non-compliance with its terms and conditions, the shipper will have the right to show the circumstances under which he executed the same, when he claims he was purposely misled by the defendant's agent and induced to sign the same without having time to examine the contents, under the fraudulent assurance that it was only a pass. *Black v. Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 388, 111 *Ill.* 351.

Where a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off

his guard, deliberately signs a written agreement without informing himself of the nature of its contents, he will nevertheless be bound by it, for the reason that the law will not permit him to allege, as a matter of defense, his ignorance of that which it was his duty to know, particularly when the means of information are within his immediate reach, and he neglects to avail himself of them. *Black v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 388, 111 Ill. 351.

One railroad company cannot recover against another for a breach of a contract entered into to co-operate in securing legislative land grants, where it appears that all of the available lands were already exhausted. *Dubuque S. W. R. Co. v. Cedar Rapids & M. R. R. Co.*, 25 Am. & Eng. R. Cas. 91, 66 Iowa 366, 23 N. W. Rep. 758.—REVIEWING *Smith v. Cedar Rapids & M. R. R. Co.*, 43 Iowa 239.

A railway company which stipulated by contract with a husband for certain special benefits to accrue to him in consideration that he should erect a hotel at a depot upon property owned by his wife, cannot, after the husband has complied with his part of the contract, avoid compliance on its part by asserting the coverture of the wife and the absence of her assent to the contract in the manner pointed out by the statute. *Texas & St. L. R. Co. v. Robards*, 60 Tex. 545.

Plaintiffs entered into a contract with defendant company by which the former were to erect a transfer house and suitably equip it so as to be ready at all times to weigh in hopper scales and transfer from car to car all grain that might be sent to them by the company; and that the company was to furnish them all their grain, and that it should not make use of the rates for any other purpose than billing property to its destination, but should collect plaintiffs' weigh charges in the same manner that other charges were collected, and pay the same over on or before the middle of each month. After a time plaintiffs closed their business, claiming that the company had violated the contract and made it impossible for plaintiffs to carry it out, and sued for breach of contract. *Held*: (1) that the question whether they were men of large means or not was immaterial; (2) the fact that plaintiffs had sued and recovered in former litigation for the principal breaches

of the contract could not prevent a further recovery; (3) that the court will not interfere with the amount of damages awarded because an error was committed at the trial in admitting evidence as to an improper item of damages, where there was nothing to show that it was considered by the jury, and where there was evidence sufficient as to other items of damage to make up the full amount awarded. *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 560.

A railroad company was sued for the cost of cutting away underbrush and preparing its right of way for grading. The company denied the authority of its engineer who made the contract for the work, claiming that certain citizens interested in the road had agreed to furnish the right of way graded. There was evidence tending to show that the contract with the citizens did not include the clearing of the right of way. *Held*, that the company was liable for the work whatever may have been its agreement with such citizens, it appearing that the officials of the company had knowledge that plaintiffs were doing the work, and expected them to be paid therefor by the company. *St. Louis, A. & T. R. Co. v. Dutton*, (Tex.) 10 S. W. Rep. 291.

96. Plea or answer.—If a fence was built by the company after suit brought, and was accepted by plaintiff in full satisfaction of that particular breach of the contract sued on, this is only available under a sworn plea *puis darrein continuance*. *Evans v. Cincinnati, S. & M. R. Co.*, 78 Ala. 341.

Residents of a county who agree to pay for the right of way of a certain railroad across the county cannot, after the road is constructed, plead inadequacy or want of consideration. *Chicago & A. R. Co. v. Derkes*, 24 Am. & Eng. R. Cas. 251, 103 Ind. 520, 3 N. E. Rep. 239.

When suit is brought on a contract, which on its face refers to a contingency, on the happening of which the defendant should be discharged from liability, it does not devolve on the plaintiff to anticipate the defense, by averring that the contingency had not happened; but if the defendant relies on it as a defense, he must allege and prove that it did happen. *Wooters v. International & G. N. R. Co.*, 4 Am. & Eng. R. Cas. 100, 54 Tex. 294.

The information alleged an agreement with her majesty whereby, in consideration of the conveyance by the Intercolonial rail-

way of certain passengers between certain stations, the defendants agreed to pay her majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned, as agreed to between the defendants and such officers. The defendants, admitting the agreement as alleged, sought to avoid it by setting up as a defense that such passengers were carried on *bons* in blank signed by one of the defendants only. *Held*, to be no answer to the breach of contract alleged. *Queen v. Pouliot*, 2 *Can. Exch.* 49.

97. Evidence. — Where the evidence tended to show that the general freight agent of defendant had authority to make a contract with plaintiff to furnish him a certain number of cars, at certain stations, on a specified day, for shipment of his stock, and that the agent entered into said contract with plaintiff, and that there was a failure to furnish the cars, to plaintiff's damage, the cause should have been submitted to the jury, and the trial court committed error in refusing to do so. *Baker v. Kansas City, St. J. & C. B. R. Co.*, 28 *Am. & Eng. R. Cas.* 61, 91 *Mo.* 152, 3 *S. W. Rep.* 486.

A contract having been made with a railroad corporation, after which the railroad was sold out and the purchasers formed a new corporation, but the contract was carried on without change, it was competent to prove, in an action against the new company for breach of this contract, what the original agreement was, and then that it had been acted upon by plaintiff and adopted by the defendant. *Walker v. Wilmington, C. & A. R. Co.*, 26 *So. Car.* 80, 1 *S. E. Rep.* 366.

And there being some testimony upon these points, the trial judge properly refused a nonsuit, and submitted to the jury the question whether the defendant had recognized and continued this contract with its predecessor. *Walker v. Wilmington, C. & A. R. Co.*, 26 *So. Car.* 80, 1 *S. E. Rep.* 366.

In an action for breach of a contract to furnish a large number of excursion tickets, for resale by plaintiff, the testimony of the subpurchaser of the tickets that he had bought a large number of tickets from the plaintiff at an advanced price is admissible. *Houston & T. C. R. Co. v. Hill*, 34 *Am. & Eng. R. Cas.* 363, 70 *Tex.* 51, 7 *S. W. Rep.* 659.

In a suit against a railroad company for board furnished the employés, under an alleged contract with the company, it was proper to show a like arrangement made with prior parties, the evidence being supplemented by proof of an agreement to continue the arrangement with plaintiff, and in the absence of an affidavit showing that defendant was misled thereby — *held*, that under the statute plaintiff might amend his petition by designating the price per meal agreed on for each employé. *Krech v. Pacific R. Co.*, 64 *Mo.* 172.

Defendants, who were railroad contractors, were sued on a parol agreement to assume the debts of the company. Plaintiff proved by the secretary of the company and two directors that at a certain meeting an agreement assuming the debts was made. It was further in evidence that defendants had written to the company, questioning the correctness of the statement of the company's debts, but did not deny their liability therefor. On the other hand, the defendants denied making the contract and proved it by two other directors, present at the same meeting. *Held*, sufficient evidence to establish the contract. *Lookout Mountain R. Co. v. Houston*, 44 *Fed. Rep.* 449.

98. Burden of proof. — Where a plaintiff takes a contract to furnish the material and build a depot, and sues to recover the price of extra material, not included in the contract, the burden of proof is on him to establish his claim. *Chicago & W. I. R. Co. v. Thomlinson*, 33 *Ill. App.* 388.

Where a party contracts with a railroad company to furnish ties, and the contract provides that the ties are to be inspected by an officer of the company, those which come up to the specifications in such contract to be accepted, and those which do not, to be rejected, and the company accepts certain ties which it refuses to pay the stipulated price for, on the ground that they are defective, the jury, in an action to recover the contract price of such ties, have a right to assume, in the absence of evidence to the contrary, that all the ties accepted and used came up to the contract. Accordingly it is proper to instruct the jury that the burden of proof is on the railroad company to show that the ties used by it without inspection were defective. *Graffin v. Charleston, C. & C. R. Co.*, (*So. Car.*) 47 *Am. & Eng. R. Cas.* 304.

99. Instructions to the jury.—In an action for failure to pay for ties which had been accepted according to contract, the court charged the jury that the company had set up admissions of the plaintiff that a very large amount of ties had been paid for, which was a question for the jury to determine. The jury were then instructed that such admissions must be received and weighed with great care, and would not estop the plaintiff, "unless defendant had done something or in some way acted upon them." *Held*, that the charge was not erroneous as invading the province of the jury, nor as inapplicable to the case. *Graffin v. Charleston, C. & C. R. Co.*, (So. Car.) 47 Am. & Eng. R. Cas. 304.

Defendant company agreed to fill in a trestle near the boundary of plaintiff's land, and also a portion of his land sufficient for a depot site. At the trial it appeared that plaintiff desired such filling of the trestle-work in order to prevent the flow on his land of water accumulating on the opposite side of the railroad. The company failed to make the fills and plaintiff sued for damages. *Held*, that he might recover the cost of filling in the depot site as contracted; but it was error to instruct the jury that he was entitled to recover, for a failure to fill the trestle-work, the cost of building an embankment sufficient to keep the water from flowing on his land, as the company had not contracted to make a fill sufficient for that purpose. *Morrell v. Long Island R. Co.*, 15 Daly (N. Y.) 127, 3 N. Y. Supp. 928, 22 N. Y. S. R. 30; reversing 1 N. Y. Supp. 65.

100. Questions of law and fact.—The interpretation of a contract is a question of law, and a prayer which submits this to the jury is for this reason defective. *Baltimore & O. R. Co. v. Kesley*, 7 Md. 297.

It is the duty of the judge to construe a written contract; but where there is dispute as to which of two agreements the parties acted under, that is an issue of fact which it is the province of the jury to determine. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353.

The question as to whether a contract or agreement entered into between the railroad company and a line of steamers plying between Jacksonville and Sanford, was entered into in good faith, and was legal and binding, or that such contract constituted an oppressive monopoly, and hence

was not legal and binding, is a mixed question of law and fact, and it was properly left to the jury to be passed upon by them. *South Fla. R. Co. v. Rhodes*, 37 Am. & Eng. R. Cas. 100, 25 Fla. 40, 5 So. Rep. 633, 3 L. R. A. 733.

101. Damages recoverable.—Where several railroads are interested in the freights received from a line of steamers which is likely to fail for lack of funds, and one road advances a sum of money to be used in running the steamers, to be paid back from the business, and secured by a pledge of stock of other companies, the other parties to the contract are only liable for such part of said money as they had agreed to contribute, there being no contract for personal liability further than this. *Ogdensburgh & L. C. R. Co. v. Nashua & L. R. Co.*, 112 U. S. 311, 5 Sup. Ct. Rep. 151; affirming 5 Fed. Rep. 882.

An action lies for the breach of an agreement to locate section-houses and to fence the track, in consideration of a promise to convey a right of way, and at least nominal damages may be recovered, and any actual damages which are the natural and proximate consequences of the breach; but not merely possible or speculative losses, such as the possible increase of patronage to plaintiff's store and mill by the location of the houses. *Evans v. Cincinnati, S. & M. R. Co.*, 78 Ala. 341.

Wherever it can be shown by the contract, or *aliunde*, that a certain and definite amount was paid as a consideration for the condition broken, such sum and interest may be properly recovered. Or, where the unperformed condition is the erection of buildings or other improvements within the city, the value of such improvements for purpose of taxation may be treated as the measure of damages. *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kan. 435.—DISTINGUISHED IN *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 631.

The measure of the plaintiff's damage, in an action for breach of a contract to deliver a large number of excursion tickets, is the net profit the plaintiff would have realized on such number of tickets as the evidence satisfies the jury, with reasonable certainty, he would have sold. *Houston & T. C. R. Co. v. Hill*, 34 Am. & Eng. R. Cas. 363, 70 Tex. 51, 7 S. W. Rep. 659.

The inventor and owner of a patent for a new device for weighing and transferring

grain in cars entered into a contract with a railway company, under which he erected the necessary buildings, etc., upon land leased to him by the company, and by which contract he was to weigh grain transferred to the company for shipment, without charge to the latter, except one half of any saving of expense over the former mode of weighing and transferring. The patentee was to have the right to charge the owners of grain such fees as might be agreed upon between him and them for weighing and transferring, and it was provided that the railway company was to make no use of the weights given it for any other purpose than billing the grain to its destination. It appeared that the weights so furnished had a market value of seventy cents per car-load of grain, and that the company, in violation of the contract, gave the weights so obtained to connecting roads, and thereby prevented the patentee from selling them. *Held*, that the company was liable to him for the value of such weights so given to other companies, or, seventy cents on each car-load of grain. *Lake Shore & M. S. R. Co. v. Richards*, 126 Ill. 448, 18 N. E. Rep. 794.

Plaintiff and defendant company contracted, by which plaintiff was to convey certain lands and a right of way for a siding and to construct necessary stockpens, etc., the company to deliver to him stock carried to be fed. The contract was carried out for more than a year and then repudiated by the company. Plaintiff sued to recover the value of the land conveyed and other damages. *Held*, that he was entitled to recover the value of the land less the profits that he had made during the time that the contract had been carried out; and he was not bound to tender such profits to the company before bringing suit. *Day v. New York C. R. Co.*, 51 N. Y. 583, 4 Am. Ry. Rep. 356; reversing 53 Barb. 250.

102. Suit on lost contract.—A contract to permanently locate railroad shops and offices in a certain city, although authorized to be recorded, is not within the meaning of Tex. Rev. St. art. 4286, providing that all deeds, bonds, bills of sale, mortgages, deeds of trust, powers of attorney, and conveyances of any and every description, which are required and permitted by law to be acknowledged or recorded, and which have been acknowledged and re-

corded, may be supplied by parol proof of their contents, if lost or destroyed. *St. Louis, A. & T. R. Co. v. Harris*, 73 Tex. 375, 11 S. W. Rep. 405.

X. PARTICULAR CONTRACTS.

103. Agreement as to construction of new lines.—An agreement between two railways contained the following provision: "Each company shall be at liberty to apply to parliament for power to construct lines in its own district for the accommodation of the local traffic in such district; but neither company shall directly or indirectly promote or support any new line in the district of the other." *Held*, that the restriction did not apply to districts occupied by both railways, and that this provision for the application to parliament for liberty to construct lines "for the accommodation of the local traffic" prohibited opposition to such application, but did not interfere with the right of each company to apply to parliament for liberty to construct within its own district lines for other than local traffic, subject to the right of the other company to oppose such application. *Caledonian R. Co. v. North British R. Co.*, 2 Ry. & C. T. Cas. 285.

104. Agreement to obtain land grant.—By the terms of a contract between S. and the defendant they were together to endeavor to obtain a certain grant of land for the construction of a railway from A. to the Missouri river. The defendant constructed from C. to the last-named terminus, and S. became subrogated to the rights of those who had constructed from A. to C.; a certain grant was obtained by the defendant, although it did not appear that any part of it was for constructing from A. to C. *Held*, that S. was entitled, under the contract, to no grant obtained by defendant. *Smith v. Cedar Rapids & M. R. R. Co.*, 43 Iowa 239, 14 Am. Ry. Rep. 426.—REVIEWED IN *Dubuque S. W. R. Co. v. Cedar Rapids & M. R. R. Co.*, 66 Iowa 366.

The fact that the legislature, in conferring the grant upon defendant, provided that the lands should only be given if the road should be commenced at M. (between A. and C.), and that defendant actually commenced at C., while S.'s grantor built from M. to C., would not operate to give to S. that portion of the lands which defendant would have earned by constructing the part

designated. *Smith v. Cedar Rapids & M. R. R. Co.*, 43 Iowa 239, 14 Am. Ry. Rep. 426.

105. Contracts for joint use of tracks, etc.—(1) Validity—*Ultra vires*.—

A contract by the Union Pacific R. Co., whereby, for 999 years, it let another company into the joint use and occupancy of its bridge and terminal facilities at Omaha, together with about seven miles of its track, such joint use not interfering with the use of such bridge and facilities by the lessor, or with the discharge of its duties to the government, is not *ultra vires*. *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174; *affirming* 47 Am. & Eng. R. Cas. 340, 47 Fed. Rep. 15.—**DISTINGUISHING** *Thomas v. West Jersey R. Co.*, 101 U. S. 79. **REVIEWING** *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094; *Oregon R. & N. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 26, 11 Sup. Ct. Rep. 478.

A provision in such contract that rules for the movement of trains shall be made which will accord equal rights and privileges to both parties, and, if not agreed upon, shall be fixed by referees, does not disable the Union Pacific R. Co. from performing its public duties, that company expressly reserving to itself the absolute control of the operation of every such train. *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174; *affirming* 47 Am. & Eng. R. Cas. 340, 47 Fed. Rep. 15.

The executive committee of the board of directors of the Union Pacific R. Co. had full authority to execute the contract in question; and such contract, having been approved by the stockholders at a regular meeting, was binding on the company, even though never ratified by a formal resolution of the board of directors. The fact that five of the twenty directors are appointed by the United States government, and not by the stockholders, is immaterial. *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174; *affirming* 47 Am. & Eng. R. Cas. 340, 47 Fed. Rep. 15.

Under the Pa. acts April 23, 1861, and February 17, 1870, authorizing railroads to lease, and make other contracts, with connecting lines, whether in or out of the state,

a company of that state has the power to contract for the privilege of running its trains across a bridge over the Mississippi river. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 Am. & Eng. R. Cas. 213, 131 U. S. 371, 9 Sup. Ct. Rep. 770.—**QUOTED IN** *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174.

After a railroad company had acquired a right of way through a city park, it contracted with another road to convey a one-half interest therein, upon receiving one half of the cost of constructing its roadbed through the park. On the same day the two railroad companies and the park commissioners entered into another agreement, recognizing the contract between the two companies, and providing that the original company, upon certain regulations, should permit other roads to use the right of way, and the second company should have a joint use of the right of way. *Held*: (1) that the agreement between the commissioners and the two railroad companies formed part of the agreement between the two railroad companies, and was binding, being based upon a sufficient consideration; (2) that the second company was bound to permit other companies to use the right of way; (3) that other roads using the right of way must do so subject to the rights and necessities of the second company. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. Rep. 546.

The St. Charles Street and the Canal & C. Streets companies, both organized under the general laws of the state, each holding assignable franchises, entered into a contract by which the first agreed to pay to the second, as a consideration for authorizing it to run its cars over its track, four cents a mile for each mile traveled by each car run over its track, said agreement to last during the term of the charters granted to the said respective corporations, or of any extension of said charter, provided that in case the first company shall cease to use the privileges granted to it in the contract, then and in that case the agreement shall be ended. *Held*, that where the first company is in undisturbed possession of the right, exercising and enjoying it every day, it cannot release itself from its contract obligations on the claim that the agreement was *ultra vires* the powers of its officers. *Canal & C. R. Co. v. St.*

Charles St. R. Co., 44 *La. Ann.* 1069, 11 *So. Rep.* 702.

Where, under such a contract, the Canal & C. R. Co. conveys all its rights, property, and franchises, especially including therein its rights under the agreement mentioned, to the Canal & C. R. Co., which assumes the obligations of the former under the agreement, there is nothing in the assignment of which the first company can complain. *Canal & C. R. Co. v. St. Charles St. R. Co.*, 44 *La. Ann.* 1069, 11 *So. Rep.* 702.

(2) *How construed.*—Two railroad companies entered into a contract for the joint operation of a road. The contract was silent as to how cars should be obtained, but for several years one company supplied them and the other paid a certain sum for their use. *Held*, that the construction thus placed upon the contract by the parties would thereafter be enforced and payment of the same sum be required. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 *Fed. Rep.* 254.—FOLLOWING *Topliff v. Topliff*, 122 U. S. 121, 7 *Sup. Ct. Rep.* 1057; *Chicago v. Sheldon*, 9 *Wall. (U. S.)* 54.

Where a contract between railroads, regarding the joint use of track and depots, provides that the lessee can only assign its interest "by sale, lease, or consolidation," and the contract shall extend to the companies' "lessees, assigns, grantees, and successors," all of the lessee's interest will pass by virtue of leases, sales, and consolidation. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 46 *Fed. Rep.* 145. See also 45 *Fed. Rep.* 304.

A contract between railroad companies for the joint use of "tracks, buildings, stations, sidings, and switchings," on and along a railway "between and including Denver and South Pueblo," gives the lessee company the right to use depot grounds in Denver in its freight and passenger business, without regard to the road over which its cars may pass. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 46 *Fed. Rep.* 145. See also 45 *Fed. Rep.* 304.

In a contract between two railroad companies for the right of way, where the track of one crosses the other, a stipulation that it shall have "the perpetual and free use of the right of way" of the other, within the distance specified, not only contemplates its uninterrupted use, but also relieves it from the payment of compensation. *Alabama*

G. S. R. Co. v. South & N. Ala. R. Co., 84 *Ala.* 570, 3 *So. Rep.* 286, 5 *Am. St. Rep.* 401.—RECONCILING *Illinois C. R. Co. v. Chicago, B. & N. R. Co.*, 122 *Ill.* 473.

A promise by one of two companies whose railways are operated under a joint management, to pay the other company for terminal facilities, in addition to payments for transportations and depot accommodations, cannot be inferred where no charges for terminal facilities have ever been made by either company, from the mere fact that the company asserting such promise has paid the other for the use of its portion of the freight houses and grounds. *Boston & L. R. Corp. v. Nashua & L. R. Corp.*, 157 *Mass.* 258, 31 *N. E. Rep.* 1067.

An agreement between two railroad companies, giving each a right to run its cars on the other's track, confers no power to assign or lease such right, where the contract is silent thereon; and an injunction will issue to prevent such assigning or leasing. *Brooklyn C. T. R. Co. v. Brooklyn City R. Co.*, 51 *Hun (N. Y.)* 600, 22 *N. Y. S. R.* 56, 3 *N. Y. Supp.* 901.

The contract between the Chicago, Rock Island and Colorado railway company and the Denver and Rio Grande railway company for the joint use of the railway of the latter company between and including Denver and Pueblo, construed, and *held*: (1) that the Chicago company has not the right to use the Denver terminals for the cars it operates and the business it does over the Union Pacific railway; (2) that the Chicago company has the right to do its own switching and handle its own freight in the joint yards, but its switching-engines and laborers must work under the orders, superintendence, and direction of a superintendent or other officer appointed by the Denver and Rio Grande railroad company and invested with the sole and absolute superintendence and control of the work in the joint yards; (3) that under the clause of the contract excluding from its operation the "shops at Burnham," the shop grounds appurtenant to the shops are excluded. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 45 *Fed. Rep.* 304. See also 46 *Fed. Rep.* 145.

Three railway companies at an intersection of their roads had a common yard, employing a common yard-master, switchmen, and brakemen. Each company had its side-tracks, which were under its exclusive

control. When switchmen and brakemen worked upon the side-track of one they were under its exclusive control. The contract further stipulated that each company should pay one third of the wages of the employes and one third of the necessary expenses incident to their work. An employe was injured and recovered damages against two of the companies. The third company was not sued. The judgment was paid, each defendant paying one half. In an action by appellant (one of such companies) against its co-defendant in the damage suit and against the company not sued for damages, for indemnity against the former and contribution against the latter—*held*: (1) the agreement cannot be reasonably construed to embrace such extraordinary expense as damages recovered by an employe for injuries resulting from the negligence of one of the companies; (2) such damages cannot be said to constitute an expense necessary or fairly incident to the work; they are too remote and unexpected to be considered as coming within the contract; (3) the company not sued would in no way be affected by the proceedings against the two other companies against whom the injured employe recovered judgment. *Gulf, C. & S. F. R. Co. v. Galveston, H. & S. A. R. Co.*, 52 *Am. & Eng. R. Cas.* 99, 83 *Tex.* 509, 18 *S. W. Rep.* 956.

Where a statute provides that on and after the 1st of February, 1880, a railway company shall make certain payments half-yearly on the 1st of March and 1st of September in each year, in consideration of being granted the right to use a line jointly with another company, the liability to make payment does not arise until September, 1880, that being the time of payment applicable to the first six months following the 1st of February, 1880. *Caledonian R. Co. v. North British R. Co.*, *L. R.* 6 *App. Cas.* 114, 29 *W. R.* 685.

(3) *Right to rescind*.—Both plaintiff and defendant companies ran railroads between Coney Island and ferries reaching New York city. Plaintiff's road was operated part of the way by horse power and the remainder by steam, but defendant's was operated entirely by horse power. There were about five blocks between the tracks where plaintiff's steam power commenced, and many of defendant's passengers were in the habit of leaving its cars and walking across to plaintiff's track and riding thence

on the steam-cars. It was mutually agreed between the companies that defendant company should use plaintiff's track along the five blocks, and have necessary terminal facilities, but if defendant should adopt steam on the southern part of its road either party might terminate the agreement by giving six months' notice. Some time thereafter defendant company adopted electricity, and plaintiff company sold the portion of its road operated by horse power. *Held*, that the sale of plaintiff's road so changed the conditions that a court would not decree specific performance, and the use of electricity was within the meaning of the contract, giving either party a right to terminate it. *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 50 *N. Y. S. R.* 862, 66 *Hun* 366, 21 *N. Y. Supp.* 1046.

106. Contracts for rolling stock.

—(1) *In general*.—A contract by which cars are furnished a railroad company, upon payment of a sum specified on delivery and so much a year for a number of years, and, on default, the persons furnishing the cars may take possession for the purposes of a sale, is a sale vesting the title in the company and making the property subject to a mortgage of the road. The provision for taking possession on default of making payment only vested in the vendors the right of mortgagees. *McGourkey v. Toledo & O. C. R. Co.*, 146 *U. S.* 536, 13 *Sup. Ct. Rep.* 170.

Where under the construction of a contract between a railroad and another the court has adjudged title to certain cars to be in such party and ordered their delivery by the receiver, the road will be liable to the owner for rent of the cars and for damage above the wear and tear. *Dawson Mfg. Co. v. Brunswick & A. R. Co.*, 51 *Ga.* 136.

Although the contract under which a railway company furnishes to a quarry owner, on his own side-track, cars for the transportation of stone, requires it to see that the cars are provided with proper brakes, it is not liable to a servant of such quarry owner who is not a party to the contract, and over whom it has no control, for injuries resulting from the company's breach of its contract with the quarry owner. *Roddy v. Missouri Pac. R. Co.*, 104 *Mo.* 234, 15 *S. W. Rep.* 1112.—*QUOTING* *Loop v. Litchfield*, 42 *N. Y.* 357.

Such contract, however, being for the mutual benefit of the quarry owner and the

railroad company, the latter, in furnishing the cars, which was a matter devolving exclusively on it, was bound to use ordinary care to furnish such as were reasonably safe for the quarry owner and his servants. *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. Rep. 1112.

Where the cars of one company were used by another, with the mutual understanding at first that there was to be no charge for car service because of other advantages enjoyed by the owner of these cars from the connection between the two companies, then regarded a sufficient compensation, such owner must show when and how this understanding was changed, before an implied contract to pay for the continued use of these cars will be raised or remuneration for their use awarded to the car owners. *Car Hire Case*, 15 So. Car. 613.

Where, under a contract to supply locomotives, a railway company agrees that after an engine has performed a trial distance of 1000 miles satisfactorily the contractor shall be released from all responsibility, in an action against the company for the balance due, it cannot give evidence of an inherent defect in the fire-box of a locomotive discovered nine months after it was accepted. *Sharp v. Great Western R. Co.*, 9 M. & W. 7, 2 Railw. Cas. 722.

(2) *Illustrations*.—By authority of a vote of the board of directors, their chairman made a contract on behalf of a corporation for a number of cars to be supplied with a certain patent improvement. It appeared that the manufacturer had no right to use the patent, but did so. *Held*, that the chairman was not liable for an infringement of the patent. *Lightner v. Brooks*, 2 Cliff. (U. S.) 287.

A contract sued on required the payment of \$30 each for the first 400 locomotives, to which an invention owned by plaintiff should be applied by defendant. The terms of payment were \$6000 within thirty days and the remainder within one year. *Held*, that the defendant did not agree to apply the invention to 400 locomotives and to pay \$30 for each one, but it agreed to pay \$6000 absolutely within thirty days, and in case the number of locomotives to which the invention should be applied within one year, at \$30 each, should produce more than \$6000, the excess was to be paid in one year. *Babcock v. Northern Pac. R. Co.*, 26 Fed. Rep. 756.

Defendant leased a railroad, which was equipped by a car trust, and, to induce the latter to leave the equipments on the road, entered into an agreement by which it arranged to pay the balance due on the equipments from the lessors to the car trust, and when such payments should be made, the car trust was to assign its interest in the equipments. *Held*, that such agreement between defendant and the car trust was a direct undertaking, and not a mere guaranty to pay the debt of another, within the statute of frauds, and defendant may be sued thereon directly. *Humphreys v. St. Louis, I. M. & S. R. Co.*, 37 Fed. Rep. 307. —APPLYING *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (U. S.) 381; *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124.

A manufacturer contracted to construct and deliver sixteen locomotives to a railroad company, to be paid for as delivered. The fifth locomotive delivered was not paid for. *Held*, that this did not justify the manufacturer in abandoning the contract, so as to entitle him to recover damages for the profits that he would have made on the other eleven locomotives, where there was nothing to show that such failure to pay prevented him from carrying out the contract, and where payment on delivery was not made a condition precedent to the completion of the contract. *Palm v. Ohio & M. R. Co.*, 18 Ill. 217.

Defendant entered into an agreement with plaintiff to pay a certain sum as rental for the use of cars and locomotives. Subsequently a compromise agreement was entered into reducing the rent, to which a majority of the certificate holders of plaintiff assented, the agreement providing that it was entered into on behalf of the assenting certificate holders. *Held*, that defendant could not claim the benefit of such contract as against certificate holders who did not assent thereto. *Humphreys v. New York, L. E. & W. R. Co.*, 21 N. Y. S. R. 750, 51 Hun (N. Y.) 641, 3 N. Y. Supp. 913; *affirmed* in 31 N. Y. S. R. 299.

The plaintiff and defendant, by their respective boards of directors, entered into a contract whereby the plaintiff agreed to supply the defendant with all the rolling stock required in the operation of its railway for the period of seven years, at an agreed rental to be paid monthly. The five persons composing the plaintiff's board of

directors were members of the defendant's board, which consisted of thirteen persons. At the meeting of the defendant's board, at which the terms of said contract were agreed upon and confirmed, there were present only eight directors, two of whom were directors of the plaintiff. The plaintiff supplied the rolling stock, as agreed, and the defendant received and used the same in the operation of its railway for the period of nearly two years and a half, when the contract was terminated. *Held*, if it be assumed that the contract, under the circumstances of the case, was voidable, in equity, at the election of the defendant within a reasonable time after the same was made, for want of a quorum of directors at the meeting at which the contract was agreed upon and confirmed, who were not directors of the plaintiff, the delay in exercising the election to avoid it operated as a waiver of the right so to do; and, consequently, an instruction to the jury that such right existed at the time of the trial was erroneous. *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 *Ohio St.* 450, 21 *Am. Ry. Rep.* 3.—REVIEWING *Foster v. Oxford, W. & W. R. Co.*, 13 *C. B.* 200.—REVIEWED IN *Pearson v. Concord R. Corp.*, 13 *Am. & Eng. R. Cas.* 102, 62 *N. H.* 537; *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly (N. Y.)* 373, 14 *Abb. N. Cas.* 103.

B., the contractor for building the E. & H. railway, and, practically, the owner thereof, negotiated with the solicitor of the C. S. R. for the sale to the latter of the E. & H. railway when built. While the negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. railway in his absence applied to the manager of the C. S. R. for some rolling stock to assist in its connection. The manager was willing to supply the rolling stock on execution of the agreement for sale of the road, which was communicated to B., who wrote to the manager that "if from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you have given Mr. Farquhar, the agent." The negotiations for the purchase having fallen through, an action was brought by the C. S. R. against B. and the E. & H. railway for the hire of the rolling stock,

which was resisted by B. on the grounds that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs, which had fallen through by no fault of his, and that if the plaintiffs had any right of action it was only against the E. & H. railway and not against him. The matter was referred to the arbitration of a county court judge, who gave an award in favor of the plaintiffs. *Held*, that the arbitrator was justified in awarding the amount he did, and that B. as well as the company was liable therefor. *Bickford v. Canada Southern R. Co.*, 14 *Can. Sup. Ct.* 743.

107. Contracts for weighing grain.

—The contract provided that the weigher should "receive, weigh, and transfer all products contemplated by this agreement, which may be delivered to his said transfer-house by or under the direction of" the company. The preamble of the contract provided that one of its objects was "to provide a cheaper method of transferring grain," and for this purpose to use the device of the second party. There was a covenant that "if said second party shall fail to transfer as fast as required the said first party may transfer by such other method as it deems proper." Another covenant provided that an additional building should be erected "to meet all the necessities of the party of the first part." *Held*, that under this contract the party of the second part was to have all the weighing and transferring which it was in the power of the company to give, to the extent of the capacity of his building and appliances. *Lake Shore & M. S. R. Co. v. Richards*, 126 *Ill.* 448, 18 *N. E. Rep.* 794.

So where a railway company contracted with a party to weigh and transfer grain shipped to it from the west, to be sent eastward, and it was expressly agreed that the company should make no use of the weights furnished it by the weigher for any other purpose than billing the grain to its eastern destination, the weigher reserving the right to sell the weights to the original shippers and owners—*held*, that even if there was, at the time of making the contract, a custom for the railway company to furnish the western roads with the weights of the grain when ascertained, it was excluded by the express terms of the contract limiting the use of the weights to the purpose of billing the grain to the east. *Lake Shore & M.*

S. R. Co. v. Richards, 126 Ill. 448, 18 N. E. Rep. 794.

The inventor of a new method of weighing grain in cars and transferring the same, under a contract with a railway company for the exclusive right to weigh and transfer grain sent to and forwarded by the latter, erected the necessary buildings and appliances to enable him to perform the duties assumed, and while engaged in such weighing and transferring the buildings used by him for that purpose were injured through the fault of the servants of the company, and while they were unfit for use, by reason of such injury, several hundred cars of grain were transferred and weighed by other means and agencies. *Held*, that the inventor was entitled to receive the compensation provided in the contract for the weighing and transferring of the grain in such case weighed and transferred by other means, he having been prevented from performing that service through the fault of the railroad company. *Lake Shore & M. S. R. Co. v. Richards*, 126 Ill. 448, 18 N. E. Rep. 794.

108. Contract to repair bridge.—

An agreement to pay for the right to cross a bridge one third of all expenditures necessarily incurred by the owner "in, by, or through the operation, maintenance, renewal, repairs, or protection of such bridge," binds the lessee to pay one third of the cost of rebuilding a span of the bridge after it is blown down by a cyclone. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 31 Fed. Rep. 440.

109. Shipping contracts.—(1) *In general.*—The names and places of residence of consignees marked upon goods shipped are no part of the contract of shipment, which is evidenced by the receipt given for the goods. *Rome R. Co. v. Sullivan*, 25 Ga. 228.

A contract for shipment of cattle made with a railroad, by which the shipper was to have certain drawbacks upon shipments over their road, does not relate to shipments made prior to the time it was entered into. *Pittsburg, Ft. W. & C. R. Co. v. Fawcett*, 56 Ill. 513, 4 Am. Ry. Rep. 405.

Where the plaintiff took the specific car designated by defendant's agents the matter of the number of the car concerned the carrier alone. This is not affected by the fact that the contract of shipment was reduced to writing, and a car designated in it

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different from the one so designated by said agent. The contract was to carry the freight, and the number of the car on the margin was nothing more than the memorandum of the defendant for its assistance and convenience. *Wilson v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 50.

(2) *Illustrations.*—Two roads were in the habit of interchanging freight and prorating the charges. The agent of one telegraphed to the agent of the other for rates on coal for a certain gas company. Authority was telegraphed back authorizing the making of a rate, but nothing was said as to the time it should continue or the amount of coal to be shipped. A contract was made for the carrying of 5000 tons during the year. Before that amount was shipped the company first telegraphed to refuse to carry at the stipulated rate, claiming that the telegrams did not authorize a contract for that amount. It appeared that the agent telegraphed to had formerly lived where the gas company was situated, and was familiar with the amount of coal it consumed, and the agent himself claimed that he thought the telegram referred to coke only, but admitted that if he had understood it to refer to coal he would have taken it to mean coal for a season. *Held*, that in view of these circumstances the contract was authorized. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 38 Fed. Rep. 561.

Where a plaintiff contended that a verbal understanding between him and a railroad station agent was the contract, and the only one, under which he made a shipment, and that an instrument signed by him and the agent was executed on his part under the belief that it was a mere pass over the road, and that belief was induced by the conduct and misrepresentation of the agent, while the defendant insisted that the instrument was a valid and binding agreement, affording the only evidence of the contract between it and the plaintiff—*held*, that it was a matter of proof which theory was correct, and that the only way of establishing the truth or falsity of either hypothesis was by showing what passed between the parties. *Black v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 388, 111 Ill. 351.

The plaintiff, desiring to ship a number of car-loads of cattle, met the defendant's general freight agent and informed him that he desired a certain number of cars at a certain day and at certain stations along

the defendant's line of road. The agent said he would have the cars ready, and called the clerk to take down the order. At the time agreed upon the defendant failed to have the cars at the places specified, and did not have them until several days later, by reason of which delay plaintiff sustained considerable damage. At the trial the defendant denied the agent's authority to enter into the contract, but the evidence showed that he had been allowed to hold himself out and act as its general freight agent for more than a year. The defendant also denied that it had entered into any contract. *Held*, that the evidence proved a valid contract, the consideration of which was the mutual promises of the parties. *Baker v. Kansas City, St. J. & C. B. R. Co.*, 28 Am. & Eng. R. Cas. 61, 91 Mo. 152, 3 S. W. Rep. 486.

Where the complaint alleged that the defendant, a common carrier, contracted for a valuable consideration to transport cattle to a place in another state by Saturday, the plaintiff giving as a reason that he desired to get the benefit of the following Sunday prices, and it was proved that the laws of the state where the cattle were to be delivered forbade sales on Sunday—*held*, that it was not error to refuse to instruct the jury that the contract was based upon an illegal consideration. *Waters v. Richmond & D. R. Co.*, 108 N. Car. 349, 12 S. E. Rep. 950.

110. Traffic agreements.—Under the Illinois statutes of February 28, 1854, February 12, 1855, and February 16, 1865, authorizing railroad companies to enter into contracts with connecting roads for the interchange of traffic, and the statute of February 25, 1867, authorizing railroads terminating at a point where there is a railroad bridge to make convenient connections with such bridge, a corporation organized under the laws of Illinois is empowered to enter into a contract with a bridge company, by which the right of running trains over the bridge is secured to it. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 Am. & Eng. R. Cas. 213, 131 U. S. 371, 9 Sup. Ct. Rep. 770.—**DISTINGUISHING** *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290; *Oregon R. & N. Co. v. Oregonian R. Co.*, 130 U. S. 1.

Where a combination or association of

three or four different railroad companies is formed for the transportation of freight and the transaction of the business of a common carrier, which is conducted by the general managers of each of the component companies, as in the case of a partnership, so long as one of the companies acts within the general scope of its powers in making contracts, or performing other acts on behalf of the association, the association itself will be bound, although the particular company acting for it has exceeded its authority, as tested by its laws or articles of association. *Erie & P. Despatch v. Cecil*, 112 Ill. 180.—**DISTINGUISHED IN** *Indianapolis, D. & S. R. Co. v. Ervin*, 27 Am. & Eng. R. Cas. 8, 118 Ill. 250.

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I. GENERAL PRINCIPLES; WHAT CONSTITUTES.

1. Definition. — Contributory negligence is commonly defined as "a want of ordinary care upon the part of the person injured by the actionable negligence of another combining and concurring with that negligence, and contributing to the injury

as a proximate cause thereof, without which the injury would not have occurred." *Montgomery Gaslight Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735.

Contributory negligence is the want of ordinary care to avoid injury from the act of another. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682.

And is the want of ordinary care and prudence, without which the injury would not have occurred. *Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 983, 8 So. Rep. 478.

Contributory negligence arises when the plaintiff has negligently omitted to do some act which it was his duty to do. *Paland v. Chicago, St. L. & N. O. R. Co.*, 44 La. Ann. 1003, 11 So. Rep. 707.

Contributory or co operative negligence exists when the act producing the injury would not have happened but for the negligence or wrong of both parties. *Houston & T. C. R. Co. v. Smith*, 52 Tex. 178.

Contributory negligence is such act or omission on the part of the plaintiff as an ordinarily prudent man would not do or suffer under similar circumstances, which, concurring with a negligent act or omission of a defendant, becomes the proximate cause of an injury. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223.

Contributory negligence is such negligence on the part of the plaintiff as directly contributes to and in part causes the injury. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.—FOLLOWED IN *Cawley v. Winifrede R. Co.*, 31 W. Va. 116.

2. Effect as a defense, generally.*—Negligence in the plaintiffs contributing to the loss is a defense at common law, the benefit of which the defendant may avail himself in a proper case. *Snyder v. Pittsburg, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154. *Sheff v. Huntington*, 16 W. Va. 307.

If the plaintiff has shown the defendant to have been negligent, to defeat a recovery it must be shown that he was likewise negligent or at fault. *Central R. Co. v. De Bray*, 71 Ga. 406.

If a plaintiff, seeking to recover damages occasioned by defendant's alleged negli-

gence, alone is at fault, or if both parties are equally in fault, there can be no recovery. *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585.

Where the appellate court finds that the plaintiff's injury was caused by his own want of reasonable care, and that there is no evidence proving, or tending to prove, any acts of negligence on the part of the defendant, no recovery can be had. *Hawk v. Chicago, B. & N. R. Co.*, 147 Ill. 399, 35 N. E. Rep. 139.—FOLLOWING *Rogers v. Chicago, B. & Q. R. Co.*, 117 Ill. 116.

When the injury sued for is alleged either in terms or in substance to have been wilfully or purposely committed, contributory negligence is no defense. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551. *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.

If the record shows negligence of the defendant and is silent as to the conduct of the plaintiff, a judgment for the plaintiff will be upheld. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37.—QUOTED IN *Union Pac. R. Co. v. Henry*, 36 Kan. 565.

Where a railroad company demurs to a complaint in a damage suit, which demurrer is overruled, and the court hears the case in damages, it is competent for the company to introduce proof of contributory negligence in mitigation of damages. *Daily v. New York & N. H. R. Co.*, 32 Conn. 356.—FOLLOWING *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69.

3. As a defense in statutory actions.*—In actions under the statute, or in other cases where parties sue for personal injuries suffered by others than themselves, no recovery can be had if the party entitled to the action be guilty of negligence or the want of care, whereby the injury occurred. *State v. Baltimore & O. R. Co.*, 30 Md. 47.—RECONCILING *Coughlan v. Baltimore & O. R. Co.*, 24 Md. 84; *Bannon v. Baltimore & O. R. Co.*, 24 Md. 108.

And to recover for the neglect of a statutory duty it must appear not only that the injury was the direct result of such neglect, but also that the plaintiff was in the exercise of due care. *St. Louis, A. & T. H. R. Co. v. Andres*, 16 Ill. App. 292.—FOLLOWING *Wabash, St. L. & P. R. Co. v. Thompson*, 15 Ill. App. 116.

* Contributory negligence as a defense, see notes, 7 L. R. A. 678; 4 Id. 239.

Contributory negligence as a defense to actions for personal injuries, see notes, 75 Am. Dec. 383; 5 L. R. A. 787.

* Company not giving statutory signals not liable in cases of contributory negligence, see note, 19 Am. & Eng. R. Cas. 361.

4. Statement of the rule, generally.*—Where the plaintiff was guilty of contributory negligence he cannot recover on account of injuries to which his negligence contributed. *Denver & R. G. R. Co. v. Morton*, 3 *Colo. App.* 155.—FOLLOWED IN *Union Pac., D. & G. R. Co. v. Williams*, 3 *Colo. App.* 526.—*Memphis & C. R. Co. v. Copeland*, 61 *Ala.* 376. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 *Am. & Eng. R. Cas.* 608, 36 *Ark.* 41. *Long v. Coronado R. Co.*, 96 *Cal.* 269, 31 *Pac. Rep.* 170. *Toledo, P. & W. R. Co. v. Riley*, 47 *Ill.* 514. *Korrady v. Lake Shore & M. S. R. Co.*, 131 *Ind.* 261, 29 *N. E. Rep.* 1069. *Pennsylvania Co. v. Sinclair*, 62 *Ind.* 301. *Louisville, N. A. & C. R. Co. v. Ader*, 110 *Ind.* 376, 9 *West. Rep.* 190, 11 *N. E. Rep.* 437. *St. Louis & S. E. R. Co. v. Mathias*, 50 *Ind.* 65, 8 *Am. Ry. Rep.* 381. *Cooper v. Central R. Co.*, 44 *Iowa* 134. *Allen v. Maine C. R. Co.*, 82 *Me.* 111, 19 *Atl. Rep.* 105. *Lake Shore & M. S. R. Co. v. Bangs*, 3 *Am. & Eng. R. Cas.* 426, 47 *Mich.* 470, 11 *N. W. Rep.* 276. *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466. *O'Donnell v. Missouri Pac. R. Co.*, 7 *Mo. App.* 190. *Murray v. Missouri Pac. R. Co.*, 101 *Mo.* 236, 13 *S. W. Rep.* 817. *Sheffield v. Rochester & S. R. Co.*, 21 *Barb. (N. Y.)* 339. *Gonzales v. New York & H. R. Co.*, 38 *N. Y.* 440; reversing 39 *How. Pr.* 407, 6 *Robt.* 93, 297; affirming 1 *Sweeney* 506.—QUOTED IN *Woodward Iron Co. v. Jones*, 80 *Ala.* 123.—*Rigler v. Charlotte, C. & A. R. Co.*, 26 *Am. & Eng. R. Cas.* 386, 94 *N. Car.* 604. *Nashville & C. R. Co. v. Carroll*, 6 *Heisk. (Tenn.)* 347, 12 *Am. Ry. Rep.* 20. *Baxter v. Second Ave. R. Co.*, 3 *Robt. (N. Y.)* 510, 30 *How. Pr.* 219. *Richmond & D. R. Co. v. Morris*, 31 *Gratt. (Va.)* 200. *Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12. *Downey v. Chesapeake & O. R. Co.*, 28 *W. Va.* 732.

Such is the rule of both the civil and common law. *Richmond & D. R. Co. v. Morris*, 31 *Gratt. (Va.)* 200.

Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged and cannot recover. *Milburn v. Kansas City, St. J. & C. B. R. Co.*, 29 *Am. & Eng. R. Cas.* 244, 86 *Mo.* 104.

* Contributory negligence, general principles of law of, see note, 55 *AM. DEC.* 666.

Dandie v. Southern Pac. R. Co., 42 *La. Ann.* 686, 7 *So. Rep.* 792.

In an action upon the case for negligence the plaintiff cannot recover, if his own negligence has, in any degree, contributed to cause his injury. *Murch v. Concord R. Corp.*, 29 *N. H.* 9, 61 *Am. Dec.* 631. *Munger v. Tonawanda R. Co.*, 4 *N. Y.* 349.—DISTINGUISHED IN *Carroll v. New York & N. H. R. Co.*, 1 *Duer (N. Y.)* 571; *Gonzales v. New York & H. R. Co.*, 39 *How. Pr. (N. Y.)* 407. QUOTED IN *Baxter v. Second Ave. R. Co.*, 3 *Robt. (N. Y.)* 510.

As applicable to cases of ordinary negligence, when the injury is not claimed to have been wilfully, wantonly, or intentionally inflicted, to maintain the action it must appear and be proved that the injury was occasioned by negligence on defendant's part, and it must not appear that there was contributory negligence on plaintiff's part. *Brown v. Milwaukee & St. P. R. Co.*, 22 *Minn.* 165, 19 *Am. Ry. Rep.* 298.—FOLLOWING *Donaldson v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 293.—DISTINGUISHED IN *Clark v. Chicago, M. & St. P. R. Co.*, 28 *Minn.* 69.—*State v. Philadelphia, W. & B. R. Co.*, 47 *Md.* 76, 18 *Am. Ry. Rep.* 253.

The question should be whether the injury complained of was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff so far contributed to the misfortune by his own negligence or want of ordinary care and prudence, that without it the injury would not have happened. In the first case the plaintiff would be entitled to recover; in the latter he would not, unless the defendant, by the exercise of care and prudence on his part, might have avoided the consequences of the negligence of the plaintiff. *Lewis v. Baltimore & O. R. Co.*, 38 *Md.* 588, 10 *Am. Ry. Rep.* 521.

Where plaintiff's negligence contributed directly to his injury it was held that he could not recover of the company in the following cases:

Where plaintiff was run over by an engine, it merely appearing that a train was moving at a dangerous rate of speed. *Bell v. Hannibal & St. J. R. Co.*, 4 *Am. & Eng. R. Cas.* 580, 72 *Mo.* 50.—APPLIED IN *Prewitt v. Eddy*, 115 *Mo.* 283.

In an action for damages occasioned by a collision between a locomotive and the plaintiff. *Brand v. Schenectady & T. R. Co.*, 8 *Barb. (N. Y.)* 368.

In an action for personal injuries inflicted by railroad cars in motion. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 *McCrary (U. S.)* 352, 10 *Fed. Rep.* 711.

In an action for a negligent act done prior to the Florida statute of June 7, 1887, section 2345 R. S., and resulting in injury to plaintiff. *Florida Southern R. Co. v. Hirst*, 52 *Am. & Eng. R. Cas.* 409, 30 *Fla.* 1, 11 *So. Rep.* 506.—FOLLOWING *Louisville & N. R. Co. v. Yniestra*, 21 *Fla.* 700.

5. Mutual, joint, or concurring negligence.*—Where the defendant and the plaintiff have been guilty of negligence in the same connection, the result depends on the facts. The question in such cases is: (1) Whether damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover; in the latter he is not. *Richmond & D. R. Co. v. Morris*, 31 *Gratt. (Va.)* 200.—APPROVING AND QUOTING *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439.—FOLLOWED IN *Baltimore & O. R. Co. v. McKenzie*, 24 *Am. & Eng. R. Cas.* 395, 81 *Va.* 71.

The general rule in regard to contributory negligence is that, if the negligence be mutual and concurring on the part of the plaintiff and defendant, there can be no recovery. *Overby v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 417, 37 *W. Va.* 524, 16 *S. E. Rep.* 813.—QUOTING *Carrico v. West Virginia C. & P. R. Co.*, 35 *W. Va.* 390.—*Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12. *Colorado C. R. Co. v. Holmes*, 8 *Am. & Eng. R. Cas.* 410, 5 *Colo.* 197. *Toledo, P. & W. R. Co. v. Riley*, 47 *Ill.* 514.—FOLLOWED IN *Chicago & A. R. Co. v. Jacobs*, 63 *Ill.* 178.—*Louisville & N. R. Co. v. Eves*, 1 *Ind. App.* 224, 27 *N. E. Rep.* 580. *Sherman v. Western Stage Co.*, 24 *Iowa* 515.—CRITICISING *Scott v. Dublin & W. R. Co.*, 11 *Ir. C. L.* 377; *Donaldson v. Mississippi & M. R. Co.*, 18 *Iowa* 280.—*Kelley v. Missouri Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 186, 101 *Mo.* 67, 13 *S. W. Rep.* 806. *Meyer v. Lindell R. Co.*, 6 *Mo. App.*

27. *Sheffield v. Rochester & S. R. Co.*, 21 *Barb. (N. Y.)* 339. *Rigler v. Charlotte, C. & A. R. Co.*, 26 *Am. & Eng. R. Cas.* 386, 94 *N. Car.* 604. *Doggett v. Richmond & D. R. Co.*, 78 *N. Car.* 305, 16 *Am. Ry. Rep.* 193. *Nashville & C. R. Co. v. Carroll*, 6 *Heisk. (Tenn.)* 347, 12 *Am. Ry. Rep.* 20. *Trow v. Vermont C. R. Co.*, 24 *Vt.* 487.

Where negligence of both parties contributes to the injury of either, the common law gives neither party damages for his injury, arising from their joint fault. *Allen v. Maine C. R. Co.*, 82 *Me.* 111, 19 *Atl. Rep.* 105.

And this is so whether the plaintiff's act was negligent or wilful. *Clark v. Syracuse & U. R. Co.*, 11 *Barb. (N. Y.)* 112.—FOLLOWING *Tonawanda R. Co. v. Munger*, 5 *Den. (N. Y.)* 255. QUOTING *Spencer v. Utica & S. R. Co.*, 5 *Barb. (N. Y.)* 338.

A recovery cannot be had for an injury which is the result of the joint or concurring negligence of both parties to the transaction. To charge the defendant with liability the plaintiff must show that the injury was caused solely by the negligence of the defendant, or of persons for whose acts he is responsible. *Chicago & E. I. R. Co. v. Hedges*, 37 *Am. & Eng. R. Cas.* 516, 118 *Ind.* 5, 20 *N. E. Rep.* 530.

It rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from these circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant. *Butcher v. West Virginia & P. R. Co.*, 37 *W. Va.* 180, 16 *S. E. Rep.* 457.—QUOTING *Gerity v. Haley*, 29 *W. Va.* 98.—*Overby v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 417, 37 *W. Va.* 524, 16 *S. E. Rep.* 813.—QUOTING *Hoffman v. Dickinson*, 31 *W. Va.* 142; *Gibson v. Erie R. Co.*, 63 *N. Y.* 449.

Where negligence is the issue, it must be a case of unmingled negligence to justify a recovery. *Toledo & W. R. Co. v. Goddard*, 25 *Ind.* 185.—DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106. QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335.

As a general legal proposition, where both

* See also post, 17.

parties are guilty of gross negligence, the plaintiff cannot recover damages sustained by the negligence of the defendant. *Mason v. Missouri Pac. R. Co.*, 6 Am. & Eng. R. Cas. 1, 27 Kan. 83, 41 Am. Rep. 405.

If the injury is disconnected from plaintiff's act of contributory negligence by an independent cause, then there is no legal contribution to the injury. *Pennsylvania R. Co. v. Richter*, 2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180.

Plaintiff's negligence, to be contributory and effectual as a defense, must be concurrent, simultaneous, and connected with the defendant's negligence. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735. *Louisville, C. & L. R. Co. v. Sullivan*, 16 Am. & Eng. R. Cas. 390, 81 Ky. 624. *Rains v. St. Louis, I. M. & S. R. Co.*, 5 Am. & Eng. R. Cas. 610, 71 Mo. 164. *Price v. St. Louis, K. C. & N. R. Co.*, 3 Am. & Eng. R. Cas. 365, 72 Mo. 414. *Kelny v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806. *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198. *Farmer v. Wilmington & W. R. Co.*, 20 Am. & Eng. R. Cas. 481, 88 N. Car. 564. *Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655, 13 Am. Ky. Rep. 105. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223. *Trow v. Vermont C. R. Co.*, 24 Vt. 487.

6. Reason for the rule, generally.—The general rule as to contributory negligence is, that when the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied, upon the ground that the injured party must be taken to have brought the injury upon himself. *Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655, 13 Am. Ky. Rep. 105.—QUOTED IN *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92; *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604; *McAdoo v. Richmond & D. R. Co.*, 41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316.

The reason for the rule rests not on the idea that one wrong sets off the other, or that one justifies the other, but on the broader ground that when the negligence of the plaintiff has contributed proximately to the injury the damage is considered of

his own causing, and it is difficult, if not impossible, to determine the *quantum* of injury which resulted from the defendant's tortious or negligent conduct. *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376.—FOLLOWING *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672; *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471; *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272.

The reasons for the rule have been enumerated as being (1) the mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for his own wrong; and (3) the policy of making the personal interests of parties dependent upon their own prudence and care. *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

7. Refusal of law to apportion the blame.—One who, in any circumstances, contributes directly to his own injury by a failure to exercise the ordinary care which would have saved him from harm from the negligence of another, is denied the right to recover damages of that other, because the law will not undertake to apportion the blame between parties mutually in fault. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682. *Northern C. R. Co. v. State*, 29 Md. 420. *Colorado C. R. Co. v. Holmes*, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197. See *Colorado C. R. Co. v. Holmes*, 5 Colo. 516.—NOT FOLLOWING *Illinois C. R. Co. v. Hammer*, 85 Ill. 526; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167. QUOTING *Tuff v. Warman*, 5 C. B. N. S. 584.

For in such a case the negligence of each party must be regarded as equally proximate. *Northern C. R. Co. v. State*, 31 Md. 357.

8. No comparison of the degrees of negligence of the parties.*—If the injury was contributed to by plaintiff's negligence the comparative degree of negligence attributable to the parties, respectively, is immaterial. If the injury was occasioned in any degree by the plaintiff's own negligence he is without redress, unless the act of the defendant amounted to a wilful trespass or intentional wrong. *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434; affirming 32 N. J. L. 166. *St. Louis, I. M.*

* But see also title COMPARATIVE NEGLIGENCE.

S. R. Co. v. Freeman, 4 *Am. & Eng. R. Cas.* 608, 36 *Ark.* 41.

Where there is both negligence and contributory negligence aiding in producing an injury, the question is not whether the negligence of plaintiff or that of defendant is the more proximate cause of the injury, but whether or not the negligence of plaintiff directly contributed to it. *Missouri Pac. R. Co. v. Moseley*, 57 *Fed. Rep.* 921.

9. Scope and extent of the rule.—

(1) *Generally*.—A person seeking to recover for an injury sustained through the alleged negligence of another will not be excused for his own negligent act contributing thereto, although he had good ground for believing, as a reasonably prudent man, and did believe, that such act was not imprudent. *Pieart v. Chicago, R. I. & P. R. Co.*, 82 *Iowa* 148, 47 *N. W. Rep.* 1017.—FOLLOWING *Muldowney v. Illinois C. R. Co.*, 36 *Iowa* 462.

All plaintiffs, in actions for injuries resulting to them from negligence, who are adults, and all persons mentally and physically incapable of taking care of themselves, stand on the same level, and cannot recover if they or those under whose care they are have been guilty of negligence contributing to the injury. *Mowrey v. Central City R. Co.*, 66 *Barb. (N. Y.)* 43; *affirmed in* 51 *N. Y.* 666, *mem.*—APPROVING *Willetts v. Buffalo & R. R. Co.*, 14 *Barb. (N. Y.)* 585; *Hartfield v. Roper*, 21 *Wend. (N. Y.)* 615.

(2) *Notwithstanding defendant's negligence*.—Plaintiff's contributory negligence will preclude a recovery, "whether the company's negligence also contributed directly to produce the injury or not." *Prewitt v. Eddy*, 115 *Mo.* 283, 21 *S. W. Rep.* 742.—APPLYING *Maher v. Atlantic & P. R. Co.*, 64 *Mo.* 267; *Fletcher v. Atlantic & P. R. Co.*, 64 *Mo.* 484; *Kelley v. Hannibal & St. J. R. Co.*, 75 *Mo.* 138; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 *Mo.* 476; *Bell v. Hannibal & St. J. R. Co.*, 72 *Mo.* 50; *Purl v. St. Louis, K. C. & N. R. Co.*, 72 *Mo.* 168; *Turner v. Hannibal & St. J. R. Co.*, 74 *Mo.* 602; *Powell v. Missouri Pac. R. Co.*, 76 *Mo.* 80; *Lenix v. Missouri Pac. R. Co.*, 76 *Mo.* 86; *Dlaui v. St. Louis, I. M. & S. R. Co.*, 105 *Mo.* 645.—*Flemming v. Western Pac. R. Co.*, 49 *Cal.* 253, 7 *Am. Ry. Rep.* 265. *Esrey v. Southern Pac. R. Co.*, 88 *Cal.* 399, 26 *Pac. Rep.* 211. *Meeks v. Southern Pac. R. Co.*, 52 *Cal.* 602, 20 *Am. Ry. Rep.* 115. *Robinson v.*

Western Pac. R. Co., 48 *Cal.* 409, 7 *Am. Ry. Rep.* 244. *Carlin v. Chicago, R. I. & P. R. Co.*, 37 *Iowa* 316, 8 *Am. Ry. Rep.* 141. *Johnson v. Canal & C. R. Co.*, 27 *La. Ann.* 53.—DISTINGUISHING *Barksdull v. New Orleans & C. R. Co.*, 23 *La. Ann.* 180. FOLLOWING *Knight v. Pontchartrain R. Co.*, 23 *La. Ann.* 462.—*State v. Baltimore & P. R. Co.*, 15 *Am. & Eng. R. Cas.* 409, 58 *Md.* 482. *Lake Shore & M. S. R. Co. v. Miller*, 25 *Mich.* 274, 5 *Am. Ry. Rep.* 478. *Atkyn v. Wabash R. Co.*, 41 *Fed. Rep.* 193, 22 *Ohio L. J.* 151. *Guess v. South Carolina R. Co.*, 30 *So. Car.* 163, 9 *S. E. Rep.* 18.

Although a company negligently runs its train through a populous city at a rapid rate, yet if a party injured thereby contributes, in any degree, by his own negligence to the injuries received there can be no recovery. *Keese v. New York, N. H. & H. R. Co.*, 67 *Barb. (N. Y.)* 205, 4 *Hun* 673.

If the injury was occasioned in any degree by the negligence of the plaintiff he cannot recover, though the agents of the company may have been in the greatest fault. *O'Brien v. Philadelphia, W. & B. R. Co.*, 3 *Phila. (Pa.)* 76.

Nor can plaintiff recover in such a case, although the defendant has been guilty of gross and culpable negligence, if the act was not intentional and wanton. *Rowen v. New York, N. H. & H. R. Co.*, 59 *Conn.* 364, 21 *Atl. Rep.* 1073.—FOLLOWING *Birge v. Gardner*, 19 *Conn.* 507; *Neal v. Gillett*, 23 *Conn.* 437.

Unless the defendant, at the time he committed his negligent act, was aware of the danger to which the plaintiff was exposed. *Zimmerman v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 191, 71 *Mo.* 476.—APPLIED IN *Prewitt v. Eddy*, 115 *Mo.* 283. FOLLOWED IN *Werner v. Citizens' R. Co.*, 81 *Mo.* 368; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 *Am. & Eng. R. Cas.* 103, 83 *Mo.* 271. QUOTED IN *Dlaui v. St. Louis, I. M. & S. R. Co.*, 105 *Mo.* 645; *White v. Wabash Western R. Co.*, 34 *Mo. App.* 57.

Although the defendant may have been guilty of negligence contributing to produce the injury complained of, still if plaintiff was also guilty of negligence proximately contributing thereto, defendant is not liable unless his negligent act occurred after he became aware of the danger to which the plaintiff, by his own neglect, exposed himself. Hence, where the defendant's neglect

consisted in the erection and maintenance of a dangerous structure obvious to the senses long before the accident—*held*, that he was not liable, whether the structure could have been differently built or not. *Rains v. St. Louis, I. M. & S. R. Co.*, 5 *Am. & Eng. R. Cas.* 610, 71 *Mo.* 164.

10. Limits and exceptions to the rule.—(1) *Generally.*—The doctrine that, in case of an injury by negligence where the parties are mutually in fault, the injured party is not entitled to redress, is subject to the following material qualifications: First, the injured party, although in the fault to some extent, at the time may, notwithstanding this, be entitled to reparation in damages for an injury which he has used ordinary care to avoid. Second, when the negligence of the defendant, in a suit upon such ground of action, is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, the action is maintainable. Third, where a party has in his custody or control dangerous instruments or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress. Fourth, and when the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant, he is entitled to reparation on the ground that, although in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by mere accident, he did not thereby discharge the defendant from the duty of observing ordinary care; or, in other words, voluntarily incur the risk of injury by the defendant's negligence. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 *Ohio St.* 172.—APPROVED IN *Baldwin v. Barney*, 12 *R. I.* 392. QUOTED IN *Timmons v. Central Ohio R. Co.*, 6 *Ohio St.* 105.

Carelessness is not imputable to a person unless he has, with respect to the action, an opportunity to observe and draw a conclusion and to act on such conclusion. *Palys v. Jewett*, 32 *N. J. Eq.* 302; *reversing on another point* 30 *N. J. Eq.* 604.

Defendant company was sued to recover

for injury to a horse, wagon, and harness. The horse became frightened and unmanageable in crossing a railroad track, but the company claimed that the owner was negligent in failing to provide safe harness, and the horse became unmanageable by reason of a rein breaking. *Held*, that if the negligence of the company was one of the concurring causes, without which the injury would not have happened, then, however bad the condition of plaintiff's harness, and however much it promoted the injury, it could not defeat a recovery, unless it amounted to negligence. *Putman v. New York C. & H. R. R. Co.*, 47 *Hun (N. Y.)* 439, 14 *N. Y. S. R.* 329.

(2) *Want of capacity—Age—Sex.**—It is a general principle of law, that one essentially contributing by his own misconduct or negligence, amounting to want of ordinary care, to produce an injury, cannot recover of a wrong-doer whose act is not wanton and intentional. This principle, however, is subject to the qualifications that the party to whom it is sought to be applied must be capable of volition—capable of legal wrong. *Government St. R. Co. v. Hanlon*, 53 *Ala.* 70.—FOLLOWED IN *Bay Shore R. Co. v. Harris*, 67 *Ala.* 6. QUALIFIED IN *Cook v. Central R. & B. Co.*, 67 *Ala.* 533. REFERRED TO IN *Memphis & C. R. Co. v. Copeland*, 61 *Ala.* 376.

Contributory negligence on the part of a plaintiff defeats his action if based wholly on negligence; but in determining whether it exists in a given case, the age, intelligence, and capacity of a plaintiff must be looked to, as well as his act or omission at the time of the accident. *International & G. N. R. Co. v. Garcia*, 75 *Tex.* 583, 13 *S. W. Rep.* 223.

The reasons for the rule of contributory negligence, as applied in cases of adults, are wholly inapplicable to the case of an infant. *Bellefontaine & I. R. Co. v. Snyder*, 18 *Ohio St.* 399. Compare *Mowrey v. Central City R. Co.*, 66 *Barb. (N. Y.)* 43; *affirmed* in 51 *N. Y.* 666, *mem.*

* See also *post*, 25-27; CHILDREN, ETC., 67-113.

Contributory negligence of child not a bar to recovery, see note, 17 *L. R. A.* 78; and see also CHILDREN, INJURIES TO, 67-113, 114-146.

Duty of carrier towards passengers in feeble health and towards females. Contributory negligence, see note, 47 *AM. & ENG. R. CAS.* 572.

The original negligence of one injured by a moving train does not excuse the company from care and watchfulness on their part, when they know that his dangerous position is due to an infirmity like deafness, idiocy, incapacity to move, or want of appreciation of the impending danger, as in the case of an infant of tender years. *International & G. N. R. Co. v. Smith*, 19 Am. & Eng. R. Cas. 21, 62 Tex. 252.

In judging of negligence all the circumstances are to be taken into account, and among others the age and sex of the person injured, so far as these are important; but it cannot be laid down as a rule of law that a less degree of care is required in a woman than in a man; and an instruction to that effect is erroneous. *Hasseyer v. Michigan C. R. Co.*, 6 Am. & Eng. R. Cas. 59, 48 Mich. 205, 12 N. W. Rep. 155, 42 Am. Rep. 470.

(3) *Wilfulness or wantonness of defendant*.—It is only when the injury sued for is alleged, in terms or substance, to have been wilfully committed, that contributory negligence ceases to be a defense. *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.—APPROVED IN *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32. NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 686. REVIEWED IN *Terre Haute & I. R. Co. v. Graham*, 12 Am. & Eng. R. Cas. 77, 95 Ind. 286.—*Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551.

A company is not liable for negligence where the plaintiff by his own negligence has contributed to the injury, unless the injury was wilful. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41. *Esrey v. Southern Pac. Co.*, 88 Cal. 399, 26 Pac. Rep. 211. *Kennedy v. Denver, S. P. & P. R. Co.*, 34 Am. & Eng. R. Cas. 40, 10 Colo. 493, 16 Pac. Rep. 210. *Rosen v. New York, N. H. & H. R. Co.*, 59 Conn. 364, 21 Atl. Rep. 1073. *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.

Or unless such negligence is so gross as to imply a wilful intention to inflict the injury. *Korady v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069. *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.—APPROVING *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am.

Rep. 185. QUOTING *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439.

Or unless it appears that the injurious acts were purposely and intentionally committed, with the design to produce injury, or that such acts were committed under such circumstances that the natural and probable consequences thereof would be to produce injury to others. *Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 437.—FOLLOWING *Belt R. & S. Y. Co. v. Mann*, 107 Ind. 89. REVIEWING *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51.

(4) — *or want of care after knowledge of plaintiff's negligence*.—A party cannot recover for injuries caused by the negligence of another if by his own negligence or wrong he contributed to produce them, unless the latter, after becoming aware of the injured party's negligence, failed to use a proper degree of care to avoid the consequences of it. *Cooper v. Central R. Co.*, 44 Iowa 134. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41. *Little Rock & Ft. S. R. Co. v. Pankhurst*, 5 Am. & Eng. R. Cas. 635, 36 Ark. 371. *Williams v. Southern Pac. R. Co.*, (Cal.) 9 Pac. Rep. 152. *Colorado C. R. Co. v. Holmes*, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197. *Johnson v. Louisville & N. R. Co.*, 91 Ky. 651, 25 S. W. Rep. 754. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 6 Am. & Eng. R. Cas. 384, 75 Mo. 185. *Yarrow v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 726, 75 Mo. 575. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1. *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198. *Dun v. Seaboard & R. R. Co.*, 16 Am. & Eng. R. Cas. 363, 78 Va. 645, 49 Am. Rep. 388. *Farley v. Richmond & D. R. Co.*, 81 Va. 783. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325. *Virginia Midland R. Co. v. Boswell*, 82 Va. 932, 7 S. E. Rep. 383. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12. *Eastburn v. Norfolk & W. R. Co.*, 34 W. Va. 681, 12 S. E. Rep. 819.

The alleged negligence of the watchman in failing to warn plaintiff of the approach-

* See also *post*, 50.

* See also *post*, 48.

ing train was prior, in point of time, to the negligent acts of plaintiff, and there is no room for the application of the rule, that where plaintiff is put in danger by the combined acts of the plaintiff and the defendant, and defendant sees, or by ordinary care could see, the peril of the plaintiff in time to avoid the danger, then plaintiff may recover; but plaintiff's negligence in going on the track being the proximate cause, the other rule applies, that to make a defendant liable for an injury, when plaintiff has been also negligent, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which plaintiff was exposed. *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198.

11. Must be the proximate cause.*

—(1) *Rule stated.*—The rule of law, which releases a defendant from responsibility for damages caused by his negligence, when there is contributory negligence on the part of the plaintiff, is limited to cases where the act or omission of plaintiff was the proximate cause of the injury. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271. *Thompson v. Duncan*, 76 Ala. 334. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735. *Kline v. Central Pac. R. Co.*, 37 Cal. 400.—FOLLOWING *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409. QUOTING *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.) 561.—APPROVED IN *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.—*Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.—APPROVING *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Kline v. Central Pac. R. Co.*, 37 Cal. 400.—*Meeks v. Southern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 314, 56 Cal. 513, 38 Am. Rep. 67. *Jamison v. San José & S. C. R. Co.*, 3 Am. & Eng. R. Cas. 350, 55 Cal. 593. *Esrey v. Southern Pac. R. Co.*, 88 Cal. 399, 26 Pac. Rep. 211. *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393.—QUOTED AND AFFIRMED IN *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409. QUOTED IN *Louisville, C. & L. R. Co. v. Sullivan*, 16 Am. & Eng. R. Cas. 390, 81 Ky. 624.—*Arts v. Chicago, R. I. & P. R. Co.*, 38 Iowa 293. *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa 45. *Mississippi C. R. Co. v. Mason*, 51 Miss. 234. *Central R. Co. v. Moore*, 24 N. J. L.

824. *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590; affirmed (?) 104 N. Y. 683, mem., 7 N. Y. S. R. 868.—APPLYING *Trow v. Vermont C. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191; *Hofnagle v. New York C. & H. R. R. Co.*, 55 N. Y. 608.—*Cornwall v. Charlotte, C. & A. R. Co.*, 97 N. Car. 11, 2 S. E. Rep. 659. *Horner v. Williams*, 35 Am. & Eng. R. Cas. 155, 100 N. Car. 230, 5 S. E. Rep. 734.—QUOTING *Farmer v. Wilmington & W. R. Co.*, 88 N. Car. 564.—*International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223. *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. Rep. 789. *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. Rep. 34. *Fowler v. Baltimore & O. R. Co.*, 8 Am. & Eng. R. Cas. 480, 18 W. Va. 579. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

(2) *Its effect.*—The plaintiff cannot recover if his or her negligence directly or proximately contributed to produce the injury. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.—CRITICISING *St. Louis, A. & T. H. R. Co. v. Todd*, 36 Ill. 409; *Coursen v. Ely*, 37 Ill. 338; *Chicago & A. R. Co. v. Hogarth*, 38 Ill. 370; *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.—FOLLOWED IN *Mahlen v. Lake Shore & M. S. R. Co.*, 14 Am. & Eng. R. Cas. 687, 49 Mich. 585.—*Clements v. East Tenn., V. & G. R. Co.*, 77 Ala. 533. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409, 7 Am. Ry. Rep. 244. *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115.—APPROVED IN *Hager v. Southern Pac. R. Co.*, 98 Cal. 309.—*Meyers v. Chicago, R. I. & P. R. Co.*, 59 Mo. 223, 8 Am. Ry. Rep. 473. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1. *Bunting v. Central Pac. R. Co.*, 14 Nev. 351. *Guess v. South Carolina R. Co.*, 30 So. Car. 163, 9 S. E. Rep. 18.—QUOTING *Carter v. Columbia & G. R. Co.*, 19 So. Car. 20.

(3) —when defendant's fault is the remote cause.—If the fault or negligence of the plaintiff was the proximate cause of the injury, the defendant is not responsible, although it may have been negligent and the remote cause of the injury. *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732.

When the negligence of the plaintiff is the proximate cause, and the fault of the defendant the remote cause, no action can

* Rule of proximate cause applied to contributory negligence, see note, 7 L. R. A. 132.

be sustained. *Trow v. Vermont C. R. Co.*, 24 Vt. 487.

Where there is mutual negligence, if the defendant cannot avoid the accident by reasonable care and skill, the plaintiff cannot recover; nor can he recover where his negligence is proximate, and directly and materially contributes to the result, if the defendant could not have avoided the accident by ordinary care. *Indianapolis & C. R. Co. v. Wright*, 22 Ind. 376.—REVIEWING *Porter v. Allen*, 8 Ind. 1.

(4) *Meaning of phrase "proximate cause."*—Acts, to constitute contributory negligence, must be the proximate, and not the remote, cause of the injury, and such acts as directly produced or concurred in directly producing the injury. *Troy v. Cape Fear & Y. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521.—QUOTING *Baltimore & O. R. Co. v. State*, 33 Md. 542.

That plaintiff's negligence "proximately contributed to his injury" means that the plaintiff's negligence was such that without it he would not have been injured. *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. Rep. 34.

An act to be a proximate cause of the injury must be one which plaintiff could reasonably anticipate would result in his injury. *Fowler v. Baltimore & O. R. Co.*, 8 Am. & Eng. R. Cas. 480, 18 W. Va. 579.

12. Must directly or essentially contribute to the injury.*—In an action for injury occasioned by defendant's negligence, it is only such negligence on the part of the plaintiff as contributed to the injury that will defeat his recovery. *Pringle v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 91, 64 Iowa 613, 21 N. W. Rep. 108. *Reed v. Pennsylvania R. Co.*, 56 Fed. Rep. 184. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735. *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 20 Am. Ry. Rep. 101. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26. *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160. *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.

Where the plaintiff's own negligence has in any essential way directly and materially

tended to cause the injury complained of he cannot recover. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87. *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48, 4 Fed. Rep. 706. *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82. *Haley v. Chicago & N. W. R. Co.*, 21 Iowa 15.—FOLLOWING *State v. Baltimore & O. R. Co.*, 24 Md. 84.—FOLLOWED IN *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31.—*Hogue v. Chicago & A. R. Co.*, 32 Fed. Rep. 365. *Thrings v. Central Park R. Co.*, 7 Robt. (N. Y.) 616.—CRITICISING *Willis v. Long Island R. Co.*, 34 N. Y. 670. FOLLOWING *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.—*Farmer v. Wilmington & W. R. Co.*, 20 Am. & Eng. R. Cas. 481, 88 N. Car. 564.

It is not true, as a general proposition, that in actions for personal injuries caused by the defendant's negligence, the contributory negligence of the injured party will constitute no defense except when the latter negligence is an element or factor in producing the force causing the injury complained of. It is sufficient if his negligence materially contributes to the injury, whether it contributes to the force causing the injury or not. *Abend v. Terre Haute & I. R. Co.*, 17 Am. & Eng. R. Cas. 614, 111 Ill. 202.

13. Negligence in the absence of which no injury would have resulted.—Where a plaintiff so far contributes to the injury by her own negligence or want of ordinary care and caution that but for such negligence or want of ordinary care and caution the injury would not have happened, there can be no recovery. *Healey v. Dry Dock, E. B. & B. R. Co.*, 14 J. & S. (N. Y.) 273. *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64.—DISTINGUISHED IN *Meesel v. Lynn & B. R. Co.*, 8 Allen (Mass.) 234; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Mayo v. Boston & M. R. Co.*, 104 Mass. 137; *Filer v. New York C. R. Co.*, 49 N. Y. 47.—*Smith v. Union R. Co.*, 61 Mo. 588. *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434; *affirming* 32 N. J. L. 166.—FOLLOWING *Runyon v. Central R. Co.*, 25 N. J. L. 556; *Telfer v. Northern R. Co.*, 30 N. J. L. 188.—NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 686.

To preclude a recovery for personal injuries the contributory negligence relied on must be the proximate cause of the injury, by which is meant the efficient cause without which the injury would not have oc-

* Efficient and operating cause of injury, see note, 17 AM. & ENG. R. CAS. 618.

curred. *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. Rep. 789.

One who is injured by the mere negligence of another cannot recover, at law or in equity, any compensation for the injury if he, by his own or his agents' ordinary negligence or wilful wrong, contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him. *Little Rock & Ft. S. R. Co. v. Pankhurst*, 5 Am. & Eng. R. Cas. 635, 36 Ark. 371.—FOLLOWED IN *Sibley v. Ratcliffe*, 37 Am. & Eng. R. Cas. 295, 50 Ark. 477.—*St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. Rep. 699. *Williams v. Southern Pac. R. Co.*, (Cal.) 9 Pac. Rep. 152. *Colorado C. R. Co. v. Martin*, 17 Am. & Eng. R. Cas. 592, 7 Colo. 592, 4 Pac. Rep. 1118. *Colorado C. R. Co. v. Holmes*, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197, 516.—DISTINGUISHING *Kansas Pac. R. Co. v. Ward*, 4 Colo. 30.—*Collins v. Davidson*, 19 Fed. Rep. 83. *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338. *Kentucky C. R. Co. v. Lebus*, 14 Bush (Ky.) 518. *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403. *Ramsey v. Louisville, C. & L. R. Co.*, 89 Ky. 99, 20 S. W. Rep. 162. *Johnson v. Louisville & N. R. Co.*, 91 Ky. 651, 25 S. W. Rep. 754. *Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 983, 8 So. Rep. 478. *Frech v. Philadelphia, W. & B. R. Co.*, 39 Md. 574, 10 Am. Ry. Rep. 474. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325. *Central R. Co. v. Moore*, 24 N. J. L. 824.—QUOTING *Beers v. Housatonic R. Co.*, 19 Conn. 566.—*Turrentine v. Richmond & D. R. Co.*, 23 Am. & Eng. R. Cas. 460, 92 N. Car. 638. *Houston & T. C. R. Co. v. Smith*, 52 Tex. 178. *Richmond & D. R. Co. v. Morris*, 31 Gratt. (Va.) 200. *Dun v. Seaboard & R. R. Co.*, 16 Am. & Eng. R. Cas. 363, 78 Va. 645, 49 Am. Rep. 388.—APPROVED IN *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860. DISTINGUISHED IN *Norfolk & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. Rep. 251. QUOTED IN *Richmond & D. R. Co. v. Picklesimer*, 85 Va. 798, 10 S. E. Rep. 44; *Richmond & D. R. Co. v. Scott*, 88 Va. 958. REVIEWED IN *Moore v. Norfolk & W. R. Co.*, 87 Va. 489.—*Farley v. Richmond & D. R. Co.*, 81 Va. 783. *Virginia Midland R. Co. v. Boswell*, 82 Va. 932,

7 S. E. Rep. 383. *Virginia Midland R. Co. v. White*, 34 Am. & Eng. R. Cas. 22, 84 Va. 498, 5 S. E. Rep. 573. *Eastburn v. Norfolk & W. R. Co.*, 34 W. Va. 681, 12 S. E. Rep. 819.

14. Need not constitute the sole cause.—Contributory negligence is a complete defense to the action, when it is one of two or more concurring efficient causes, and it is not necessary that it should be the sole proximate cause. *North Birmingham St. R. Co. v. C. Merwood*, 89 Ala. 247, 7 So. Rep. 360. *Davis v. Button*, 78 Cal. 247, 20 Pac. Rep. 545, 18 Pac. Rep. 133.

When contributory negligence is relied on as a defense to an action for damages, it is not essential that the plaintiff should have been the cause of the injury, for if his negligence contributed proximately to an injury which he could have avoided by the use of ordinary care or diligence, he cannot recover. *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114.—QUOTED IN *Woodward Iron Co. v. Jones*, 80 Ala. 123.

A party cannot recover for injuries done him when his own want of care and prudence contributed to the injury, or was in whole or in part the proximate cause thereof. *Spencer v. Illinois C. R. Co.*, 29 Iowa 55.

15. Plaintiff's negligence as remote cause.—The negligence of a plaintiff which is the remote cause and does not contribute to the injury, is no bar to a recovery. *Travis v. Carrolltown, & Silv. Sup. Ct.* 262, 7 N. Y. Supp. 231. *Haley v. Earle*, 30 N. Y. 258.—FOLLOWING *Carroll v. New York & N. H. R. Co.*, 1 Duer (N. Y.) 571.—FOLLOWED IN *Willis v. Long Island R. Co.*, 34 N. Y. 670.

Negligence of a plaintiff at the time of an accident, but in no way contributing thereto, will not defeat a recovery. *Cummings v. National Furnace Co.*, 60 Wis. 603, 18 N. W. Rep. 742, 20 N. W. Rep. 665.—DISTINGUISHED IN *Muster v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 113, 61 Wis. 325.

Where the negligent act precedes that of the defendant it is the remote cause, and the defendant will be liable if the injury could have been avoided by the exercise of reasonable care. *Farmer v. Wilmington & W. R. Co.*, 20 Am. & Eng. R. Cas. 481,

* Where contributory negligence has remote connection with injury, see note, 2 AM. & ENG. R. CAS. 37.

88 N. Car. 564.—QUOTED IN *Smith v. Richmond & D. R. Co.*, 34 Am. & Eng. R. Cas. 557, 99 N. Car. 241, 5 S. E. Rep. 896; *Horner v. Williams*, 35 Am. & Eng. R. Cas. 155, 100 N. Car. 230, 5 S. E. Rep. 734.

Or if the injury would have happened just the same, although the plaintiff had been in no wise negligent, his negligence will not prevent his recovery. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.—QUOTED IN *Overby v. Chesapeake & O. R. Co.*, 37 W. Va. 524.

In an action by a railroad company against its lessee of a side-track to recover damages for a collision of one of its moving trains with cars left standing on the side-track, if the complaint alleges that the defendant was lawfully in possession of the side-track and negligently suffered the cars to remain standing on it too near to the main track, whereby the collision and damage resulted, it shows a substantial cause of action, although it may not negative fault or neglect on the part of the plaintiff; and even if it was plaintiff's right and duty, as to third persons, to have removed the cars as an obstruction on the track, this would not relieve the defendant of liability for its negligence. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735.

A plea in bar of such action, averring contributory negligence on the part of the plaintiff (1) in backing the train at a rate of speed faster than was allowed by a municipal ordinance; (2) in failing to make provision for giving necessary signals to the engineer of the train; and (3) in the construction of the side-track in an improper and unskillful manner, "by reason of all which said negligence and want of ordinary care on the part of plaintiff said alleged injury was caused, and said negligence and want of ordinary care of plaintiff proximately contributed to cause said injury"—presents a substantial defense. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735.

Where the action is based upon the negligence of defendant, contributory negligence cannot defeat a recovery, unless it contributes proximately to the injury sued for. *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 20 Am. Ry. Rep. 101.

So held, where plaintiff was laying a gas-pipe in the ditch under a horse-car track

and was injured by the car horses becoming frightened and falling from the track on him, due to the negligence of the driver in approaching the ditch at too rapid a speed and failing to hold the lines so as to have the horses in control. The failure of plaintiff to leave the ditch was not the proximate cause of the injury. *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 20 Am. Ry. Rep. 101.

16. Plaintiff's negligence the remote and defendant's the proximate cause.—If the negligence of a railroad be the proximate and that of the party injured the remote cause of the injury, an action is maintainable, notwithstanding the party injured may not have been entirely without fault. *Northern C. R. Co. v. State*, 29 Md. 420. *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325. *Pacific R. Co. v. Houts*, 12 Kan. 328. *Mississippi C. R. Co. v. Mason*, 51 Miss. 234. *Burham v. St. Louis & I. M. R. Co.*, 56 Mo. 338.—QUOTED IN *White v. Wabash Western R. Co.*, 34 Mo. App. 57.—*Meyers v. Chicago, R. I. & P. R. Co.*, 59 Mo. 223, 8 Am. Ry. Rep. 473.—FOLLOWING *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476.—*Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471. *Frick v. St. Louis, K. C. & N. R. Co.*, 5 Mo. App. 435; affirmed on other points in 75 Mo. 542. *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 25. *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35. *Omaha Horse R. Co. v. Doolittle*, 7 Neb. 481.—QUOTING *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631.—*Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655, 13 Am. Ry. Rep. 105. *Caldwell v. Murphy*, 1 Duer (N. Y.) 233. *Doggett v. Richmond & D. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193. *Walker v. Reidsville*, 96 N. Car. 382, 2 S. E. Rep. 74. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172. *Trow v. Vermont C. R. Co.*, 24 Vt. 487. *Richmond & D. R. Co. v. Morris*, 31 Gratt. (Va.) 200. *Clark v. Richmond & D. R. Co.*, 18 Am. & Eng. R. Cas. 78, 78 Va. 709, 49 Am. Rep. 394.—REVIEWED IN *Norfolk & W. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. Rep. 370.

When the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff is remote, consisting of some act or omission not occurring at the

time of the injury, the action can be maintained, although the plaintiff is himself not without fault. *Louisville, C. & L. R. Co. v. Sullivan*, 16 *Am. & Eng. R. Cas.* 390, 81 *Ky.* 624.—QUOTING *Isbell v. New York & N. H. R. Co.*, 27 *Conn.* 393; *Johnson v. Chicago, R. I. & P. R. Co.*, 58 *Iowa* 348.—LIMITED IN *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 *Am. & Eng. R. Cas.* 313, 109 *Ind.* 179.

Contributory negligence cannot be attributed to the plaintiff merely because he was negligently guilty of an act which exposed him to a possible danger having no relation to the accident which actually occurred. *Harmon v. Washington & G. R. Co.*, 7 *Mackey (D. C.)* 255.

17. Rule where there are two concurrent proximate causes of the injury.*—Where there has been mutual negligence, that of each party being the proximate cause of the injury, there can be no recovery. *Meyer v. Lindell R. Co.*, 6 *Mo. App.* 27. *Sherman v. Western Stage Co.*, 24 *Iowa* 515. *Trow v. Vermont C. R. Co.*, 24 *Vt.* 487.—APPROVED AND DISTINGUISHED IN *Button v. Hudson River R. Co.*, 18 *N. Y.* 248. EXPLAINED IN *Scott v. Third Ave. R. Co.*, 36 *N. Y. S. R.* 838, 59 *Hun* 456, 13 *N. Y. Supp.* 344. QUOTED IN *Cleveland, C. & C. R. Co. v. Terry*, 8 *Ohio St.* 570; *Richmond & D. R. Co. v. Anderson*, 31 *Gratt. (Va.)* 812. REVIEWED IN *Haley v. Chicago & N. W. R. Co.*, 21 *Iowa* 15.

But when there are concurrent causes of an injury, each of which contributes thereto, the fact that one of the causes might have been avoided by the plaintiff, or that with reference to it he might have been guilty of contributory negligence, will not exempt the company as to the other cause. *Gulf, C. & S. F. R. Co. v. Shearer*, 1 *Tex. Civ. App.* 343, 21 *S. W. Rep.* 133.

18. Must have been the negligence of the injured party.†—The doctrine of contributory negligence is confined to the negligence of the party injured, and it is such negligence only, concurring with the negligence complained of, that will defeat the right of action. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Hunn v. Michigan C. R. Co.*, 41 *Am. & Eng. R. Cas.* 452, 78 *Mich.* 513, 7 *L. R. A.* 500, 44 *N. W. Rep.* 502. *Paulmier v. Erie R. Co.*, 34 *N. J. L.* 151.

* See also *ante*, §.

† See also title IMPUTED NEGLIGENCE.

Or of some person for whose acts he is responsible. *Stetter v. Chicago & N. W. R. Co.*, 49 *Wis.* 609, 6 *N. W. Rep.* 303.

That another party was also guilty of culpable neglect is not a defense in an action against a party by whose negligence an injury resulted. *Pacific Exp. Co. v. Lasker Real Estate Assoc.*, 81 *Tex.* 81, 16 *S. W. Rep.* 792.

Defendant company ran an engine over a hose of a fire engine across the track and cut it in two, thereby preventing the firemen from extinguishing a fire, whereby plaintiff's property was consumed. *Held*, that it was error to instruct the jury that if there was negligence of the firemen in not using proper means to warn the approaching train of the fact of the fire and its locality, and that the hose was across the track, and that if such negligence concurred with that of the company in producing the injury, that such negligence of the firemen must be deemed the negligence of plaintiff, and therefore a bar to a recovery. *Mott v. Hudson River R. Co.*, 8 *Bosw. (N. Y.)* 345.—APPLYING *Colegrove v. New York & H. R. Co.*, 6 *Duer (N. Y.)* 382, 20 *N. Y.* 492.

19. Care demanded of the injured party, generally.—(1) *Rule stated.*—Though ordinary care as a legal standard for the measure of diligence is invariable, yet, as the conduct of a prudent man varies with the degree of danger attending the vocation in which he is engaged, and he is more or less cautious according to circumstances, those who are bound to conform their conduct to his must graduate it in like manner. This applies both to one exposed to danger and to others not so exposed whose acts or omissions affect his safety. *Central R. & B. Co. v. Ryles*, 84 *Ga.* 420, 11 *S. E. Rep.* 499.

One who is called upon to exercise care to avoid danger from the acts of others may, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they will act with reasonable caution and not with culpable negligence. *Loucks v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 305, 31 *Minn.* 526, 18 *N. W. Rep.* 651.

The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment or use the wisest precautions; the influences which ordinarily govern human action are

to be considered, and what would, under some circumstances, be a want of reasonable care may not be such under others. *Lent v. New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 373, 120 *N. Y.* 467, 24 *N. E. Rep.* 653, 31 *N. Y. S. R.* 538; *affirming* 22 *J. & S.* 317, 8 *N. Y. S. R.* 93.—FOLLOWING *Bucher v. New York C. & H. R. Co.*, 98 *N. Y.* 128; *McIntyre v. New York C. R. Co.*, 37 *N. Y.* 287; *Lowery v. Manhattan R. Co.*, 99 *N. Y.* 158; *Sherry v. New York C. & H. R. R. Co.*, 104 *N. Y.* 652.

A person, while grossly negligent himself, has no legal right to count on due diligence by others, but is bound to anticipate that others, as he has done, may fail in diligence, and must guard, not only against negligence on their part which he might discover in time to avoid the consequences, but also against the ordinary danger of there being negligence which he might not discover until too late. *Central R. & B. Co. v. Smith*, 34 *Am. & Eng. R. Cas.* 1, 78 *Ga.* 694, 3 *S. E. Rep.* 397.

(2) *Ordinary care*.—The law imposes upon every person the duty to use ordinary care for his own protection and security against accident. *Parvis v. Philadelphia, W. & B. R. Co.*, (Del.) 17 *All. Rep.* 702. *Louisville & N. R. Co. v. Eves*, 1 *Ind. App.* 224, 27 *N. E. Rep.* 580.

The use of slight care and diligence would not be sufficient. *Allender v. Chicago, R. I. & P. R. Co.*, 37 *Iowa* 264, 8 *Am. Ry. Rep.* 115.

But the exercise of ordinary caution by the injured party to avoid the danger is all that the law requires in order that he may be protected against the consequences of having contributory negligence imputed to him. *Hays v. Gainesville St. R. Co.*, 34 *Am. & Eng. R. Cas.* 97, 70 *Tex.* 602, 8 *S. W. Rep.* 491. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 *Ohio St.* 172.

(3) — *in Illinois*.—A plaintiff may recover for injuries resulting from the negligence of the defendant, if he has observed ordinary care for his personal safety and to avoid the injury. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 *Am. & Eng. R. Cas.* 82, 120 *Ill.* 587, 11 *N. E. Rep.* 855. *Chicago & E. I. R. Co. v. O'Connor*, 119 *Ill.* 586, 9 *N. E. Rep.* 263; *affirming* 19 *Ill. App.* 591. *Cleveland, C. C. & St. L. R. Co. v. Arbaugh*,

47 *Ill. App.* 360. *Chicago, S. F. & C. R. Co. v. Bents*, 38 *Ill. App.* 485.

In Illinois, in order to recover for a personal injury on the ground of mere negligence of the defendant as distinguished from a wilful tort or intentional wrong, the party injured must be in the exercise of ordinary care. *Chicago, B. & Q. R. Co. v. Flint*, 22 *Ill. App.* 502.

The doctrine of comparative negligence has no application in such a case, and where the evidence is conflicting great accuracy in the instructions is required. *Chicago & W. I. R. Co. v. White*, 26 *Ill. App.* 586.

(4) *More than ordinary care*.—When a plaintiff is himself in the wrong, or not in the exercise of a legal right, or was at the time enjoying a privilege granted without compensation or benefit to the party granting it and of whose carelessness complaint is made, plaintiff must use extraordinary care before he can properly and legitimately complain of the negligence of another. So held, where a person was killed while crossing switches at a point where the public had no right to go. *Chicago & A. R. Co. v. McKenna*, 14 *Ill. App.* 472.

As a rule a person is only required to use ordinary care to prevent injury to himself; but if he voluntarily places himself in a position of great peril, then he is bound to exercise care in accordance with the conditions by which he has voluntarily surrounded himself. *Chicago & E. I. R. Co. v. Roberts*, 44 *Ill. App.* 179.—FOLLOWING *Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 74.

The degree of care which a plaintiff is bound to exercise depends upon the relative rights or position of the parties. As growing out of these relative positions, two classes of cases arise: (1) Where both parties are equally in a position of right, which they hold independent of each other, plaintiff is only required to show that the injury resulted from defendant's negligence and that he exercised due care, or by the exercise of such care the injury could not have been avoided. (2) The other class relates to children incapable of exercising discretion, and enables them to recover, though they may seemingly be trespassers at the time. *Aurora Branch R. Co. v. Grimes*, 13 *Ill.* 585.—DISTINGUISHING *Bird v. Holbrook*, 4 *Bing.* 628, 15 *E. C. L.* 91; *Lynch v. Nurdin*, 1 *Q. B.* 29, 41 *E. C. L.* 422. QUOTING *Kennard v. Burton*, 25 *Me.* 39.—MODIFIED IN *Chicago & A. R. Co. v. Gretzner*, 46

* See also COMPARATIVE NEGLIGENCE, 1-20.

Ill. 74. QUOTED IN Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; Chicago, B. & Q. R. Co. v. Dougherty, 12 Ill. App. 181.

Greater precaution and diligence are required of an individual who has knowledge of the danger and is familiar with all the surroundings than of one who is ignorant of them. *Louisville & N. R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580.—QUOTING *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279.

20. Must use care expected of prudent person under like circumstances.—The party injured must have exercised such reasonable care to avoid the injury as a prudent person would have exercised under like circumstances, in order to authorize a recovery for damages occasioned by the negligence of the company. *Dufour v. Central Pac. R. Co.*, 67 Cal. 319, 7 Pac. Rep. 769. *Behrens v. Kansas Pac. R. Co.*, 8 Am. & Eng. R. Cas. 184, 5 Colo. 400. *Kansas Pac. R. Co. v. Twombly*, 3 Colo. 125, 21 Am. Ry. Rep. 447. *Nolan v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 342, 53 Conn. 461, 4 Atl. Rep. 106.—QUOTING *Beers v. Housatonic R. Co.*, 19 Conn. 566.—*Parvis v. Philadelphia, W. & B. R. Co.*, (Del.) 17 Atl. Rep. 702. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818. *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Ill. App. 407. *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831.—DISTINGUISHING *Greany v. Long Island R. Co.*, 101 N. Y. 424; *Sherry v. New York C. & H. R. R. Co.*, 104 N. Y. 652, 5 N. Y. S. R. 574.—*Houston & T. C. R. Co. v. Smith*, 52 Tex. 178.—APPLIED IN *Artusy v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177.—*Texas & P. R. Co. v. Best*, 66 Tex. 116. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223. *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 503.

The plaintiff, however, is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he belongs. *Dinnney v. Wheeling & E. G. R. Co.*, 27 W. Va. 32. But see *Picart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148, 47 N. W. Rep. 1017, for circumstances under which plaintiff was not allowed to recover, even though he had good reasons to believe, as a prudent man, and did believe, his act was not imprudent.

The care required of the plaintiff is that degree of care which may reasonably be

3 D. R. D.—17.

expected from one in his situation—i.e., reasonable care; and if this degree of care be exercised by him, the want of a greater degree will not preclude him from a recovery for the negligence of the defendant. *Beers v. Housatonic R. Co.*, 19 Conn. 566.—REVIEWING *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244.—QUOTED IN *Nolan v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 342, 53 Conn. 461; *Moore v. Central R. Co.*, 24 N. J. L. 268; *Central R. Co. v. Moore*, 24 N. J. L. 824.

Whether a plaintiff was negligent or not depended upon the particular facts admitted or shown by the evidence. If the facts thus established constituted negligence, then, whether they exhibited such conduct as an ordinarily prudent man might reasonably be expected to indulge in or not, it was none the less negligence. *Pennsylvania Co. v. Marion*, 27 Am. & Eng. R. Cas. 132, 104 Ind. 239, 3 N. E. Rep. 874.

21. Failure to use reasonable and ordinary care.*—(1) Rule stated.—Negligence of the plaintiff bars a recovery for personal injuries where, by the exercise of ordinary care, he could have avoided the accident. *Kearney v. Lindell R. Co.*, 15 Mo. App. 576. *Ohio & M. R. Co. v. Gullett*, 15 Ind. 487. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264, 8 Am. Ry. Rep. 115. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682. *Bowers v. Union Pac. R. Co.*, 4 Utah 215, 7 Pac. Rep. 251. *Richmond & D. R. Co. v. Anderson*, 31 Gratt. (Va.) 812.—QUOTING *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147. REVIEWING *Richmond & D. R. Co. v. Morris*, 31 Gratt. (Va.) 200.

And notwithstanding the company may have been guilty of negligence contributing to the injury, still, if plaintiff could by the exercise of ordinary care and reasonable prudence have avoided the injury, he cannot recover. *Chicago & A. R. Co. v. Jacobs*, 63 Ill. 178, 7 Am. Ry. Rep. 125. *Louisville & N. R. Co. v. Ynestrá*, 29 Am. & Eng. R. Cas. 297, 21 Fla. 700. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818. *Chattanooga, R. & C. R. Co. v. Clowdis*, 90 Ga. 258, 17 S. E. Rep. 88. *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604.—APPROVING *Georgia R. & B. Co.*

* Kind and degree of contributory negligence which will defeat a recovery, see very full note, 55 AM. DEC. 607.

v. Neely, 56 Ga. 540; *Lavier v. Central R. Co.*, 71 Ga. 222. REVIEWING *Higgins v. Cherokee R. Co.*, 73 Ga. 149; *Central R. Co. v. Dixon*, 42 Ga. 327; *Southwestern R. Co. v. Johnson*, 60 Ga. 668; *Georgia R. Co. v. Thomas*, 68 Ga. 744.—*Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; affirming 22 Ill. App. 462. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185. *Ramsey v. Louisville, C. & L. R. Co.*, 89 Ky. 99, 20 S. W. Rep. 162. *Walker v. Reidsville*, 96 N. Car. 382, 2 S. E. Rep. 74. *Turrentine v. Richmond & D. R. Co.*, 23 Am. & Eng. R. Cas. 460, 92 N. Car. 638. *Seymour v. Chicago, B. & Q. R. Co.*, 3 Biss. (U. S.) 43.

If it can be shown that plaintiff, by his own want of ordinary care, occasioned the injury, or by his negligence directly contributed to his own misfortune, he can maintain no claim for damages, although the company, by the use of greater diligence, might have prevented the injury. *Baltimore & O. R. Co. v. State*, 29 Md. 252.

In California the rule is not that any degree of negligence, however slight, which directly concurs in producing the injury, will prevent a recovery; but that if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately in any degree to the injury, the plaintiff shall not recover. *Strong v. Sacramento & P. R. Co.*, 61 Cal. 326. *Hearne v. Southern Pac. R. Co.*, 50 Cal. 482. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409.

(2) *Illustrations*.—If the plaintiff had timely notice of the danger, and by the exercise of ordinary care and prudence could have avoided the injury, there can be no recovery, though the speed of defendant's train exceeded the limit fixed by ordinance. *Neier v. Missouri Pac. R. Co.*, 13 Mo. App. 25.—DISTINGUISHED IN *Donohue v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 673, 91 Mo. 357.

In an action by plaintiff for damages occasioned by trains of cars—held, that if by the exercise of ordinary skill and care the plaintiff could have avoided the injury, or if his conduct contributed to produce it, he cannot recover. *Runyon v. Central R. Co.*, 25 N. J. L. 556.—FOLLOWING *Moore v. Central R. Co.*, 24 N. J. L. 268.—DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106. FOLLOWED IN *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434. QUOTED IN *Morris & E. R. Co. v. Haslan*,

33 N. J. L. 147; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627.

In order to recover for personal injuries received by being struck by moving cars, it must appear that the company's employes were negligent; and evidence showing that the injured party was also negligent, which contributed directly to the injury, will defeat a recovery. The degree of care to be exercised by either party is ordinary care and prudence, taking into consideration all the circumstances of the case and the perils to be encountered. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570.—FOLLOWED IN *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255. QUOTED IN *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1.

22. Failure to use extraordinary care—Slight negligence.—If the negligence of the defendant is the efficient cause of the injury he is liable although the injured party may himself have been in some default and might have escaped injury by the exercise of extraordinary care. *Nashville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347, 12 Am. Ry. Rep. 20. *Ramsey v. Louisville, C. & L. R. Co.*, 89 Ky. 99, 20 S. W. Rep. 162.

Gross negligence is not classed with wilfulness; and when wilfulness is not charged there can be no recovery, unless it appears that plaintiff was without fault. Contributory negligence, however slight, will defeat a recovery. *Louisville, N. A. & C. R. Co. v. Shanks*, 19 Am. & Eng. R. Cas. 28, 94 Ind. 598.

Slight negligence of the injured party, directly contributing to the injury, will defeat a recovery. *Chamberlain v. Milwaukee & M. R. Co.*, 7 Wis. 425.

But while a slight want of ordinary care on plaintiff's part will defeat such an action as this, it will not be defeated by "slight negligence" on his part, that phrase properly denoting a want of extraordinary care. *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. Rep. 69.

No one is bound to keep a constant lookout against dangers which could not be expected to exist, so long as ordinary care is used by those whose action only can cause them. *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667.

23. Failure to use slight care—Gross negligence.—Where the conduct, both of a party injured and of the railroad alleged to have caused the injury, clearly

indicates an absence of the exercise of the most ordinary care, the latter will not be held liable unless the acts which resulted in the injury were wilfully and deliberately done. *Hager v. Southern Pac. R. Co.*, 98 Cal. 309, 33 Pac. Rep. 119.

Where the circumstances of a case show that it belongs to that class of cases where the injury to the plaintiff resulted from an act of recklessness on his part amounting to folly or foolhardiness, he is not entitled to recover. *Richmond & D. R. Co. v. Picklesimer*, 89 Va. 389, 16 S. E. Rep. 245.

24. When plaintiff by use of care could not have avoided accident.—

Although a person injured by a railroad train be in fault to some extent, yet he can recover if the injury could not have been avoided by ordinary care on his part. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604. *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588, 10 Am. Ry. Rep. 521. *Omaha Horse R. Co. v. Doolittle*, 7 Neb. 481.—FOLLOWING *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631; *Timmons v. Central Ohio R. Co.*, 6 Ohio St. 105.—*Pennsylvania R. Co. v. Richter*, 2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180. *Walker v. Reidsville*, 96 N. Car. 382, 2 S. E. Rep. 74. *Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655, 13 Am. Ry. Rep. 105. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172. *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12. *Holohan v. Washington & G. R. Co.*, 8 Mackey (D. C.) 316.

The plaintiff, in an action for damages resulting from a casualty caused by the defendant, is entitled to recover if he could not have prevented the injury by the exercise of ordinary care and diligence; but he cannot recover for any enhancement of damages caused by his own want of care. *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195.—FOLLOWED IN *Owens v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 276, 35 Fed. Rep. 715.

25. Care demanded of aged or infirm persons.*—A young, healthy, vigorous man may assume risks which would be culpable negligence in another of feeble health or protracted age. *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep.

462.—QUOTED IN *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

A plaintiff of full age, and consequent maturity of judgment, will be presumed to act with care and caution proportioned to the emergency and the necessity for their exercise; one of less age and experience might act very differently. And while the capacity of a person is not directly the subject of examination, yet, so far as it may be presumed or inferred from age, it is proper to take it into consideration. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, med.

26. Care demanded of blind persons.—Where a complaint for a personal injury received in falling into an excavation in a sidewalk contains an averment that plaintiff was without fault or negligence, the mere fact that he was blind is not conclusive evidence of his negligence in venturing on the sidewalk. *Salem v. Goller*, 76 Ind. 291.

The fact that intestate was almost blind did not make him chargeable with contributory negligence in attempting to travel without an attendant, even if sight would have enabled him to escape injury, since his blindness was not the juridical cause of his injury, but only a condition that made it possible. *St. Louis, I. M. & S. R. Co. v. Maddy*, 58 Am. & Eng. R. Cas. 327, 57 Ark. 306, 21 S. W. Rep. 472.

27. — of intoxicated persons.*—A man intoxicated is not required to exercise a greater degree of care and prudence than a sober one under the same circumstances. *Chicago & N. W. R. Co. v. Drake*, 33 Ill. App. 114.

It does not excuse an individual to say that he was drunk. While perhaps he may not be held to that high order of care which is expected from sober persons, still he is not excused from diligence and care. *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408.

Where a person, while intoxicated, places himself, in the dusk of evening, on a railroad track in a city street, where trains are constantly passing, and so remains until he is run over and killed, he will be held to have been guilty of such gross negligence that no recovery can be had against the company, unless the agents of the company wilfully caused the death, or were guilty of such gross negligence as amounted in law

* Age of injured person, as bearing on question of, see EVIDENCE, 27.

* See also *post*, 28 (3).

to a wilful neglect of duty. *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408.

28. Various applications of the rule—Generally.—(1) *What constitutes contributory negligence.*—What acts or conduct amounts to contributory negligence is necessarily governed by the circumstances of the particular case. *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336.—FOLLOWED IN *Duncan v. Wyatt Park R. Co.*, 48 Mo. App. 659.—*Crowley v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 119. *Hobbold v. Chicago Sugar Refining Co.*, 44 Ill. App. 418. *Baldwin v. St. Louis, K. & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 166, 63 Iowa 210, 18 N. W. Rep. 884. *Baltimore & O. R. Co. v. Owings*, 28 Am. & Eng. R. Cas. 639, 65 Md. 502, 4 Atl. Rep. 899. *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208.

Negligence is not absolute or intrinsic, but always relates to some circumstance of time, place, or persons. *Jamison v. San José & S. C. R. Co.*, 3 Am. & Eng. R. Cas. 350, 55 Cal. 593.

In an action for personal injuries the court instructed the jury that there is a distinction between negligence of plaintiff himself—that is, acts of omission or commission on his part, independent of the defendant's negligence—and the conduct of the plaintiff in exposing himself to, and failure to avoid, the known risks and dangers of the defendant's negligence, without objection, and without being induced by defendant to believe that its negligence would be remedied; that the former was contributory negligence, the latter a waiver

to hold defendant liable. The jury found a general verdict for the defendant, and found specially that defendant was guilty of negligence which produced the injury, and that plaintiff was not guilty of contributory negligence. *Held*, that the special findings were not inconsistent with the general verdict, in view of the distinction drawn in the charge between contributory negligence and a waiver. *Goltz v. Winona & St. P. R. Co.*, 22 Minn. 55, 19 Am. Ry. Rep. 359.

The reasonable belief of a party that he will not sustain an injury in doing acts which, but for such belief, would be negligent, does not exonerate him from the charge of contributory negligence. *Muldowney v. Illinois C. R. Co.*, 36 Iowa 462.—FOLLOWED IN *Pieart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148. NOT FOLLOWED IN *Kitteringham v. Sioux City & P. R. Co.*, 18 Am. & Eng. R. Cas. 14, 62 Iowa 285.

(2) *What does not.*—For a person to exercise proper care in avoiding the consequences of his own or another's negligence, he must have time to become aware of the conduct and situation of the latter. *North-ern C. R. Co. v. State*, 31 Md. 357.

The law will not hold it imprudent in one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both, even though such other has once conducted himself in a contrary manner. *Newson v. New York C. R. Co.*, 29 N. Y. 383.—DISTINGUISHED IN *Murphy v. New York, L. E. & W. R. Co.*, 42 N. Y. S. R. 580. FOLLOWED IN *Feeney v. Long Island R. Co.*, 39 Am. & Eng. R. Cas. 639, 116 N. Y. 375, 22 N. E. Rep. 402, 26 N. Y. S. R. 729, 5 L. R. A. 544. QUOTED IN *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106. REVIEWED IN *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524.

Where a company has constructed its track along a public highway, which constitutes the only means of ingress to and egress from the home of an adjacent landowner, and has left excavations and embankments in the highway, in violation of its statutory duty to restore it to its former condition, the act of a member of the landowner's family in using the highway under such circumstances does not of itself constitute such contributory negligence as will defeat a recovery against the railroad company for an injury. *Evansville & T. H. R. Co. v.*

* Various illustrations of what is and what is not contributory negligence, see notes, 8 AM. ST. REP. 850; 11 *Id.* 66; 13 *Id.* 94.

As to how far injured party being a trespasser constitutes contributory negligence, see note, 55 AM. DEC. 674.

Alighting from trains, see note, 52 AM. & ENG. R. CAS. 289.

Alighting from trains while in motion on advice of conductor, see note, 56 AM. REP. 843.

Alighting from and boarding stationary trains, see note, 37 AM. & ENG. R. CAS. 86.

Falling asleep on the track, see note, 15 AM. & ENG. R. CAS. 478.

Getting on or off moving trains, see note, 37 AM. REP. 384.

How far knowledge of or reason to apprehend danger is essential to contributory negligence, see note, 55 AM. DEC. 672.

Mere error of judgment in case of danger not contributory negligence, see note, 6 L. R. A. 195.

Placing cattle in unfenced field, see note, 15 AM. & ENG. R. CAS. 540.

Crist, 116 Ind. 446, 19 N. E. Rep. 310, 2 L. R. A. 450.

Where a person, awaiting a ferry-boat, stands in the midst of a crowd, that presses rapidly toward the boat when the gate is opened, and pushes him over onto the driveway for teams, where he is killed by a heavy truck, he cannot be charged with contributory negligence in failing to wait until the other persons had passed onto the boat, where there is nothing to show that he did anything that a man of ordinary prudence would not have done, though he had been on the boat before, but without anything to show that he knew of the danger. *Tonkins v. New York Ferry Co.*, 14 N. Y. S. R. 874; affirmed in 113 N. Y. 653, mem., 21 N. E. Rep. 414, 22 N. Y. S. R. 998.

In an action for damages for the crushing of the plaintiff's foot by the defendant's train—held, upon the facts stated in the opinion, that the evidence was sufficient to justify a finding of negligence on the part of the employees of the defendant; and held further, that the case does not show such contributory negligence on the part of the plaintiff as should preclude a recovery by him. *Meeks v. Southern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 314, 56 Cal. 513, 38 Am. Rep. 67.—QUOTING *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 404; *Kline v. Central Pac. R. Co.*, 37 Cal. 400.

It is negligence for a stranger to attempt to enter a car in a running train, especially at a point not in near proximity to a station or depot, and when all the surroundings are plainly seen, and are forbidding in their character. *Blair v. Grand Rapids & I. R. Co.*, 24 Am. & Eng. R. Cas. 430, 60 Mich. 124, 26 N. W. Rep. 855.

(3) *Intoxication, when bars recovery.**—If a plaintiff voluntarily becomes drunk, and in that condition places himself on a railroad track, where he is injured, he cannot recover under Ga. Code, § 2972, whether the company was negligent or not. *Southwestern R. Co. v. Hankerson*, 61 Ga. 114.

A person who voluntarily uses intoxicat-

ing drinks until he has become helpless, or his powers so far impaired that he is unable to exert the necessary effort to avoid danger, is guilty of negligence when he places himself in a position of danger. *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242.—QUOTING *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

Intoxication of a plaintiff to a degree rendering him incapable of taking proper care of himself, or of avoiding the injuries of which he complains, is contributory negligence and defeats a recovery. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.—QUOTED IN *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242.

Contributory negligence caused by the inebriation of the party injured will exonerate the party inflicting the injury from responsibility, if there is no fault on his part. *Weeks v. New Orleans & C. R. Co.*, 32 La. Ann. 615.

One standing in a state of intoxication on a railroad track at the usual time of running of the train, and in a position of exposure, is guilty of negligence. *Whalen v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 323, 9 Am. Ry. Rep. 224.

A man cannot voluntarily place himself in an intoxicated condition, whereby he loses the control of his brain and muscles, and thereby contributes to an injury to himself, and then require of one ignorant of his condition responsibility therefor. *Strand v. Chicago & W. M. R. Co.*, 31 Am. & Eng. R. Cas. 54, 67 Mich. 380, 11 West. Rep. 538, 34 N. W. Rep. 712.

One who, while helpless from drunkenness, is run over and injured by a passing railway train, is guilty of contributory negligence, which constitutes a bar to his action for damages, unless his injuries were wantonly or wilfully inflicted. *Houston & T. C. R. Co. v. Sympkins*, 6 Am. & Eng. R. Cas. 11, 54 Tex. 615.

One cannot by intoxication voluntarily incapacitate himself from ability to exercise ordinary care for his own self-protection and then set up such inability as an excuse for his failure to use care; and if the intoxication contributed to the injury as a proximate cause thereof, it is a complete bar to any action for damages sustained in consequence of it. *Fisher v. West Virginia & P. R. Co.*, (W. Va.) 58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578.

* See also ante, 27.

Intoxication as contributory negligence, see notes, 21 AM. & ENG. R. CAS. 349; 19 Id. 325; 25 AM. ST. REP. 39.

Intoxicated person driving along railroad is guilty of contributory negligence, see 42 AM. & ENG. R. CAS. 191, *abstr.*

(4) — *and when not.**—Intoxication is not a defense *per se*, but it is evidence of contributory negligence on the part of the intoxicated person. It is only a complete defense when it contributes to bring about the injury. *Lynch v. Mayor, etc., of N. Y., 47 Hun (N. Y.) 524, 15 N. Y. S. R. 103.*

Drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the death of the deceased. If the person injured got drunk under such circumstances that any reasonably prudent man could foresee that he was putting himself in such a condition that that which resulted might probably happen, then his drunkenness would be a defense. *Davis v. Oregon & C. R. Co., 8 Oreg. 172.*

29. Duty to watch for dangers.—Where the facts show that if plaintiff had looked he would have seen an approaching train, and that he had faculties to understand the danger, he is charged with the knowledge of such danger, and is bound to act upon that knowledge as a prudent and cautious man would under the same circumstances; and his failure to so act is negligence and will defeat a recovery, notwithstanding the negligence of the defendant. *Glascok v. Central Pac. R. Co., 73 Cal. 137, 14 Pac. Rep. 518.*

The plaintiff need only use ordinary care, and is not required to keep a constant lookout for dangers and perils. *Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.*

Contributory negligence is not imputable to a person for failing to look out for a danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended. *Langan v. St. Louis, I. M. & S. R. Co., 3 Am. & Eng. R. Cas. 355, 72 Mo. 392; reversing 5 Mo. App. 311.*—DISTINGUISHING *Maier v. Atlantic & P. R. Co., 64 Mo. 267.*

30. Failure to look and listen for approach of locomotive.†—Plaintiff

* Liability for killing or injuring intoxicated persons on track, see 37 AM. & ENG. R. CAS. 312, *abstr.*

† Contributory negligence of traveler in crossing track, see notes, 3 L. R. A. 595; 11 *Id.* 388; 45 AM. & ENG. R. CAS. 184; 49 *Id.* 385; 35 *Id.* 363, *abstr.*; 55 *Id.* 293, *abstr.*

Duty of travelers to stop, look, and listen, see notes, 45 AM. & ENG. R. CAS. 196; 35 *Id.* 325; 90 AM. DEC. 780; 51 AM. REP. 360; 8 AM. ST. REP. 813; 7 L. R. A. 318; 9 *Id.* 168; 42 AM.

stood a few inches outside of a railroad track on a wharf, with knowledge of its existence, and was so absorbed in attempting to push a boat off that he did not see an approaching train until he was struck, though in plain view. *Held*, that his own contributory negligence would defeat a recovery, notwithstanding the defendant's negligence. *Trouclair v. Pacific Coast Steamship Co., 39 Am. & Eng. R. Cas. 393, 80 Cal. 521, 22 Pac. Rep. 258.*—FOLLOWING *Glascok v. Central Pac. R. Co., 73 Cal. 137.*

A person who is rightfully on the track or siding is bound to use ordinary care and diligence for his own protection and to preserve himself from injury by the movement of engines or cars, and though injured by them through negligence on the part of the servants of the company having the management of them, yet, if he has by his own negligence contributed in any degree to the happening of the injury to him, he cannot recover any damages for it. *Patterson v. Philadelphia, W. & B. R. Co., 4 Houst. (Del.) 103, 7 Am. Ky. Rep. 207.*

A person is guilty of contributory negligence who steps off one track to allow a train to pass and walks on another, with a space of 13 feet between the two tracks, and is struck by a switch-engine which he saw at a distance of 150 yards before he stepped onto the second track, but did not again look back to see how near it was to him. *Illinois C. R. Co. v. Dick, (Ky.) 15 S. W. Rep. 665.*

A woman in the possession of her faculties cannot be said to have exercised due care who goes upon the track, in the night-time, in front of a moving train, where it appears that the usual signals were given and the headlight shone brightly, and when first

& ENG. R. CAS. 152, *abstr.*; 41 *Id.* 533, *abstr.*; 37 *Id.* 508, *abstr.*; 35 *Id.* 377, *abstr.*

Failure to stop and look for trains at a crossing is contributory negligence, see note, 23 AM. & ENG. R. CAS. 261.

Application of rule requiring persons to stop, look, and listen, see 49 AM. & ENG. R. CAS. 442, *abstr.*

Approaching crossing with head muffled or with umbrella, see note, 19 AM. & ENG. R. CAS. 332.

Approaching track where view is obstructed, see 32 AM. & ENG. R. CAS. 156, *abstr.*

Only watching one of two engines, see 49 AM. & ENG. R. CAS. 190, *abstr.*

Injury at crossing to one familiar with it, see 32 AM. & ENG. R. CAS. 581, *abstr.*

seen from the train she was standing erect between the rails of the track on which the train was approaching; and there can be no recovery for her death, it appearing that she had often been at the place before, though in the daytime. *Moore v. Boston & A. R. Co.*, 159 Mass. 399, 34 N. E. Rep. 366.

It is no excuse for a plaintiff that he was absent-minded and did not look to see or stop to hear the cars. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274.

Plaintiff is not entitled to recover where it appears from her own testimony that she was not injured on the track, but just as she was about to step upon it, and that she walked directly up against a moving locomotive, which she must have seen or heard had she stopped, looked, and listened. *Hauser v. Central R. Co.*, 147 Pa. St. 440, 23 Atl. Rep. 766.

It is in vain for a man to say that he looked and listened if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive, and the injury he received was attributable solely to his own gross carelessness. *Carroll v. Pennsylvania R. Co.*, 2 Pennyp. (Pa.) 159.

A statutory duty to ring a bell or sound a whistle on approaching stations does not relieve a person on the track from using his senses to ascertain the approach of trains; and if such person knows that a train is approaching, a failure to give such signals is immaterial. *McDonald v. International & G. N. R. Co.*, (Tex.) 22 S. W. Rep. 939.

The mere fact that plaintiff, while on the platform, did not look behind him for an approaching train cannot be held evidence of contributory negligence. *Langan v. St. Louis, I. M. & S. R. Co.*, 3 Am. & Eng. R. Cas. 355, 72 Mo. 392; reversing 5 Mo. App. 311.

One is not necessarily guilty of contributory negligence because he might have perceived the danger. *Baldwin v. St. Louis, K. & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 166, 63 Iowa 210, 18 N. W. Rep. 884.—DISTINGUISHED IN *Collins v. Burlington, C. R. & N. R. Co.*, 83 Iowa 346.

Plaintiff had been riding on a locomotive and left it at a point where the track on which it was moving ran parallel with defendant's track and only a few feet distant, and where an approaching train could be seen two miles distant. He was familiar with the surroundings, and left the cab

backwards and was struck by a train immediately on stepping on defendant's track. He testified that before leaving the cab he looked in both directions and saw no train, but did not look after reaching the ground. Held, that a nonsuit on the ground of contributory negligence was properly allowed. *Smith v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 55, 17 N. Y. Supp. 400; affirmed in 137 N. Y. 562, 33 N. E. Rep. 338.—REVIEWING *Nash v. New York C. & H. R. R. Co.*, 125 N. Y. 715, 26 N. E. Rep. 266.

31. Failure to guard against known danger.*—When a person knows that he is approaching a place of danger, and yet takes no precaution whatever to avoid it until it is too late, he cannot escape the charge of contributory negligence. *Nash v. New York C. & H. R. R. Co.*, 125 N. Y. 715, mem., 34 N. Y. S. R. 788, 3 Silv. App. 315; reversing 51 Hun 594, 22 N. Y. S. R. 106, 4 N. Y. Supp. 525.—REVIEWED IN *Smith v. New York C. & H. R. R. Co.*, 17 N. Y. Supp. 400.

A failure, under ordinary circumstances, to make diligent use of the available means at one's command to avoid a known and apprehended danger, where it is apparent that such danger might have been avoided if such means had been so used, is to be regarded as concurring negligence, and so declared by the court. *Brown v. Milwaukee & St. P. R. Co.*, 22 Minn. 165, 19 Am. Ry. Rep. 298.

The law requires a person, when approaching a known place of danger, or when placed in a dangerous position, to exercise such care and circumspection for his safety as an ordinarily prudent and cautious man would observe under the circumstances surrounding him. But the degree of care required cannot be formulated into a particular rule of conduct, for the reason that the conduct of ordinarily cautious and prudent men will vary as the circumstances presented may be varied. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855.—FOLLOWED IN *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586.

Where danger is not actually known, nor apparent to ordinary observation, nor reasonably to be apprehended, proof of positive or special care to avoid it is not required—

* Failing to heed warnings and signals, see 41 AM. & ENG. R. CAS. 534, *abstr.*

the absence of positive negligence may suffice; but where it is, such proof ought to be made to warrant a recovery. *Chicago, B. & Q. R. Co. v. Olson*, 12 Ill. App. 245.

Negligence of a plaintiff which will defeat a recovery is when, in the presence of a seen danger, he omits to do what prudence requires to be done under the circumstances for his protection, or does some act inconsistent therewith; but where the danger is not seen but anticipated merely, or depending on future events, he is not bound to guard against it by refraining from his usual course of business. *Snyder v. Pittsburg, C. & St. L. R. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

32. Voluntary assumption of a position of danger, generally.—(1) *Rule stated.*—If a man voluntarily and unnecessarily puts himself into a dangerous position, where there are other positions that he may take, in connection with the discharge of his duty, that are safe, he cannot recover damages for that injury to which he has contributed by his own negligence. *Cunningham v. Chicago, M. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 217, 5 McCrary (U. S.) 465, 17 Fed. Rep. 882.—QUOTED IN *Darracott v. Chesapeake & O. R. Co.*, 31 Am. & Eng. R. Cas. 157, 83 Va. 288.

If a person, having voluntarily and wrongfully placed himself in a dangerous position, thereby assuming its risks, fails to use the proper means to discover the peril, or, on discovering it, fails to make exertions to extricate himself, the concurrence of such acts and omissions makes a case of contributory negligence which operates as a constructive estoppel to a recovery, unless it is overcome by the defendant's disregard, not of particular duty to the plaintiff, but of the general duty not to inflict wanton or reckless or intentional injury on another. *Frazer v. South & N. Ala. R. Co.*, 28 Am. & Eng. R. Cas. 565, 81 Ala. 185, 1 So. Rep. 85.—LIMITING *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. RE-VIEWING *Cook v. Central R. & B. Co.*, 67 Ala. 533.—QUOTED IN *Schilling v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 60, 71 Wis. 255.

When a person negligently and without excuse places himself in a position of known danger, and thereby suffers an injury at the hands of another, to the production of which he has directly contributed, he cannot recover damages for the injury sus-

tained. *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. Rep. 331. *Chicago & A. R. Co. v. Murphy*, 17 Ill. App. 444. *Robinson v. Manhattan R. Co.*, 5 Misc. 209, 25 N. Y. Supp. 91, 54 N. Y. S. R. 792.—FOLLOWING *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 31 Am. St. Rep. 537.

(2) *Illustrations.*—A party may voluntarily and without actual necessity expose himself to danger and still not be chargeable with contributory negligence, as in this case plaintiff, who was an employé, may have gone to a dangerous portion of the car of his own will, and without any actual necessity therefor, and still may have been in the discharge of his duties. *Jeffrey v. Keokuk & D. M. R. Co.*, 5 Am. & Eng. R. Cas. 568, 56 Iowa 546, 9 N. W. Rep. 884.

Plaintiff was chargeable with negligence contributing to his injury, he having been injured while standing in the hold of a vessel under an open hatchway, through which freight was being lowered into the hold, after having been warned by an officer of the vessel against standing in such a position. *McCarthy v. Lehigh Valley Transp. Co.*, 48 Minn. 533, 51 N. W. Rep. 480.

A person who, in passing from the ferry-boat to the dock, puts himself in so dense a crowd that he cannot see his footing, and in that situation gets his foot crushed between the boat and the dock, has no cause of action against the ferry company, as his own negligence has been contributory to the injury. *Dwyer v. New York, L. E. & W. R. Co.*, 47 N. J. L. 9.

33. Assuming danger in the attempt to rescue another.*—Where a mother is injured while attempting to rescue her infant child from the danger of an approaching train, the company is liable if it was guilty of negligence with respect to the child before the mother attempted the rescue, or with respect to the mother or child after the attempt to save the child began; and this is the case although the parents of the child may have been guilty of contributory negligence in permitting it to go on the track. *Donahue v. Wabash, St. L. & P. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594.

It is not contributory negligence *per se* to voluntarily risk one's life in attempting to

* Whether act done in discharge of legal duty, to save life, or the like, is contributory negligence, see notes, 55 AM. DEC. 675; 48 AM. & ENG. R. CAS. 423.

rescue another from impending danger. *Pennsylvania Co. v. Langendorf*, 49 *Am. & Eng. R. Cas.* 317, 48 *Ohio St.* 316, 28 *N. E. Rep.* 172. *Eckert v. Long Island R. Co.*, 57 *Barb. (N. Y.)* 555; affirmed in 43 *N. Y.* 502.

While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger. And in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. *Pennsylvania Co. v. Langendorf*, 49 *Am. & Eng. R. Cas.* 317, 48 *Ohio St.* 316, 28 *N. E. Rep.* 172.

In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently, or wrongfully, exposed to danger the person who required assistance. *Pennsylvania Co. v. Langendorf*, 49 *Am. & Eng. R. Cas.* 317, 48 *Ohio St.* 316, 28 *N. E. Rep.* 172.

34. — or to save his own or another's property.—Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages. *Connell v. Prescott*, 20 *Ont. App.* 49.—DISTINGUISHING *Anderson v. Northern R. Co.*, 25 *U. C. C. P.* 301.

35. Approaching place of danger in the dark.—It is contributory negligence to approach a place of danger in the dark. Whether so instructed or not, a person of ordinary prudence would carry a lantern rather than an open lamp in a place exposed to the wind. *Ingram v. Lehigh C. & N. Co.*, 148 *Pa. St.* 177, 23 *Atl. Rep.* 1001.

Having taken an open lamp, and the wind having extinguished it, it would have been the part of prudence to have relighted it, or procured a lantern, before venturing to pass a place of known danger. *Ingram v. Lehigh C. & N. Co.*, 148 *Pa. St.* 177, 23 *Atl. Rep.* 1001.

36. Attempt to cross in front of moving train.*—It is contributory negligence for one to attempt to cross a track immediately in front of a moving train in the limits of a town, but not at a public crossing; and he cannot recover for an injury though the train be running at an unreasonable rate of speed. *Craddock v. Louisville & N. R. Co.*, (Ky.) 16 *S. W. Rep.* 125.

If plaintiff negligently went on the track in front of the rapidly approaching train, where he was injured, there was necessarily a causal connection between his negligence and the injury, and he could not recover. The jury could not find him thus guilty of negligence and yet find that the negligence did not contribute to the injury; hence the charge was improper. *Memphis & C. R. Co. v. Jobe*, 69 *Miss.* 452, 10 *So. Rep.* 672.

The inability of an engineer to stop the train after seeing plaintiff's peril, because of the fact that he was running the train at greater speed than was permitted by the city ordinance, does not absolve plaintiff from the consequences of his own contributory negligence in recklessly riding in front of the train. *Prewitt v. Eddy*, 115 *Mo.* 283, 21 *S. W. Rep.* 742.—QUOTING *Guenther v. St. Louis, I. M. & S. R. Co.*, 108 *Mo.* 18; *Boyd v. Wabash Western R. Co.*, 105 *Mo.* 371. REVIEWING *Fiedler v. St. Louis, I. M. & S. R. Co.*, 107 *Mo.* 645; *Maher v. Atlantic & P. R. Co.*, 64 *Mo.* 276; *Dunkman v. Wabash, St. L. & P. R. Co.*, 95 *Mo.* 232.

37. Climbing over cars.†—One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence, and cannot recover for injuries received in such attempt. *Lake Shore & M. S. R. Co. v. Pinchin*, 31 *Am. & Eng. R. Cas.* 428, 112 *Ind.* 592, 11 *West. Rep.* 247, 13 *N. E. Rep.* 677.—QUOTED IN *Hudson v. Wabash Western R. Co.*, 101 *Mo.* 13.

* Contributory negligence in crossing track in front of moving train, see notes, 35 *AM. & ENG. R. CAS.* 421; 49 *Id.* 425, *abstr.*

† Liability of company for injuries to persons attempting to pass under, between, or around cars on crossings, see notes, 54 *AM. REP.* 272; 13 *L. R. A.* 634.

Passing between cars or climbing over train, see note, 45 *AM. & ENG. R. CAS.* 173.

38. Riding in dangerous place.*—

A passenger riding upon the coping or foot-board attached to the rear end of a tender, when there are plenty of vacant seats in the cars, is guilty of contributory negligence. *Chicago & N. W. R. Co. v. Rielly*, 40 Ill. App. 416.

A traveler by railroad cannot maintain an action to recover damages for a personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car while the train is in motion. *Hick v. Boston & L. R. Co.*, 14 Allen (Mass.) 429.—APPROVED IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107. DISTINGUISHED IN *Mayo v. Boston & M. R. Co.*, 104 Mass. 137; *Barden v. Boston, C. & F. R. Co.*, 121 Mass. 426; *Dickinson v. Port Huron & N. W. R. Co.*, 21 Am. & Eng. R. Cas. 456, 53 Mich. 43; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106; *Filer v. New York C. R. Co.*, 49 N. Y. 47. QUOTED IN *Bon v. Railway Pass. Assur. Co.*, 56 Iowa 664; *Houston & T. C. R. Co. v. Clemmons*, 8 Am. & Eng. R. Cas. 396, 55 Tex. 88; *Jewell v. Chicago, St. P. & M. R. Co.*, 6 Am. & Eng. R. Cas. 379, 54 Wis. 610, 41 Am. Rep. 63. REVIEWED IN *Chicago & N. W. R. Co. v. Rielly*, 40 Ill. App. 416; *Baltimore & Y. Turnpike Road v. Cason*, 72 Md. 377.

39. Standing upon track.†—A plaintiff was guilty of gross negligence who voluntarily placed himself upon the track before an approaching railroad engine, by which he was injured. *Mills v. Orange, A. & M. R. Co.*, 2 MacArth. (D. C.) 314.

On a railroad track where cars frequently pass every one is bound to be vigilant in his own protection, according to the common experience of men of ordinary prudence

under like circumstances; but the want of such vigilance is matter of defense in an action against the railroad company to recover damages for injuries sustained because of its negligence. *Kansas Pac. R. Co. v. Twombly*, 3 Colo. 125, 21 Am. Ry. Rep. 447.

It is not conclusive proof of negligence that one when injured was standing upon the track of a railroad at a place where he had a right to cross. *Illinois C. R. Co. v. Nowicki*, 46 Ill. App. 566.

Standing on the railroad track with one's back to a train of cars, in the absence of anything showing necessity or excuse for it, is certainly negligence. *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30 (Gil. 18).—FOLLOWED IN *Carroll v. Minnesota Valley R. Co.*, 14 Minn. 57 (Gil. 42).—*Carroll v. Minnesota Valley R. Co.*, 14 Minn. 57 (Gil. 42).—FOLLOWING *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30 (Gil. 18).

Plaintiff, who was an employé, stood on the end of a tie, where the track was elevated at a bridge, about twelve inches out of the line of passing cars, if he had stood erect; but he stooped over, talking with a man who was working on a scaffold under the track, and thus brought his body within the line of the cars. He looked and saw a slowly approaching engine a short distance away, but did not move until he was struck. Held, that his own contributory negligence would defeat a recovery. *McClure v. New York C. & H. R. R. Co.*, 5 N. Y. S. R. 140, 42 Hun 654.

40. Standing near track.—If a person, knowing of the approach of a railroad train at speed, unnecessarily stands so near the track that the common sense of mankind must condemn his act as a want of ordinary care, he cannot recover for personal injuries occasioned by being struck by the train, even if it is assumed that the defendant corporation held out an invitation to the plaintiff to cross the track at the point where he was injured; and experiments made shortly after the accident by putting a stick in the ground near the track when another train was passing are immaterial. *Rigg v. Boston, R. B. & L. R. Co.*, 138 Mass. 309, 33 N. E. Rep. 512.

41. Choosing between several courses of action.—It is not necessarily negligence to take a choice of risks or to do, without freedom of choice, an act involving danger. *Lake Shore & M. S. R. Co. v. Bangs*, 3 Am. & Eng. R. Cas. 426,

* Projecting person beyond the side of the car, see note, 39 AM. & ENG. R. CAS. 459.

Riding on engine as contributory negligence, see note, 17 AM. & ENG. R. CAS. 620.

Riding on platform of cars, see notes, 18 AM. & ENG. R. CAS. 201; 16 Id. 374; 2 Id. 26; 6 Id. 360; 37 AM. REP. 710; 41 Id. 347; 12 L. R. A. 129.

Riding on street-car platform not negligence per se, see 47 AM. & ENG. R. CAS. 584, abstr.

Sitting on end of open coal car; going on car before regular time; stealing ride; person in charge of live stock, see note, 47 AM. & ENG. R. CAS. 597.

† Trespassers on track, see notes, 48 AM. & ENG. R. CAS. 586; 45 Id. 59; 19 Id. 41.

Persons walking on track, see note, 15 AM. & ENG. R. CAS. 414.

47 Mich. 470, 11 N. W. Rep. 276. *Dela-matyr v. Milwaukee & P. du C. R. Co.*, 24 Wis. 578. *Saltonstall v. Stockton, Taney (U. S.)* 11. *McMillan Marble Co. v. Black*, 89 Tenn. 118, 14 S. W. Rep. 479.—REAFFIRMING *East Tenn.*, V. & G. R. Co. v. *Gurley*, 12 Lea (Tenn.) 47.

And the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance in determining whether he was guilty of contributory negligence or not. *Haney v. Pittsburgh, C., C. & St. L. R. Co.*, 38 W. Va. 570, 18 S. E. Rep. 748. *Haff v. Minneapolis & St. L. R. Co.*, 4 McCrary (U. S.) 622, 14 Fed. Rep. 558.

It is no excuse to the company, whose negligence in retaining an incompetent servant occasioned a collision, that the party injured in the excitement of the moment lost his presence of mind and adopted the wrong mode of self-preservation, *East Tenn., V. & G. R. Co. v. Gurley*, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46.—REAFFIRMED IN *McMillan Marble Co. v. Black*, 89 Tenn. 118.

The plaintiff in an action for personal injuries having been compelled to choose between two perilous courses without time for deliberation, it was not error to instruct the jury that he was not guilty of negligence if, in the exercise of his judgment, he chose the course which he followed, although had he chosen the other course he would have escaped injury. *Knowlton v. Milwaukee City R. Co.*, 16 Am. & Eng. R. Cas. 330, 59 Wis. 278, 18 N. W. Rep. 17.

An instruction that a "mere error of judgment does not necessarily amount to carelessness; if the plaintiff took reasonable care and then made a mistake as to the safest course to pursue in crossing the street, he is not guilty of negligence for that reason," is not erroneous. *McClain v. Brooklyn City R. Co.*, 40 Am. & Eng. R. Cas. 254, 116 N. Y. 459, 22 N. E. Rep. 1062, 27 N. Y. S. R. 549; affirming 42 Hun 657, 6 N. Y. S. R. 49.

But it is negligence to risk life or limb merely to escape inconvenience or mental vexation. *Lake Shore & M. S. R. Co. v. Bangs*, 3 Am. & Eng. R. Cas. 426, 47 Mich. 470, 11 N. W. Rep. 276.

Plaintiff, a female, while waiting for a car, with an infant in her arms and another small child at her side, stood on a sidewalk between two street-car tracks, used for housing cars. While there she saw two

cars approaching, one of them rapidly, whereupon she motioned to the driver to stop, which he failed to do, and she was knocked down and injured. *Held*, that no claim of contributory negligence could be predicated upon the fact that she stood on the sidewalk in front of the company's depot. Being rightfully in this position she was compelled to act because of what she believed to be the danger she was placed in—an actual danger, according to her testimony—and if she failed to pursue the very best course which, under the circumstances, she might have done, it would not deprive her of a right of recovery. *O'Toole v. Central Park, N. & E. R. R. Co.*, 12 N. Y. Supp. 347, 35 N. Y. S. R. 591; affirmed in 128 N. Y. 597, *mem.*

Where a party perceiving, or having the means of perceiving, by the use of ordinary care, that danger is imminent on a certain line of conduct, nevertheless pursues it for the advantage supposed to be offered thereby, declining another which he sees to be certainly safe, in the belief that he will be able to escape, and is overtaken by the danger, he is chargeable with the want of ordinary care, and must suffer the consequence to which he has contributed. *Chicago & N. W. R. Co. v. Bliss*, 6 Ill. App. 411. *Cunningham v. Chicago, M. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 217, 5 McCrary (U. S.) 465, 17 Fed. Rep. 882.

42. In situations of peril, generally.*—Persons who act under the impulse of fright, or persons who are in peril, and feel obliged to act upon the spur of the moment, are not necessarily to be charged with negligence if they do not do the right thing. *Nichols v. Dubuque & D. R. Co.*, 27 Am. & Eng. R. Cas. 183, 68 Iowa 732, 28 N. W. Rep. 44. *Moore v. Central R. Co.*, 47 Iowa 688. *Goodrich v. New York C. & H. R. R. Co.*, 41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 22 N. E. Rep. 397, 26 N. Y. S. R. 767, 5 L. R. A. 750; affirming 3 N. Y. S. R. 774. *Schultz v. Chicago & N. W. R. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146.—QUOTED IN *Kelly v. Chicago & N. W. R. Co.*, 70 Wis. 335, 35 N. W. Rep. 538.—*Col-lins v. Davidson*, 19 Fed. Rep. 83. *Ladd v. Foster*, 12 Sawy. (U. S.) 547, 31 Fed. Rep.

* Contributory negligence of persons in sudden peril, see notes, 12 AM. & ENG. R. CAS. 180; 17 Id. 578; 14 Id. 639; 27 Id. 815; 33 Id. 539; 55 AM. DEC. 674.

827. *Stevenson v. Chicago & A. R. Co.*, 5 *McCrary* (U. S.) 634, 18 *Fed. Rep.* 493.

A person who has been put off his guard is not necessarily guilty of contributory negligence in acting in a manner *prima facie* dangerous and imprudent. *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 *App. Cas.* 1155, 39 L. T. 365, 27 *W. R.* 191.

One in a perilous position is not to be held to the exercise of the same care and prudence as if he were in a place of security. *Adams v. Hannibal & St. J. R. Co.*, 7 *Am. & Eng. R. Cas.* 414, 74 *Mo.* 553. *Bunting v. Central Pac. R. Co.*, 14 *Nev.* 351. *Schultz v. Chicago & N. W. R. Co.*, 44 *Wis.* 638, 18 *Am. Ry. Rep.* 146.

The law makes allowance for the fright and lack of coolness of judgment incident to such a peril. *Fehrnrich v. Michigan C. R. Co.*, 87 *Mich.* 606, 49 *N. W. Rep.* 890. *Galena & C. U. R. Co. v. Yarwood*, 17 *Ill.* 509.

And a person will be presumed to have used that care and caution which the law requires, and to which instinct would prompt him in saving his life. *Cook v. Central R. & B. Co.*, 67 *Ala.* 533.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112.

43. In situations of peril produced by party himself.—Where a party, by his own negligence, has placed himself in a position of peril, and, being called upon in a sudden exigency to act, mistakes his best course through an error in judgment, he is not thereby relieved from the original negligence, if it appreciably contributed to cause injury to another. *Schneider v. Second Ave. R. Co.*, 133 *N. Y.* 583, 4 *Silv. App.* 232, 30 *N. E. Rep.* 752, 44 *N. Y. S. R.* 680. *reversing in part* 27 *J. & S.* 536, 39 *N. Y. S. R.* 370, 15 *N. Y. Supp.* 556.

For an error of judgment under imminent danger, a party is responsible when by his own fault he incurs the danger. *Robinson v. Manhattan R. Co.*, 5 *Misc. (N. Y.)* 209, 25 *N. Y. Supp.* 91, 54 *N. Y. S. R.* 792.—FOLLOWING *Aiken v. Pennsylvania R. Co.*, 130 *Pa. St.* 380, 17 *Am. St. Rep.* 775.

44. In situations of peril produced by fault of another.—An instinctive effort to escape a sudden impending danger resulting from the negligence of another does not relieve the latter from liability. The law does not require a delay in the efforts to escape until the exact nature and measure of the danger is ascertained. *Coul-*

ter v. American M. U. Exp. Co., 56 *N. Y.* 585.

One brought into danger by the wrong of another is not bound, when confronted by sudden imminent peril, to act with coolness and deliberation; and if, considering his surroundings at the time, he exercised the prudence of a reasonable man he is not guilty of contributory negligence. *Richmond & D. R. Co. v. Farmer*, 97 *Ala.* 141, 12 *So. Rep.* 86. *Peoria, D. & E. R. Co. v. Rice*, 144 *Ill.* 227, 33 *N. E. Rep.* 951. *Joliet St. R. Co. v. Duggan*, 45 *Ill. App.* 450. *Clarke v. Pennsylvania Co.*, 132 *Ind.* 199, 31 *N. E. Rep.* 808. *Kleiber v. People's R. Co.*, 52 *Am. & Eng. R. Cas.* 531, 107 *Mo.* 240, 17 *S. W. Rep.* 946.—QUOTING *Twomley v. Central Park, N. & E. R. Co.*, 69 *N. Y.* 160; *Lund v. Tyngsboro*, 11 *Cush. (Mass.)* 566; *Wesley City Coal Co. v. Healer*, 84 *Ill.* 129.—*Lincoln Rapid Transit Co. v. Nichols*, 56 *Am. & Eng. R. Cas.* 584, 37 *Neb.* 332, 55 *N. W. Rep.* 872. *Palsys v. Jewett*, 32 *N. J. Eq.* 302; *reversing on another point* 30 *N. J. Eq.* 604. *East Tenn., V. & G. R. Co. v. Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea (Tenn.)* 46. *Malone v. Pittsburgh & L. E. R. Co.*, 152 *Pa. St.* 390, 25 *Atl. Rep.* 638. *McMillan Marble Co. v. Black*, 89 *Tenn.* 118, 14 *S. W. Rep.* 479. *Haney v. Pittsburgh, C. C. & St. L. R. Co.*, 38 *W. Va.* 570, 18 *S. E. Rep.* 748. *Fowler v. Baltimore & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 480, 18 *W. Va.* 579. *Haff v. Minneapolis & St. L. R. Co.*, 4 *McCrary* (U. S.) 622, 14 *Fed. Rep.* 558.

Even though, in attempting to escape, he puts himself in a more dangerous position. *Mark v. St. Paul, M. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 86, 30 *Minn.* 493, 16 *N. W. Rep.* 367.—DISTINGUISHED IN *Rogstad v. St. Paul, M. & M. R. Co.*, 14 *Am. & Eng. R. Cas.* 648, 31 *Minn.* 208.

Provided such attempt was one such as a person acting with ordinary prudence might, under the circumstances, make. *Lincoln Rapid Transit Co. v. Nichols*, 56 *Am. & Eng. R. Cas.* 584, 37 *Neb.* 332, 55 *N. W. Rep.* 872.

And also provided the plaintiff did not act from a rash misapprehension as to the true situation. *Macon & W. R. Co. v. Winn*, 26 *Ga.* 250.

To entitle one to recover for injuries received in endeavoring to escape from peril occasioned by another's negligence it must appear (1) that the alarm was caused by the defendant's negligence; (2) that the appre-

hension of peril from the plaintiff's standpoint was reasonable; and (3) that the appearance of danger was so imminent as to leave no time for deliberation. The danger must be determined by the circumstances as they appeared and not by the fact that if plaintiff had not sought to escape the threatened danger no injury would have resulted. *Kleiber v. People's R. Co.*, 52 Am. & Eng. R. Cas. 531, 107 Mo. 240, 17 S. W. Rep. 946.—FOLLOWED IN *Lynch v. St. Joseph & I. R. Co.*, 111 Mo. 601. REVIEWED IN *Prewitt v. Eddy*, 115 Mo. 283.

The doctrine that a man in a position of danger is not responsible for the results of an error of judgment committed in his attempt to get out of it, is to be taken with the essential qualification that he must have gotten into the danger without negligence or fault of his own. *Aiken v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 571, 130 Pa. St. 380, 18 Atl. Rep. 619.—DISTINGUISHING *Pennsylvania R. Co. v. Werner*, 89 Pa. St. 59.

45. Obedience to order involving risk.—Obedience to an order involving personal danger cannot be declared negligent in law unless the danger was so glaring that no ordinarily prudent person in like situation would have obeyed. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1074.

46. Permitting stock to run at large near track.*—It is not negligence in Missouri on the part of the owners of stock to let them run at large in the vicinity of railroad tracks. *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419.—FOLLOWING *Gorman v. Pacific R. Co.*, 26 Mo. 444. QUOTING *Turner v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 580.—DISTINGUISHED IN *Hanlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483. QUOTED IN *O'Brien v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 12.

47. A recovery notwithstanding contributory negligence, generally.†—The doctrine of contributory negligence cannot be invoked as a defense when the

law requires no precautionary action on the part of the party damaged. *Union Pac., D. & G. R. Co. v. Williams*, 3 Colo. App. 526.—FOLLOWING *Denver & R. G. R. Co. v. Morton*, 3 Colo. App. 155.

A plaintiff may recover for an injury caused by the defendant's negligence, notwithstanding his own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after such notice of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury. If the plaintiff is an adult the defendant will only be liable for wilful or gross negligence; but if a child, then for the want of ordinary care. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; affirming 31 Ill. App. 621.

If the plaintiff exercised reasonable care, though he may have been guilty of some negligence or want of caution, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence. *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32.

The doctrine of contributory negligence applies only where the negligent act of the plaintiff is concurrent in point of time with the negligent act of the defendant, so that the defendant has no opportunity to act with reference to the act of the plaintiff. It has no application to a case where the negligence of the plaintiff was prior in point of time to that of the defendant. In such a case the negligence of the plaintiff is not contributory, for the defendant's action should be controlled by the plaintiff's whether the act of the latter was the result of carelessness or not. *Spencer v. Baltimore & O. R. Co.*, 4 Mackey (D. C.) 138, 54 Am. Rep. 269.—REVIEWING *Davies v. Mann*, 10 M. & W. 548.

The rule which permits a recovery notwithstanding the previous negligence of the plaintiff or person injured is only properly applied where such negligence was the remote and not the proximate cause of the injury, and the negligence of the defendant is independent of the preceding negligence of the person injured; and this principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them. *Holmes v. South Pac. Coast R. Co.*, 97 Cal. 161, 31 Pac. Rep. 834.

* See also ANIMALS, ETC., 243-276.

† Liability of company notwithstanding traveler's contributory negligence, see notes, 19 AM. & ENG. R. CAS. 260; 8 AM. ST. REP. 850.

When employé may recover for injuries received in apprehending danger which did not exist in fact, and putting himself in a position where he was injured, see 41 AM. & ENG. R. CAS. 326, *abstr.*

48. When by care defendant could have prevented injury.*—(1) *Rule stated.*—The rule that the negligence of the injured party which proximately contributes to the injury precludes him from recovering has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. *Cincinnati, H. & D. R. Co. v. Kassen*, 52 Am. & Eng. R. Cas. 427, 49 Ohio St. 230, 16 L. R. A. 674, 31 N. E. Rep. 282.—QUOTING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.

When, in an action to recover damages for personal injuries, the defense of contributory negligence is relied on, the defendant is liable, although the plaintiff's negligence essentially co-operated to produce the injury, when it could have been averted by the exercise of reasonable care and ordinary prudence on the part of the defendant or his servants after discovering, or after the time when they ought to have discovered, the danger in which the party injured stood. *Cook v. Central R. & B. Co.*, 67 Ala. 533.—QUALIFYING *Government St. R. Co. v. Hanlon*, 53 Ala. 70.—REVIEWED IN *Frazer v. South & N. Ala. R. Co.*, 81 Ala. 185.—*Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114.—FOLLOWING *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621.—FOLLOWED IN *Cook v. Central R. & B. Co.*, 67 Ala. 533.—*Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. Rep. 505. *Denver & B. P. R. T. Co. v. Dwyer*, 3 Colo. App. 408. *Johnson v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 232. *Holohan v. Washington & G. R. Co.*, 8 Mackey (D. C.) 316. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; affirming 31 Ill. App. 621. *Meyers v. Chicago, R. I. & P. R. Co.*, 59 Mo. 223, 8 Am. Ry. Rep. 473. *Romick v. Chicago, R. I. & P. R. Co.*, 15 Am. & Eng. R. Cas. 288, 62 Iowa 167, 17 N. W. Rep. 458. *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa 29.—FOLLOWED IN *Wooster v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 152, 74 Iowa 593. REVIEWED IN *Benton v. Chicago, R. I. & P. R. Co.*, 55 Iowa 496.—*Lewis v. Baltimore & O. R. Co.*, 38 Md. 588, 10 Am. Ry. Rep. 521. *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486.

—DISTINGUISHING *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 259; *Keech v. Baltimore & W. R. Co.*, 17 Md. 45. REVIEWING *Butterfield v. Forrester*, 11 East 60; *Davies v. Mann*, 10 M. & W. 546; *Mayor, etc., of Colchester v. Brooke*, 7 Q. B. 377; *Tull v. Warman*, 5 C. B. N. S. 573, 94 E. C. L. 573.—*Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476.—FOLLOWED IN *Meyers v. Chicago, R. I. & P. R. Co.*, 59 Mo. 223; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267. QUOTED IN *White v. Wabash Western R. Co.*, 34 Mo. App. 57.—*Swigert v. Hannibal & St. J. R. Co.*, 9 Am. & Eng. R. Cas. 322, 75 Mo. 475. *Price v. St. Louis, K. C. & N. R. Co.*, 3 Am. & Eng. R. Cas. 365, 72 Mo. 414. *Dunkman v. Wabash, St. L. & P. R. Co.*, 95 Mo. 232, 10 West. Rep. 396, 4 S. W. Rep. 670; modifying 16 Mo. App. 548.—APPLIED IN *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348. FOLLOWED IN *Fiedler v. St. Louis, I. M. & S. R. Co.*, 107 Mo. 645; *Brooks v. Hannibal & St. J. R. Co.*, 35 Mo. App. 571; *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.—*Kelby v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806. *Warmington v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159. (By Smith, P. J., but Ellison and Gill, JJ., dissenting.)—QUOTING *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 138.—*Brooks v. Hannibal & St. J. R. Co.*, 35 Mo. App. 571.—FOLLOWING *Dunkman v. Wabash, St. L. & P. R. Co.*, 95 Mo. 232; *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22; *Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678; *Rine v. Chicago & A. R. Co.*, 88 Mo. 392; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 677; *Drain v. St. Louis, I. M. & S. R. Co.*, 86 Mo. 574.—*White v. Wabash Western R. Co.*, 34 Mo. App. 57. *Keim v. Union R. & T. Co.*, 15 Mo. App. 593. *Cadmus v. St. Louis, B. & T. Co.*, 15 Mo. App. 86. *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 25. *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35. *Kempinger v. St. Louis & I. M. R. Co.*, 3 Mo. App. 581. *Union Pac. R. Co. v. Merites*, 35 Neb. 204, 52 N. W. Rep. 1099. *Green v. Erie R. Co.*, 11 Hun (N. Y.) 333. *Sweeney v. New York Steam Co.*, 25 N. Y. S. R. 598, 6 N. Y. Supp. 528; affirmed in 117 N. Y. 642, mem., 22 N. E. Rep. 1131, 27 N. Y. S. R. 977. *Deans v. Wilmington & W. R. Co.*, 45 Am. & Eng. R. Cas. 45, 107 N. Car. 686, 12 S. E. Rep. 77.—APPLYING *Gunter v. Wicker*, 85 N. Car. 312; *Davies v. Mann*,

* See also ante, 10 (4).

10 M. & W. 546. NOT FOLLOWING Mulherin v. Delaware, L. & W. R. Co., 81 Pa. St. 366; Rounds v. Delaware, L. & W. R. Co., 64 N. Y. 129; Pennsylvania Co. v. Sinclair, 62 Ind. 301; Donaldson v. Milwaukee & St. P. R. Co., 21 Minn. 293; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434. OVER-RULING Herring v. Wilmington & R. R. Co., 10 Ired. (N. Car.) 402. — *Gunter v. Wicker*, 85 N. Car. 310. — QUOTING Doggett v. Richmond & D. R. Co., 78 N. Car. 305. — APPLIED AND APPROVED IN Deans v. Wilmington & W. R. Co., 107 N. Car. 686. DISTINGUISHED IN Emry v. Raleigh & G. R. Co., 109 N. Car. 589. — *Turrentine v. Richmond & D. R. Co.*, 23 Am. & Eng. R. Cas. 460, 92 N. Car. 638. — DISTINGUISHED IN Emry v. Raleigh & G. R. Co., 109 N. Car. 589. QUOTED IN Smith v. Richmond & D. R. Co., 34 Am. & Eng. R. Cas. 557, 99 N. Car. 241, 5 S. E. Rep. 896. — *Maully v. Wilmington & W. R. Co.*, 74 N. Car. 655, 13 Am. Ry. Rep. 105. *Troy v. Cape Fear & Y. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521. *Cincinnati, H. & D. R. Co. v. Kassen*, 52 Am. & Eng. R. Cas. 427, 49 O. St. 230, 31 N. E. Rep. 282, 16 L. R. A. 674. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172. *Hays v. Gainesville St. R. Co.*, 34 Am. & Eng. R. Cas. 97, 70 Tex. 602, 8 S. W. Rep. 491. *Trow v. Vermont C. R. Co.*, 24 Vt. 487. — QUOTING Davies v. Mann, 10 M. & W. 548. REVIEWING Mayor, etc., of Colchester v. Brooke, 7 Q. B. 339, 53 E. C. L. 376. — APPLIED IN Van Ostran v. New York C. & H. R. R. Co., 35 Hun (N. Y.) 590. — *Virginia Midland R. Co. v. White*, 34 Am. & Eng. R. Cas. 22, 84 Va. 498, 5 S. E. Rep. 573. — REVIEWING Davis v. Chicago & N. W. R. Co., 58 Wis. 646. — *Clark v. Richmond & D. R. Co.*, 18 Am. & Eng. R. Cas. 78, 78 Va. 709, 49 Am. Rep. 394. *Richmond & D. R. Co. v. Anderson*, 31 Gratt. (Va.) 812. — QUOTING Baltimore & P. R. Co. v. Jones, 95 U. S. 439; *Trow v. Vermont C. R. Co.*, 24 Vt. 495. — DISTINGUISHED IN Norfolk & W. R. Co. v. Carper, 88 Va. 556. FOLLOWED IN Miles v. Atlantic, M. & O. R. Co., 4 Hughes (U. S.) 172. QUOTED IN Richmond & D. R. Co. v. Pickleseimer, 85 Va. 798, 10 S. E. Rep. 44. — *Dononey v. Chesapeake & O. R. Co.*, 28 W. Va. 732. *Kadley v. London & N. W. R. Co.*, L. R. 1 App. Cas. 754, 46 L. J. Ex. D. 573, 35 L. T. 637, 25 W. R. 147; reversing L. R. 10 Ex. 100, 44 L. J. Ex. 73,

33 L. T. 209; which reversed L. R. 9 Ex. 71, 43 L. J. Ex. Ch. 73.

(2) *Its reason, extent, and limits.*—If one, by his own negligence puts himself in peril, yet if the party sought to be charged, after discovering the peril, or after being placed in a condition where, if diligent, he would have discovered the peril in time to avert the catastrophe, fails to exert proper diligence, which, if exerted, would probably prevent the disaster—this is culpable negligence, to which the primary negligence of the plaintiff is but remotely contributory. *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. — ADHERED TO IN Georgia Pac. R. Co. v. Hughes, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 473. DISTINGUISHED IN East Tenn., V. & G. R. Co. v. King, 81 Ala. 177; *Memphis & C. R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618. FOLLOWED IN *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376. LIMITED IN *Frazer v. South & N. Ala. R. Co.*, 81 Ala. 185.

And the defendant's want of ordinary care must be deemed to be the proximate cause of the injury, under such circumstances. *Hays v. Gainesville St. R. Co.*, 34 Am. & Eng. R. Cas. 97, 70 Tex. 602, 8 S. W. Rep. 491.

In such cases, however, time is to be allowed for the defendant to become aware of the conduct and situation of the plaintiff, for neither could be required to anticipate the other's negligence. *Hobbs v. Washington & G. R. Co.*, 8 Mackey (D. C.) 316. — QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 702. — *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588, 10 Am. Ry. Rep. 521.

It is not material how short an interval occurs between the negligent act of the plaintiff and that of the defendant, if the latter had time to discover the danger and avert it by the exercise of ordinary care. *Clark v. Wilmington & W. R. Co.*, 48 Am. & Eng. R. Cas. 546, 109 N. Car. 430, 14 S. E. Rep. 43.

But where there is no opportunity for the defendant to become aware of the negligence of the plaintiff, and the injury is occasioned by the concurrent and co-operating negligence of both, an action will not lie. *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588, 10 Am. Ry. Rep. 521.

The recovery by a plaintiff for an injury

produced by mutual negligence where the defendant, before the injury, discovered, or might have discovered, plaintiff's perilous position, caused by the concurring negligence of both parties, and neglected to use the means at his command to prevent the injury, does not rest on the ground that the defendant has been guilty of a second and independent act of negligence, which is the sole cause of the injury and which must be charged as a separate and independent cause of action, but on the ground that defendant's recklessness and wantonness cannot be excused by plaintiff's contributory negligence. *Kelny v. Missouri Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 186, 101 *Mo.* 67, 13 *S. W. Rep.* 806.

Although the plaintiff, suing for an injury resulting from the gross negligence of the defendant, may have been guilty of negligence, if, nevertheless, the injury might have been avoided by the proper care of the defendant, such co-operating negligence of the plaintiff will not exonerate the defendant. *Louisville & N. R. Co. v. Collins*, 2 *Div. (Ky.)* 114.—DISTINGUISHED IN *Louisville & N. R. Co. v. Sickings*, 5 *Bush (Ky.)* 1. FOLLOWED IN *Louisville & N. R. Co. v. Filbern*, 6 *Bush (Ky.)* 574.

(3) *Illustrations.*—Railroad companies are under the same obligations as other persons to use their own property so as not to hurt or injure others; and though a person be injured while unlawfully on their track, or contributes to the injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, they are liable in damages for the injury. *Brown v. Hannibal & St. J. R. Co.*, 50 *Mo.* 461, 3 *Am. Ky. Rep.* 540.—QUOTED IN *Bunting v. Central Pac. R. Co.*, 6 *Am. & Eng. R. Cas.* 282, 16 *Nev.* 377. REVIEWED IN *Frick v. St. Louis, K. C. & N. R. Co.*, 8 *Am. & Eng. R. Cas.* 280, 75 *Mo.* 595.

Where it appeared that plaintiff stood upon the track long enough prior to the accident, and far enough from the coming train for those operating the same, by the exercise of ordinary care, to have discovered his peril in time to stop the train before striking the plaintiff, plaintiff was entitled to recover, even though he was negligent in entering and stopping upon the track. *Duncan v. Missouri Pac. R. Co.*, 46 *Mo. App.* 198.—FOLLOWING *White v. Wabash Western R. Co.*, 34 *Mo. App.* 57.

And plaintiff would be entitled to recover under similar circumstances, where he was rightfully on the track but was guilty of negligence in failing to look out for the approach of cars. *Kelly v. Union R. & T. Co.*, 35 *Am. & Eng. R. Cas.* 396, 95 *Mo.* 279, 14 *West. Rep.* 721, 8 *S. W. Rep.* 420.

Where a defendant, after becoming aware of plaintiff's danger, by observing the condition and peril of plaintiff, could, by the exercise of reasonable care and prudence, have avoided the collision, the negligence, etc., of the plaintiff is not contributory. In such case it cannot be said that the collision would not have happened but for the negligence, etc., of plaintiff. *Healy v. Dry Dock, E. B. & B. R. Co.*, 14 *J. & S. (N. Y.)* 473.

40. When obedience to an ordinance would have prevented accident.—A company is liable for an injury caused by its servants, notwithstanding plaintiff's contributory negligence in being on its track, if the observance by it of a city ordinance in force would have enabled its servants to see plaintiff in time to have avoided the accident. *Jennings v. St. Louis, I. M. & S. R. Co.*, 99 *Mo.* 394, 11 *S. W. Rep.* 999.—FOLLOWED IN *Pope v. Kansas City Cable R. Co.*, 43 *Am. & Eng. R. Cas.* 290, 99 *Mo.* 400, 12 *S. W. Rep.* 891.

But running a train at a greater rate of speed than that prescribed by a city ordinance, within the corporate limits of the city, while negligence on the part of a company, will not of itself entitle the party to recover damages for an injury sustained by collision with a train, if the injury in part results from his own negligence. *Missouri Pac. R. Co. v. Burnett*, 3 *Tex. App. (Civ. Cas.)* 287.—CRITICISING *Missouri Pac. R. Co. v. Weisen*, 65 *Tex.* 443.

Where the evidence showed that when plaintiff drove on the track the train of cars was standing, with engine attached, about two hundred yards behind him, where he was in full view; that the cars were detached and allowed to run on a down-grade, with only one brakeman on them, who could not control their speed as they approached plaintiff, running at the rate of more than six miles an hour, the maximum allowed by a municipal ordinance there in force—these facts show such gross negligence as amounts to recklessness, wilfulness, wantonness, and avoid the defense of contributory negligence. *Georgia Pac. R.*

Co. v. O'Shields, 90 Ala. 29, 8 So. Rep. 248.

50. When defendant was guilty of wilful or wanton conduct.*—(1) *Rule stated*.—When contributory negligence is relied on as a defense to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defense is vitiated and overcome. *Cook v. Central R. & B. Co.*, 67 Ala. 533.—FOLLOWING *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114.—*Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306, 9 So. Rep. 509. *Georgia Pac. R. Co. v. O'Shields*, 90 Ala. 29, 8 So. Rep. 248. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41. *Shumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174, 17 Wash. L. Rep. 550. *Esrey v. Southern Pac. Co.*, 88 Cal. 399, 26 Pac. Rep. 211. *Kennedy v. Denver, S. P. & P. R. Co.*, 34 Am. & Eng. R. Cas. 40, 10 Colo. 493, 16 Pac. Rep. 210. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506. *Lake Shore & M. S. R. Co. v. Bodemer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; *affirming* 31 Ill. App. 621. *Illinois C. R. Co. v. Beard*, 49 Ill. App. 232. *Chicago & N. W. R. Co. v. Rielly*, 40 Ill. App. 416. *Citizens' St. R. Co. v. Willoby*, 58 Am. & Eng. R. Cas. 485, 134 Ind. 563, 33 N. E. Rep. 627. *Korradly v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551. *Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 137. *Belt R. & S. Y. Co. v. Mann*, 107 Ind. 89, 7 N. E. Rep. 893. *Ivens v. Cincinnati, W. & M. R. Co.*, 23 Am. & Eng. R. Cas. 258, 103 Ind. 27, 2 N. E. Rep. 134. *Pennsylvania Co. v. Sinclair*, 62 Ind. 301. *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26. *Kansas Pac. R. Co. v. Whipple*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 38. *Louisville & N. R. Co. v. Brice*, 28 Am. & Eng. R. Cas. 542, 84 Ky. 298, 1 S. W.

Rep. 483. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403. *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12. *Bouwmeester v. Grand Rapids & I. R. Co.*, 28 Am. & Eng. R. Cas. 476, 63 Mich. 557, 30 N. W. Rep. 337. *Kellny v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806.

A railroad company is liable for the recklessness or carelessness of its employes in failing to discover the danger of a person, where the exercise of ordinary care would have discovered the danger and averted the calamity, however gross the negligence of the injured party may have been in placing himself in such position of danger. *White v. Wabash Western R. Co.*, 34 Mo. App. 57.—APPLYING *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480, 65 Mo. 22. QUOTING *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476; *Burham v. St. Louis & I. M. R. Co.*, 56 Mo. 338; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476; *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 138; *Donohue v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 357.—FOLLOWED IN *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198.—*Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.

(2) *Its extent and limits*.—To entitle one to recover for an injury to which his own negligence may have contributed, the injurious act of defendant must have been purposely and intentionally committed, with a design to produce injury; or it must have been committed under such circumstances as that its natural and probable consequence would be to produce injury to others. *Belt R. & S. Y. Co. v. Mann*, 107 Ind. 89, 7 N. E. Rep. 893.—FOLLOWING *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 437.—*Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370.

And the intent to commit an injury may be either actual or constructive so as to make the injury one wilfully inflicted. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551.

And wilfulness or wantonness is always to be attributed to the defendant, if he might have avoided injuring the plaintiff notwithstanding his own negligence. *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370.—QUOTING *Waite v. North Eastern R. Co.*,

* See also ante, 10 (3).

Contributory negligence is not a defense where injury is wilful or gross, see notes, 30 AM. REP. 190; 44 AM. & ENG. R. CAS. 558, *abstr.*

El., Bl. & El. 719, 96 E. C. L. 719; Woolf v. Beard, 8 C. & P. 373, 34 E. C. L. 435; Hawkins v. Cooper, 8 C. & P. 473, 34 E. C. L. 485.—DISTINGUISHED IN *Lary v. Cleveland*, C., C. & I. R. Co., 3 Am. & Eng. R. Cas. 498, 78 Ind. 323. QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.

When wanton and wilful negligence on the part of defendant is charged and proved, it makes no difference to what extent the person killed or injured was guilty of a want of care. *Lake Shore & M. S. R. Co. v. Bademer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692; affirming 33 Ill. App. 479. *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12.—FOLLOWING *Louisville, C. & L. R. Co. v. Mahony*, 7 Bush (Ky.) 235.

"Gross negligence" on the part of the railroad engineer does not overcome the defense of contributory negligence, unless it is such as raises the presumption of a conscious indifference to consequences—that is, unless it is wanton, reckless, or intentional. *Carrington v. Louisville & N. R. Co.*, 41 Am. & Eng. R. Cas. 543, 88 Ala. 472, 6 So. Rep. 910. *Citizens' St. R. Co. v. Wilcoy*, 58 Am. & Eng. R. Cas. 485, 134 Ind. 563, 33 N. E. Rep. 627.

To avoid the defense of contributory negligence it is not necessary that the wrongful act of the defendant, or its agents and servants, should be "wanton and intentional," as erroneously stated in the case of *Government St. R. Co. v. Hanlon*, 53 Ala. 70; if the injury done be wanton, reckless, or intentional, that defense is overcome. *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621.—FOLLOWED IN *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376; *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114; *Cook v. Central R. & B. Co.*, 67 Ala. 533.

In no case will the wilful neglect of a party be excused by the contributing negligence of the person injured, unless the contributing fault is more than gross neglect, and amounts to a purposed injury which could not be avoided by a proper degree of care before or after its discovery. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403.—QUOTING *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 267.

51. Under various statutes.—(1) *Georgia*.—In an action against a railroad for damages on account of a personal in-

jury, where the negligence of the defendant, if there was any at all, seems to have been but slight, and that of the plaintiff greater, a verdict in favor of the plaintiff for \$10,000 is not only flagrantly extravagant, but so excessive as to disclose either bias in his favor or prejudice against the defendant, or that the jury wholly mistook and misapprehended the instructions of the court. *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.—REVIEWED IN *Central R. & B. Co. v. Smith*, 80 Ga. 526.

Sections 3034 and 2772 of the Ga. Code are *in pari materia*, but not identical. They provide for separate defenses to suits against railroads. The first applies where the person injured causes the injury to himself, or consents thereto; the second applies where the consequences of the present or antecedent negligence of the defendant are impending, but may be avoided by ordinary care on the part of the other party. Both include the doctrine of contributory negligence, and provide for a recovery in part, in case the negligence of both parties contributed to the injury. *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427. See also *Southwestern R. Co. v. Hankerson*, 61 Ga. 114.

(2) *Kentucky*.—Contributory neglect is not a defense to an action under the statute for wilful neglect, if wilful neglect is proved. *Louisville & N. R. Co. v. Brice*, 28 Am. & Eng. R. Cas. 542, 84 Ky. 298, 1 S. W. Rep. 483.

The Ky. statute, making defendant liable for causing injuries through gross neglect, regardless of any contributory negligence on the part of the person injured, applies to cases only where the injury results in death. *Illinois C. R. Co. v. Dick*, (Ky.) 15 S. W. Rep. 665.

The right to plead contributory negligence is denied only in cases arising under the statute authorizing the recovery of punitive damages, where the life of one person has been lost by the wilful neglect of another. *Owen v. Louisville & N. R. Co.*, 35 Am. & Eng. R. Cas. 687, 87 Ky. 626, 9 S. W. Rep. 698.

(3) *Mississippi*.—The provision in § 1047 of the Code of 1880, relating to the injury of an individual, was not intended to abrogate the common law rule that one cannot recover on account of the negligence of another if by reasonable care he could have avoided injury from it, but rather to pre-

* See also *ante*, 2, 3.

clude the idea that the penalty recoverable by the town, city, or village for a violation of the statute is exclusive of the right of an individual to redress for injury sustained at the time of such violation. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682.

(4) *Tennessee*.—Under statutory regulations, Code, §§ 1166–1168, in regard to railroads, in case of failure on the part of the railroad company to show that the precautions required have been complied with, the company is liable for the injury resulting, although the observance of the requirements would not have prevented the injury and the injured party contributed to the damage by his own negligence. Yet his negligence may and should be looked to by the jury in mitigation of damages. *Railroad Co. v. Walker*, 11 Heisk. (Tenn.) 383.—APPROVED IN *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428.

A charge that "it is the duty of an intelligent being to exercise reasonable precaution to avoid danger, and this precaution must be exercised in proportion to the danger and the knowledge of the danger," applies both to a court for common law negligence and for negligence under the Tennessee statute, the difference being that a violation of this rule would bar the remedy at common law and mitigate the damages under the statute. *Nashville & C. R. Co. v. Smith*, 15 Am. & Eng. R. Cas. 469, 9 Lea (Tenn.) 470.

The rule of this state, in the case of contributory negligence, is, that if the injured party proximately contribute to the injury, he cannot recover damages, nor can he recover if both parties are equally in fault; but he may recover if the negligence of the other party was the proximate cause of the injury, although he may have contributed to the injury by his own negligence, such negligence going only in mitigation of the damages. *Louisville, N. & G. S. R. Co. v. Fleming*, 18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128.

The negligence or wrongful conduct of the injured party may be considered in mitigation of damages, whether the damages recoverable be only compensatory, or compensatory and exemplary; and this rule

is applicable to all cases of contributory negligence, and is not confined to cases growing out of statutes regulating the duties of railroad employes on a moving train when an obstruction appears on the track. *Louisville, N. & G. S. R. Co. v. Fleming*, 18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128.—QUOTING *Louisville & N. R. Co. v. Conner*, 2 Baxt. (Tenn.) 382; *East Tenn., V. & G. R. Co. v. Humphreys*, 12 Lea (Tenn.) 206.

The negligence of the person injured, which caused or contributed to the accident, may be taken into consideration by the jury in determining the amount of damages to be given for the injury. *Louisville & N. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45.—OVERRULED IN *Nashville & C. R. Co. v. Prince*, 2 Heisk. (Tenn.) 580.

II. PLEADING.

52. When must be negated in declaration or complaint*—Illinois.

—In order to recover for damages for negligence, it must be alleged and proved that the party injured was at the time he was injured observing due or ordinary care for his own safety. *Chicago & A. R. Co. v. Crowder*, 49 Ill. App. 154. *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373.—QUOTED IN *Chicago, B. & Q. R. Co. v. Damerell*, 81 Ill. 450.

53. — *Indiana*.—Where a suit is based upon negligence, the complaint must aver that plaintiff was in the exercise of due care, or that the injury resulted without his fault, or contain some equivalent averment. *Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. Rep. 273. *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102. *Toledo, W. & W. R. Co. v. Bevin*, 26 Ind. 443. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228. *Michigan S. & N. I. R. Co. v. Lantz*, 29 Ind. 528. *Maxfield v. Cincinnati, I. & L. R. Co.*, 41 Ind. 269. *Hathaway v. Toledo, W. & W. R. Co.*, 46 Ind. 25, 6 Am. Ry. Rep. 399. *Jackson v. Indianapolis & St. L. R. Co.*, 47 Ind. 454. *Louisville, N. A. & C. R. Co. v. Boland*, 53 Ind. 398.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas.

* Duty to negative contributory negligence in complaint, see notes, 22 AM. & ENG. R. CAS. 651; 19 Id. 194.

When absence of contributory negligence must be averred, see 38 AM. & ENG. R. CAS. 183, *abstr.*

* Doctrine that contributory negligence goes in mitigation of damages, see note, 18 AM. & ENG. R. CAS. 362.

36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122.—*Gormley v. Ohio & M. R. Co.*, 5 Am. & Eng. R. Cas. 581, 72 Ind. 31. *Pennsylvania Co. v. Gallentine*, 7 Am. & Eng. R. Cas. 517, 77 Ind. 322. *Cincinnati, W. & M. R. Co. v. Peters*, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168. *Fl. Wayne, C. & L. R. Co. v. Gruff*, 132 Ind. 13, 31 N. E. Rep. 460. —QUOTING *Ohio & M. R. Co. v. Walker*, 113 Ind. 196.—*Bier v. Jeffersonville, M. & I. R. Co.*, 132 Ind. 78, 31 N. E. Rep. 471.

Or else the absence of contributory negligence must clearly appear from the facts which are alleged. *Maxfield v. Cincinnati, I. & L. R. Co.*, 41 Ind. 269.

The averment in a complaint for negligence that the plaintiff was free from fault is so essential and fundamental to the cause of action that its omission will render the complaint bad on a motion in arrest of judgment, whether the action be commenced in the circuit or superior court or before a justice of the peace. *Cincinnati, W. & M. R. Co. v. Stanley*, (Ind. App.) 27 N. E. Rep. 316.

A complaint for negligence which does not aver or show the absence of negligence by the plaintiff contributing to the injury is bad on demurrer. *Louisville, N. A. & C. R. Co. v. Lockridge*, 22 Am. & Eng. R. Cas. 649, 93 Ind. 191.

And this is true notwithstanding the fact that it charges generally, by way of epithet, that the acts complained of were wrongfully, unlawfully, and wilfully done. *Louisville, N. A. & C. R. Co. v. Schmidt*, 106 Ind. 73, 5 N. E. Rep. 684; further appeal, 126 Ind. 200.

But an express averment that the plaintiff was guilty of no contributory negligence is not necessary if that fact otherwise appears; e. g., as where it is averred that while the plaintiff, being a passenger, was seated in the defendant's coach, the coach, by reason of the defendant's negligence, broke through a bridge, whereby, etc. *Bedford, S. O. & B. R. Co. v. Ruinbolt*, 21 Am. & Eng. R. Cas. 466, 99 Ind. 551.—QUOTED IN *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225. REVIEWED IN *Ohio & M. R. Co. v. Smith*, 5 Ind. App. 560.

The general rule that a person suing for damages resulting from negligence must aver that he was in the exercise of due care himself does not apply where he sues to recover for the value of wood which he had

already placed near a railroad track under a contract to sell it to the company, but which was burned before it was measured or paid for. In such case it is sufficient to allege that the fire took place through the negligence of the company's servants, without further alleging that the plaintiff was free from negligence. *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143.—DISTINGUISHED IN *Pennsylvania Co. v. Gallentine*, 7 Am. & Eng. R. Cas. 517, 77 Ind. 322.

54. — Massachusetts.—Where a plaintiff sues to recover for injuries at a crossing, a complaint charging that he was in the exercise of due care, that he was knocked down and injured by a locomotive of defendant's through the negligence and carelessness of the company, by reason of its failure to give the required signals, states a good cause of action at common law, but is not sufficient under the Mass. Act of 1874, ch. 372, § 164. In such case plaintiff cannot recover unless he was using due care when hurt. *Fuller v. Boston & A. R. Co.*, 14 Am. & Eng. R. Cas. 695, 133 Mass. 491.

55. — Michigan.—Plaintiff must allege and prove that the injury was occasioned by defendants' negligence, particularly specifying the duty and the breach thereof which constituted negligence, and averring also that plaintiff himself was in the exercise of ordinary care and did not by his own negligence contribute to the injury. *Thompson v. Flint & P. M. R. Co.*, 23 Am. & Eng. R. Cas. 289, 57 Mich. 300, 23 N. W. Rep. 820.—REVIEWED IN *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376.

56. When need not be negated in declaration or complaint—Alabama—California.—In an action to recover for personal injuries, based upon the negligence of the defendant, it is not necessary to aver due care on the part of the plaintiff, or, in other words, to deny contributory negligence. *Holt v. Whatley*, 51 Ala. 569. *Thompson v. Duncan*, 76 Ala. 334. *Mary Lee C. & R. Co. v. Chambliss*, 53 Am. & Eng. R. Cas. 254, 97 Ala. 171, 11 So. Rep. 897. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409, 7 Am. Ry. Rep. 244.

For contributory negligence is a matter of defense only. *Mobile & M. R. Co. v. Crenshaw*, 8 Am. & Eng. R. Cas. 340, 65 Ala. 566.

In an action for injuries to the person,

occasioned by negligence, it is not necessary to aver that the plaintiff was in the exercise of reasonable care or without fault; these are matters of defense. *Government St. R. Co. v. Hanlon*, 53 Ala. 70.—OVER- RULED IN *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412.

57. — Georgia.—Negligence of a company being presumed when injury by the running of its train is shown, it is not necessary for a father, suing for loss of the services of his minor son, not an employé of the company, who was killed on a public crossing, to allege in his declaration either that he or the son was in the exercise of due care, or was without fault. *Georgia Midland & G. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. Rep. 580.

58. — Kentucky.—In an action for negligence, when the plaintiff has shown the negligence of the company, and the injury caused by it, the cause of action is made out, and, unless his own proof shows contributory negligence on his part, he is entitled to recover; and it is not necessary for plaintiff to allege or prove affirmatively that he was not guilty of negligence. *Paducah & M. R. Co. v. Hoeft*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338.—DISTINGUISHING *Allyn v. Boston & A. R. Co.*, 105 Mass. 78. QUOTING *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 407.

59. — Missouri.—Contributory negligence is a matter of defense, and need not be alleged or proved by the plaintiff. *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. Rep. 3. *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474. *Petty v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 618, 88 Mo. 306.—FOLLOWING *Thompson v. North Mo. R. Co.*, 51 Mo. 190; *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509.

And it is not incumbent on a plaintiff suing for an injury caused by defendant's negligence to allege that the injury was done "without any fault on plaintiff's part." *Hudson v. Wabash Western R. Co.*, 101 Mo. 13, 14 S. W. Rep. 15.

60. — Montana.—In an action for damages for injury of person the plaintiff need not allege or prove that the same occurred without his fault or contributing neglect. Proof of such fault of negligence is proper matter of defense. *Higley v. Gilmer*, 3 Mont. 90.—FOLLOWING *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.

61. — New Hampshire.—In case for an injury resulting from the alleged negligence of the defendants, it is not necessary to allege that the plaintiff was without fault. *Smith v. Eastern R. Co.*, 35 N. H. 356.—APPROVED IN *Becker v. New York, L. E. & W. R. Co.*, 31 N. Y. S. R. 750, 57 Hun 585, 10 N. Y. Supp. 413.

62. — New York.—A plaintiff need not negative contributory negligence in his complaint. The fact is involved in the allegation that the injury was caused by the negligence of the defendant. *Mele v. Delaware & H. Canal Co.*, 27 J. & S. (N. Y.) 367, 14 N. Y. Supp. 630, 39 N. Y. S. R. 153. *Lee v. Troy Citizens' Gas-Light Co.*, 98 N. Y. 115.

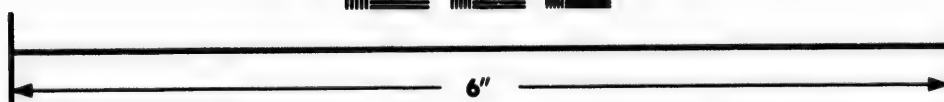
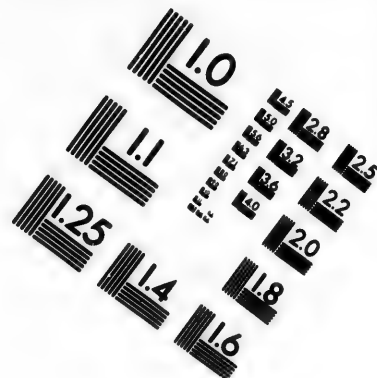
And to prove this allegation it is necessary, and the burden is on plaintiff to establish, that his own negligence did not cause or contribute to the injury. *Lee v. Troy Citizens' Gas-Light Co.*, 98 N. Y. 115.

Where a company is sued for personal injuries based upon the alleged negligence of the company, contributory negligence is a matter of defense, and need not be negatived in the complaint, nor by evidence, unless there is something tending to establish it. *Hackford v. New York C. & H. R. R. Co.*, 13 Abb. Pr. N. S. (N. Y.) 18.

63. — North Carolina.—The suggestion that the complaint does not disclose a cause of action, in that it does not negative concurring negligence in the plaintiff, has no force; the injury is to land, and no agency of the plaintiff could have averted it. So held, where the complaint was in an action for damages for timber burned by fire communicated through defendant's negligence. *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.

64. — Ohio—Oregon.—In an action for an injury alleged to have been caused by the negligence of the defendant, it is not necessary to allege in the petition that the injury was caused without the fault or negligence of the plaintiff, unless the other averments necessary to state a cause of action suggest the inference that the plaintiff may have been guilty of contributory negligence. *Street R. Co. v. Nolthenius*, 19 Am. & Eng. R. Cas. 191, 40 Ohio St. 376.—FOLLOWING *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.

Where the plaintiff relies upon the negligence of the defendant, he need not allege that he himself is free from contributory



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negligence. *Johnston v. Oregon S. L. R. Co.*, 23 *Oreg.* 94, 31 *Pac. Rep.* 283.—EXPLAINING *Coughtry v. Willamette St. R. Co.*, 21 *Oreg.* 245, 27 *Pac. Rep.* 1031. QUOTING *Walsh v. Oregon R. & N. Co.*, 10 *Oreg.* 253.

65. — South Carolina.—Contributory negligence is a matter of defense and need not be negated in the complaint. *Donahue v. Enterprise R. Co.*, 32 *So. Car.* 299, 11 *S. E. Rep.* 95.—FOLLOWING *Carter v. Columbia & G. R. Co.*, 19 *So. Car.* 20, *Crouch v. Charleston & S. R. Co.*, 21 *So. Car.* 495; *Darwin v. Charlotte, C. & A. R. Co.*, 23 *So. Car.* 531.

Where a plaintiff sues for an injury resulting from defendant's negligence, it is not necessary to aver due care in the complaint on plaintiff's part. *Crouch v. Charleston & S. R. Co.*, 29 *Am. & Eng. R. Cas.* 495, 21 *So. Car.* 495.

66. — Texas.—In a suit for damages against a railway company on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributory negligence on the part of plaintiff. An exception to this rule exists when the petition, from its averments, would establish, if unexplained, a *prima-facie* case of negligence of the party injured. *Texas & P. R. Co. v. Murphy*, 46 *Tex.* 356, 13 *Am. Ry. Rep.* 319.—FOLLOWED IN *Houston & T. C. R. Co. v. Cowser*, 57 *Tex.* 293. QUOTED IN *Murray v. Gulf, C. & S. F. R. Co.*, 38 *Am. & Eng. R. Cas.* 177, 73 *Tex.* 2, 11 *S. W. Rep.* 125.—*Houston & T. C. R. Co. v. Cowser*, 57 *Tex.* 293.—FOLLOWING *Texas & P. R. Co. v. Murphy*, 46 *Tex.* 356.—*Murray v. Gulf, C. & S. F. R. Co.*, 38 *Am. & Eng. R. Cas.* 177, 73 *Tex.* 2, 11 *S. W. Rep.* 125. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 *Tex.* 181, 2 *S. W. Rep.* 513.—REVIEWING *Houston & T. C. R. Co. v. Cowser*, 57 *Tex.* 293.

67. — Virginia—Washington.—If in his declaration plaintiff alleges that his injury was caused by the defendant's negligence, it is sufficient, and it is not necessary to deny that he was guilty of contributory negligence. If defendant relies on the contributory negligence of plaintiff to defeat the suit, he must prove it, unless the fact be inferable from all the circumstances. *Norfolk & W. R. Co. v. Gilman*, 88 *Va.* 239, 13 *S. E. Rep.* 475.—REVIEWING *Johnson v. Hudson River R. Co.*, 5 *Duer* (N.

Y.) 21.—*Baltimore & O. R. Co. v. Whittington*, 30 *Gratt. (Va.)* 805.

Contributory negligence is a matter of defense, and its absence need not be alleged and proved by the plaintiff. *Northern Pac. R. Co. v. Hess*, 48 *Am. & Eng. R. Cas.* 91, 2 *Wash.* 383, 26 *Pac. Rep.* 866.

68. — West Virginia.—In his declaration against a corporation for injury as the result of negligence, the plaintiff need not aver that he was not guilty of contributory negligence, that being a matter of defense to be alleged and proved, if it exist, by the defendant. *Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12.—DISTINGUISHING *Dun v. Seaboard & R. R. Co.*, 78 *Va.* 645.—*Fowler v. Baltimore & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 480, 18 *W. Va.* 579.

69. Wisconsin.—Where a railroad company is sued for negligently causing the death of a person, it is not necessary to aver in the complaint that the deceased was free from contributory negligence. *Potter v. Chicago & N. W. R. Co.*, 20 *Wis.* 533.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252.

70. When defendant's wilful, wanton, or intentional acts are alleged.—Where, in an action against a railroad company, the charge is wilful negligence, the plaintiff need not negative in his complaint contributory negligence, for the reason that that makes the defendant liable, notwithstanding contributory negligence. *Pennsylvania Co. v. Gallentine*, 7 *Am. & Eng. R. Cas.* 517, 77 *Ind.* 322.—DISTINGUISHING *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 *Ind.* 150; *Indianapolis & C. R. Co. v. Paramore*, 31 *Ind.* 143.

A complaint which alleges that the injury was the result of an act of the company's servant performed in a "wilful, reckless, careless, and unlawful manner," and fails to aver that there was no contributory negligence by the plaintiff, is good on demurrer. *Indiana, B. & W. R. Co. v. Burdge*, 18 *Am. & Eng. R. Cas.* 192, 94 *Ind.* 46.

If the plaintiff cannot set up such a combination of facts as shows that he is free from negligence on his part, he must by proper allegation charge that the injury was caused by the wanton or wilful negligence of the defendant, such as in law amounts to gross negligence and a reckless disregard of the consequences of his neglect. *Denman v.*

Johnston, 85 Mich. 387, 48 N. W. Rep. 565.
—QUOTED IN *Frost v. Milwaukee & N. R. Co.*, 96 Mich. 470.

A complaint alleging that the defendant, by its agents, servants, and employes, carelessly, negligently, wantonly, and wilfully ran and caused to be run a locomotive engine against and over the plaintiff, thereby injuring him, does not charge a wilful injury, and, there being no negation of contributory negligence, is bad. *Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 437.

Under a complaint which alleges that plaintiff's injuries were inflicted wantonly, wilfully, and intentionally, a recovery cannot be had on proof of simple negligence merely, nor is contributory negligence a defense to the action; but a count which charges that the injury was caused "negligently, carelessly, and recklessly" is not the equivalent of a charge that it was done wantonly, wilfully, or intentionally. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. Rep. 262.—QUOTING *Harrison v. State*, 37 Ala. 154.

71. Form and sufficiency of the averment, generally.—It is sufficient if the plaintiff plead in general terms the absence of contributory negligence. The degree of care required can be estimated by no fixed standard, but must be determined by the circumstances of each particular case. *Messenger v. Pate*, 42 Iowa 443.

Plaintiff attempted to lead his horse across a railroad track, when the horse became frightened by the wheel of the buggy scraping on the rail and ran away and injured him, and he sued for the injury. Held, that an averment in the complaint that he took the horse by the bit "and attempted to lead him gently and carefully" over the railroad is not a sufficient averment that he was in the exercise of due care. *Thompson v. Flint & P. M. R. Co.*, 23 Am. & Eng. R. Cas. 289, 57 Mich. 300, 23 N. W. Rep. 820.

A general averment that plaintiff, who was injured while walking upon a railroad track in a public street, was "without fault or negligence" is sufficient on general demurrer. *Lewis v. Galveston, H. & S. A. R. Co.*, 39 Am. & Eng. R. Cas. 372, 73 Tex. 504, 11 S. W. Rep. 528.

For it is not necessary in a declaration to negative each fact. *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32.

72. — Indiana.—(1) *The rule stated.*—An allegation that the plaintiff is "without fault" has a technical significance, and admits proof of any facts tending to show its truth, and is sufficient, unless the facts especially pleaded clearly show that he is chargeable with contributory negligence. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338. *Ohio & M. R. Co. v. Hawkins*, 1 Ind. App. 213, 27 N. E. Rep. 331. *Louisville, E. & St. L. Con. R. Co. v. Hanning*, 53 Am. & Eng. R. Cas. 452, 131 Ind. 528, 31 N. E. Rep. 187. *Cincinnati, I., St. L. & C. R. Co. v. Darling*, 130 Ind. 376, 30 N. E. Rep. 416. *Pennsylvania Co. v. O'Shaughnessy*, 41 Am. & Eng. R. Cas. 479, 122 Ind. 588, 23 N. E. Rep. 675. *Louisville, N. A. & C. R. Co. v. Head*, 4 Am. & Eng. R. Cas. 619, 80 Ind. 117. *Louisville, N. A. & C. R. Co. v. Smith*, 58 Ind. 575, 19 Am. Ry. Rep. 18. *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43, 8 Am. Ry. Rep. 315.

The general averment of a want of negligence on the part of the plaintiff is controlled by the specific allegations of fact which show that he was negligent. *Spencer v. Ohio & M. R. Co.*, 130 Ind. 181, 29 N. E. Rep. 915. *Toledo, St. L. & K. C. R. Co. v. Adams*, 131 Ind. 38, 30 N. E. Rep. 794.

The averment in a complaint for negligently causing injury, that the plaintiff was without fault, is technical, and admits of any legitimate evidence to prove it. It makes the complaint good in this respect against an inference of contributory negligence, unless the inference arises as a necessary legal conclusion from the facts stated. So long as the facts stated do not require a contrary inference, the averment entitles the plaintiff to have the question submitted to the jury, as a question of fact, whether there was such negligence. *Pittsburgh, C. & St. L. R. Co. v. Wright*, 5 Am. & Eng. R. Cas. 628, 80 Ind. 182.

(2) *Illustrations.*—A general averment that the plaintiff "was without fault or negligence in all said matter, and acted with prudence and care in all said transactions," is sufficient to show that the plaintiff was free from contributory negligence, unless the specific averment of facts shows that he was, notwithstanding, guilty of such negligence. *Stewart v. Pennsylvania Co.*, 130 Ind. 242, 29 N. E. Rep. 916.

A complaint averred that the intestate was directed to assist in making up a train in defendant's yard; that as part of his duty he was proceeding carefully and diligently along the track to a switch to which it was his duty to go; that an incompetent employé in charge of the train caused it to be run at a speed of 40 miles an hour without giving any signals or warning; and that intestate was run over and killed. It also contained a general averment that there was no fault or negligence whatever on the part of the intestate. *Held*, that the allegations of the complaint did not show contributory negligence on the part of the intestate so as to break the force of the general averment that he exercised due care. *Pennsylvania Co. v. O'Shaughnessy*, 41 *Am. & Eng. R. Cas.* 479, 122 *Ind.* 588, 23 *N. E. Rep.* 675.

Where a company is sued to recover for the death of an employé, a general averment that the deceased was without fault excludes the existence of contributory negligence. *Louisville, N. A. & C. R. Co. v. Sandford*, 117 *Ind.* 265, 19 *N. E. Rep.* 770.

A complaint for negligence resulting in injury, in which it fairly appears that the plaintiff needlessly took the risk of probable danger, does not sufficiently negative contributory negligence by the averment that the injury occurred "without any negligence on the part of the plaintiff." *Evansville & T. H. R. Co. v. Griffin*, 100 *Ind.* 221, 50 *Am. Rep.* 783.—DISTINGUISHED IN *Pennsylvania Co. v. O'Shaughnessy*, 41 *Am. & Eng. R. Cas.* 479, 122 *Ind.* 588, 23 *N. E. Rep.* 675.

Where a party sues for personal injuries a complaint is good on demurrer that states generally that the injury resulted without any fault or negligence whatever of plaintiff, without directly alleging that his negligence did not contribute to the loss of time and labor, and the injuries for which he claims damages. *Ohio & M. R. Co. v. Nickless*, 71 *Ind.* 271.

(3) *Motion to make more specific*.—A general averment that the plaintiff was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence. Negligence may be charged in general terms, and if the defendant desires a more definite statement of the facts, his remedy is by motion to make the complaint more specific, and not by demurrer. *Ohio & M. R. Co. v. Walker*, 32 *Am. & Eng. R. Cas.* 121, 113 *Ind.* 196, 15 *N.*

E. Rep. 234, 12 *West. Rep.* 731.—QUOTED IN *Ft. Wayne, C. & L. R. Co. v. Gruff*, 132 *Ind.* 13.—*Pennsylvania Co. v. Horton*, 132 *Ind.* 189, 31 *N. E. Rep.* 45.—FOLLOWED IN *Lake Erie & W. R. Co. v. Mugg*, 132 *Ind.* 168.

73. Necessity of negating negligence of fellow-servant.—In an action by an employé of a railroad company against another corporation—in this instance a bridge company—for damages for personal injuries, it is not necessary to allege in the complaint that the fellow-servants of the plaintiff were not guilty of negligence contributing to the injury. *Kentucky & I. Bridge Co. v. Hall*, 125 *Ind.* 220, 25 *N. E. Rep.* 219.

74. Demurrer to complaint showing on its face negligence of injured party.—If the complaint or declaration on its face shows clearly defined and palpable negligence on the part of the person injured contributing to the injury, no cause of action is stated, and it is proper to demur. *Mau v. Morse*, 3 *Colo. App.* 359. *Paterson v. Central R. & B. Co.*, 85 *Ga.* 653, 11 *S. E. Rep.* 872. *Dimmey v. Wheeling & E. G. R. Co.*, 27 *W. Va.* 32.

While contributory negligence is a defense which must be affirmatively pleaded, yet it may be decided on demurrer to the petition that, according to the facts stated by the plaintiff, his own negligence, or want of ordinary or common care and caution, so far contributed to the injury complained of that but for his co-operating fault the injury would not have occurred, and that he cannot recover. There are, however, two exceptions to the rule: one, where the injury is intentionally done, or results from wilful negligence of the defendant; and the other is where the direct cause of the injury is the omission of defendant, after becoming aware of plaintiff's negligence, to use a proper degree of care to avoid the consequence of such negligence. *Faire v. Louisville & N. R. Co.*, 47 *Am. & Eng. R. Cas.* 594, 91 *Ky.* 541.

A complaint alleging that a company negligently suffered loose blocks of firewood, etc., to lie scattered about near its track at a certain station where plaintiff and other brakemen were obliged to run along beside the track in the performance of their duties in coupling cars, thereby rendering the performance of such duties unnecessarily dangerous, and that

plaintiff, in attempting to make a coupling at such station, without any negligence on his part, stumbled upon such a block of wood and was thrown between the cars and injured, but not showing that plaintiff knew of or was chargeable with knowledge of such obstructions along the track prior to the happening of the accident, states a cause of action, and is good as against demurrer. *Kulchan v. Green Bay, W. & St. P. R. Co.*, 12 *Am. & Eng. R. Cas.* 208, 58 *Wis.* 319, 17 *N. W. Rep.* 17. —FOLLOWING *Dorsey v. Phillips & C. Constr. Co.*, 42 *Wis.* 585; *Bessex v. Chicago & N. W. R. Co.*, 45 *Wis.* 477.

75. When must be specially pleaded as a defense.—In an action to recover damages for personal injuries, contributory negligence on the part of the plaintiff himself is defensive. Matter in the nature of confession and avoidance must be specially pleaded (*Ala. Code*, § 2675), and is not available under the general issue. *Kansas City, M. & B. R. Co. v. Crocker*, 95 *Ala.* 412, 11 *So. Rep.* 262.—OVERRULING *Government St. R. Co. v. Hanlon*, 53 *Ala.* 70. QUALIFYING *North Birmingham St. R. Co. v. Calderwood*, 89 *Ala.* 254.

Contributory negligence is a matter of defense and, to be availed of, must be pleaded. *Schlereth v. Missouri Pac. R. Co.*, 96 *Mo.* 509, 10 *S. W. Rep.* 66. *Davis v. Kansas City Belt R. Co.*, 46 *Mo. App.* 180. *Louisville & N. R. Co. v. Yniestra*, 29 *Am. & Eng. R. Cas.* 297, 21 *Fla.* 700. *Hudson v. Wabash Western R. Co.*, 101 *Mo.* 13, 14 *S. W. Rep.* 15. *Parsons v. Missouri Pac. R. Co.*, 94 *Mo.* 286, 12 *West. Rep.* 615, 6 *S. W. Rep.* 464. *Donovan v. Hannibal & St. J. R. Co.*, 26 *Am. & Eng. R. Cas.* 588, 89 *Mo.* 147, 1 *S. W. Rep.* 232. *Schultze v. Missouri Pac. R. Co.*, 32 *Mo. App.* 438. *Brown v. Hannibal & St. J. R. Co.*, 31 *Mo. App.* 661. *Keitel v. St. Louis C. & W. R. Co.*, 28 *Mo. App.* 657. *Taylor v. Missouri Pac. R. Co.*, 26 *Mo. App.* 336. *Johnston v. Oregon S. L. R. Co.*, 23 *Oreg.* 94, 31 *Pac. Rep.* 283. *Missouri Pac. R. Co. v. Watson*, 72 *Tex.* 631, 10 *S. W. Rep.* 731. *San Antonio & A. P. R. Co. v. Bennett*, 76 *Tex.* 151, 13 *S. W. Rep.* 319. *Andreson v. Ogden U. R. & D. Co.*, 8 *Utah* 128, 30 *Pac. Rep.* 305.

Unless it appears from the pleading of the plaintiff. *Missouri Pac. R. Co. v. Watson*, 72 *Tex.* 631, 10 *S. W. Rep.* 731.

Or unless plaintiff's case discloses want of care on the part of the injured party, or

exposes him to suspicion of negligence. *San Antonio & A. P. R. Co. v. Bennett*, 76 *Tex.* 151, 13 *S. W. Rep.* 319.—QUOTED IN *Galveston R. & T. Co. v. Burkett*, 2 *Tex. Civ. App.* 308.

Contributory negligence is a matter of defense which cannot be considered under a motion for nonsuit. *Carter v. Oliver Oil Co.*, 34 *So. Car.* 211, 13 *S. E. Rep.* 419.

Contributory negligence is strictly an affirmative defense, and in order to be availed of by defendant as a matter of pleading must be specially pleaded. Nor is the foregoing rule affected by the fact that the petition states that plaintiff was injured "without any fault on his part," and the answer denies the averment. *Hudson v. Wabash Western R. Co.*, 101 *Mo.* 13, 14 *S. W. Rep.* 15.—NOT FOLLOWING *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 *Mo.* 482.

76. Where plaintiff's case shows negligence on his part.—Where, in an action founded on the negligence of the defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged and cannot recover, notwithstanding such contributory negligence is not pleaded. If it falls short of this, and remains a question of fact which might be decided either way, then it should be pleaded to be available as a defense. *Schultze v. Missouri Pac. R. Co.*, 32 *Mo. App.* 438.

If plaintiff's case develops contributory negligence on his part, the defendant may take advantage of it, although his answer contains no allegation of the same. *Murray v. Gulf, C. & S. F. R. Co.*, 38 *Am. & Eng. R. Cas.* 177, 73 *Tex.* 2, 11 *S. W. Rep.* 125.—QUOTING *Texas & P. R. Co. v. Murphy*, 46 *Tex.* 363; *Dallas & W. R. Co. v. Spicker*, 61 *Tex.* 427.—*Louisville & N. R. Co. v. Yniestra*, 29 *Am. & Eng. R. Cas.* 297, 21 *Fla.* 700. *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 *Miss.* 601, 7 *So. Rep.* 401. *Hudson v. Wabash Western R. Co.*, 101 *Mo.* 13, 14 *S. W. Rep.* 15. *Brown v. Hannibal & St. J. R. Co.*, 31 *Mo. App.* 661.

Although contributory negligence is generally an affirmative defense which must be pleaded, yet, if an inference of contributory negligence arises from the plaintiff's testimony, the question is properly submitted to the jury. *Evans & H. Fire Brick Co. v. St. Louis & S. F. R. Co.*, 21 *Mo. App.*

648.—FOLLOWED IN *McGuire v. Missouri Pac. R. Co.*, 23 Mo. App. 325.

77. Facts constituting negligence must be set out.—A plea averring contributory negligence in general terms is not sufficient to admit proof thereof. It must state the facts constituting such negligence. *Murray v. Gulf, C. & S. F. R. Co.*, 38 Am. & Eng. R. Cas. 177, 73 Tex. 2, 11 S. W. Rep. 125.—QUOTING *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 503.—REVIEWED IN *Galveston R. & T. Co. v. Burkett*, 2 Tex. Civ. App. 308.—*Watkins v. Southern Pac. R. Co.*, 14 Sawy. (U. S.) 30.

It is not sufficient to aver generally that the damages sustained by the adverse party were the result of his own negligence and want of proper care directly contributing to produce the same. *Harrison v. Missouri Pac. R. Co.*, 7 Am. & Eng. R. Cas. 382, 74 Mo. 364, 41 Am. Rep. 318.—FOLLOWING *Waldhiser v. Hannibal & St. J. R. Co.*, 71 Mo. 516.—DISTINGUISHED IN *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567.

78. Plea of confession and avoidance.—Contributory negligence is a defense which necessarily implies negligence on the part of the defendant, and is therefore a plea of confession and avoidance. *Watkins v. Southern Pac. R. Co.*, 14 Sawy. (U. S.) 30.

79. When may be proved under a general denial.—Where a plaintiff is required to negative contributory negligence in his complaint, it is sufficiently put in issue by a general denial. *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

In Indiana, where plaintiff must negative contributory negligence, evidence thereof may be introduced under a general denial, and it is therefore proper, where both the general denial and a special plea stating the facts are filed, to strike out the special plea. *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82.

An answer alleging facts showing that the negligence of the plaintiff contributed to the injury, or facts showing that the injury was caused solely by the plaintiff's negligence, is sufficient on demurrer, though unnecessary where the general denial is pleaded. *Hathaway v. Toledo, W. & W. R. Co.*, 46 Ind. 25, 6 Am. Ry. Rep. 399.

Plaintiff's contributory negligence may be shown under a general denial. If especially pleaded the court may order that such plea be made definite and certain or be

stricken out. And such order is not appealable. *McQuade v. Chicago & N. W. R. Co.*, 68 Wis. 616, 32 N. W. Rep. 633.

Where the answer is a general denial, the defendant cannot invoke the contributory negligence of the plaintiff, unless the evidence offered in the latter's behalf shows such contributory negligence as will defeat the action. *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509, 10 S. W. Rep. 66.

It seems that where in a negligence case the complaint contains no averment of lack of contributory negligence on plaintiff's part, and the answer does not aver the existence of such contributory negligence, the court is, notwithstanding, justified in admitting on the trial evidence on that point and submitting it to the jury. *Law v. Jewett*, 6 Am. & Eng. R. Cas. 111, 86 N. Y. 616.—REVIEWED IN *Greany v. Long Island R. Co.*, 24 Am. & Eng. R. Cas. 473, 101 N. Y. 419, 5 N. E. Rep. 425.

80. When may be shown under plea of "not guilty by statute."—Evidence of contributory negligence is properly admissible under a defense of "not guilty by statute," without any special plea of contributory negligence, and at any rate in this case, even if, strictly speaking, the evidence was not admissible as the pleadings stood; still, it having been given without objection, the plaintiff could not afterwards complain. *Doan v. Michigan C. R. Co.*, 17 Ont. App. 481; reversing 18 Ont. 482.

81. — under specific denial of the plaintiff's negative averment.—Where the plaintiff alleges in his complaint that the injury which is the subject of the action was not caused by any fault or negligence on his part, and the defendant, instead of moving to strike out the allegation, specifically denies the same, an issue is formed on the question of contributory negligence, and no further pleading is necessary thereabout. *Watkins v. Southern Pac. R. Co.*, 38 Fed. Rep. 711.

III. QUESTIONS OF LAW AND FACT.

82. Contributory negligence a question of fact, generally.*—(1) *Rule stated.*—The law only defines the circum-

* When plaintiff's contributory negligence for the jury, see 35 AM. & ENG. R. CAS. 408, *abstr.*; 37 *Id.* 93, *abstr.*; 38 *Id.* 182, *abstr.*; 41 *Id.* 268, *abstr.*; 42 *Id.* 190, *abstr.*; 43 *Id.* 299, *abstr.*

Whether negligence is question of law or a

stances that will make one guilty of contributory negligence. The question whether these circumstances exist is for the jury. *Dufour v. Central Pac. R. Co.*, 67 Cal. 319, 7 Pac. Rep. 769.

Contributory negligence is a question of fact for the jury, and not a question of law for the court. *Williams v. Southern Pac. R. Co.*, (Cal.) 9 Pac. Rep. 152. *Jamison v. San José & S. C. R. Co.*, 3 Am. & Eng. R. Cas. 350, 55 Cal. 593. *Louisville & N. R. Co. v. Shelton*, 43 Ill. App. 220. *Chicago v. McLean*, 133 Ill. 148, 8 L. R. A. 765, 24 N. E. Rep. 527. *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. Rep. 510; affirming 35 Ill. App. 430. *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. Rep. 513; affirming 30 Ill. App. 437. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855. *Hoggatt v. Evansville & T. H. R. Co.*, 3 Ind. App. 437, 29 N. E. Rep. 941. *Pittsburgh, C. & St. L. R. Co. v. Wright*, 6 Am. & Eng. R. Cas. 114, 80 Ind. 236. *Alender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264, 8 Am. Ry. Rep. 115. *Kansas City, Ft. S. & G. R. Co. v. Owen*, 25 Kan. 419. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770. *Baltimore & O. R. Co. v. Owings*, 28 Am. & Eng. R. Cas. 639, 65 Md. 502, 4 Atl. Rep. 899. *Philadelphia, W. & B. R. Co. v. Hoggland*, 66 Md. 149, 7 Atl. Rep. 105. *Chaffee v. Boston & L. R. Corp.*, 104 Mass. 108. *Adams v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 105, 100 Mo. 555, 12 S.W. Rep. 637, 13 S. W. Rep. 509. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S.W. Rep. 804, 7 L. R. A. 819, 13 S.W. Rep. 587. *Dickson v. Mis-*

souri Pac. R. Co., 104 Mo. 491, 16 S.W. Rep. 381. *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336. *Corcoran v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 399, 16 S.W. Rep. 411. *Smith v. Union R. Co.*, 61 Mo. 588. *Conroy v. Twenty-third St. R. Co.*, 52 How. Pr. (N. Y.) 49. *Towns v. Rome, W. & O. R. Co.*, 4 Silv. Sup. Ct. (N. Y.) 332. *Halsey v. Rome, W. & O. R. Co.*, 12 N. Y. S. R. 319, 46 Hun 678, mem.; affirmed in 113 N. Y. 622, mem., 20 N. E. Rep. 876, 22 N. Y. S. R. 992. *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590; affirmed 104 N. Y. 683, mem., 7 N. Y. S. R. 868.

question of fact, see notes, 39 AM. & ENG. R. CAS. 624; 8 AM. ST. REP. 849; 51 AM. REP. 602. When case should be left to jury as to question of contributory negligence, in actions for personal injuries, see note, 34 AM. REP. 697.

When contributory negligence of passenger a question for jury, see note, 1 L. R. A. 542.

Whether failure to look for detached cars is contributory negligence is for jury, see 42 AM. & ENG. R. CAS. 191, *abstr.*

When contributory negligence is for the jury in an action by laborer for injury received by sudden starting of car which he was unloading, see 45 AM. & ENG. R. CAS. 45, *abstr.*

When contributory negligence of employé, who forgets that a car is defective and is injured while using it, is for the jury, see 41 AM. & ENG. R. CAS. 429, *abstr.*

—APPLYING *Weston v. New York El. R. Co.*, 73 N. Y. 595; *Hoffman v. New York C. & H. R. R. Co.*, 13 Hun 589.—*Meagher v. Cooperstown & C. V. R. Co.*, 75 Hun (N. Y.) 455, 27 N. Y. Supp. 504, 57 N. Y. S. R. 679. *Fisher v. Monongahela Connecting R. Co.*, 131 Pa. St. 292, 18 Atl. Rep. 1016. *McGill v. Pittsburg & W. R. Co.*, 152 Pa. St. 331, 25 Atl. Rep. 540. *Boatwright v. Northeastern R. Co.*, 25 So. Car. 128. *Texas & P. R. Co. v. Kirby*, 1 Tex. App. (Civ. Cas.) 285. *Gulf, C. & S. F. R. Co. v. Moore*, 69 Tex. 157, 6 S.W. Rep. 631. *Smith v. Rio Grande Western R. Co.*, 9 Utah 141, 33 Pac. Rep. 626. *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48, 4 Fed. Rep. 706.

Except in cases where there is no conflict in the evidence, and no material fact left to inference. *Alabama G. S. R. Co. v. Arnold*, 30 Am. & Eng. R. Cas. 546, 80 Ala. 600, 2 So. Rep. 337. *Woodward Iron Co. v. Jones*, 80 Ala. 123.

Or unless contributory negligence is so clearly established as to justify the court in granting a nonsuit. *MacDougall v. Central R. Co.*, 12 Am. & Eng. R. Cas. 143, 63 Cal. 431.

Or unless from the certificate of the evidence, or facts proved, it appears that the evidence on the subject of contributory negligence was such that the court would be justified in setting aside the verdict and granting a new trial. *Sheff v. Huntington*, 16 W. Va. 307.

Or unless the evidence offered by the plaintiff shows such contributory negligence as prevents his recovery as a matter of law. *Matthews v. Missouri Pac. R. Co.*, 26 Mr. App. 75. *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 Am. & Eng. R. Cas. 749, 64 Wis. 447, 24 N. W. Rep. 618, 54 Am. Rep. 634.

Or unless it appear, in an action to recover for the alleged negligence of defendant, that plaintiff has been guilty of gross negligence, or was injured by reason of a failure on his part to exercise ordinary care and caution to avoid danger. *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586. *Towns v. Rome, W & O. R. Co.*, 4 Silv. Sup. Ct. (N. Y.) 332.

(2) *Its scope and extent.*—Whether the person injured was guilty of contributory negligence is a question within the province of the jury to decide, and one that the court cannot rightfully take from them. *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

But should submit it to them as a question of fact, under proper and suitable instructions. *Philadelphia, W. & B. R. Co. v. Hogland*, 66 Md. 149, 7 Atl. Rep. 105. *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 20 Am. Ry. Rep. 101. *Smith v. Union R. Co.*, 61 Mo. 588. *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349.

And when the question of contributory negligence has been properly submitted under proper instructions to the jury, their verdict is conclusive on that point. *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770. *Sheff v. Huntington*, 16 W. Va. 307.

For of the weight of the evidence of contributory negligence the jury are the sole judges. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520.

And courts will interfere with the verdict of the jury only in clear cases. *Hoggatt v. Evansville & T. H. R. Co.*, 3 Ind. App. 437, 29 N. E. Rep. 941.—QUOTING *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346.

If it is a question to be decided upon admitted facts whether a man of common prudence would have acted as the plaintiff did, and the common knowledge and experience of men do not make the court to determine whether the plaintiff's conduct was negligent, the question of contributory negligence is to be submitted to the jury. *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 20 Am. Ry. Rep. 101.

It is for the jury to determine whether

plaintiff has been guilty of negligence, by a consideration of his conduct under the circumstances shown to have surrounded him at the time of the alleged negligent act or conduct. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 20 Ill. 587, 11 N. E. Rep. 855. *Hobbold v. Sugar Refining Co.*, 44 Ill. App. 418.

Contributory negligence must, like negligence (when it does not arise from violation of a statutory duty), depend upon the facts of the particular case, of which the jury should judge under general instructions. *Gulf, C. & S. F. R. Co. v. Greenlee*, 35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129.—FOLLOWED IN *Dillingham v. Parker*, 80 Tex. 572.

Ordinarily contributory negligence is a question of fact depending in each case upon all the circumstances disclosed, applying, as the measure of ordinary care, the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which a plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it should be submitted to the jury. What is ordinary care is a question of fact, even though the facts are undisputed. It is the judgment and experience of the jury, and not the court, which is to be appealed to. The refusal of the judge to withdraw a case from the jury cannot, in any case, be construed as an intimation that, in his opinion, the jury ought to find in plaintiff's favor; but, on the contrary, it is his duty to submit it to the jury if there is any evidence to justify a finding, although he may think it preponderates against the plaintiff. *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208.—QUOTED IN *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45.

83. Particular illustrations.—(1) *Generally.*—The question whether a certain plaintiff, at the time of receiving an injury, was using due care or whether he was grossly negligent, is not one of law for the court to determine, but one of fact to be ascertained by the jury, under all the evidence. The same may be said in respect to comparative negligence of the parties. *Illinois C. R. Co. v. Haskins*, 22 Am. & Eng. R. Cas. 343, 115 Ill. 300, 2 N. E. Rep. 654.

In a suit against a gravel-road company

to recover damages for injuries to the plaintiff, resulting, as alleged, from obstructions in, and the bad repair of, the defendant's road, the question as to whether or not the plaintiff's negligence contributed to the alleged injuries, is a question of fact, and is properly left to the jury. *Ramsey v. Rushville & M. Gravel Road Co.*, 81 Ind. 394.

Whether it is contributory negligence to walk upon a sidewalk in a dark night without a light is a question of fact for the jury, and not a question of law for the court. *Maloy v. New York C. R. Co.*, 58 Barb. (N. Y.) 182.

The question whether it is contributory negligence to place lumber within the right of way of the company at a point where lumber intended for shipment is usually placed, is for the jury. *Gibbons v. Wisconsin Valley R. Co.*, 25 Am. & Eng. R. Cas. 479, 66 Wis. 161, 28 N. W. Rep. 170.—DISTINGUISHING *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.

Plaintiff claimed that he was injured while passing along the side of a track by stumbling on obstructions left there by the company. The company's claim was that he was injured while attempting to get on the pilot of a moving engine. *Held*, that it was a question for the jury to determine what caused the accident, and if they should find that it was caused by attempting to get on the pilot, they must find for the defendant. *Grant v. Union Pac. R. Co.*, 45 Fed. Rep. 673.

In an action against a railway company as a common carrier to recover damages for personal injuries, if the facts relating to contributory negligence are disputed, that question should be submitted to the jury; and if the jury find for the plaintiff, the court is not required in the exercise of judicial discretion to set the verdict aside. *Washington & G. R. Co. v. Harmon*, 58 Am. & Eng. R. Cas. 380, 147 U. S. 571, 13 Sup. Ct. Rep. 557.

(2) *Going into dangerous place—Crossing track.*—While it is the duty of a person approaching a place of danger to do so cautiously, and with due and proper care for his safety, it cannot be said, as a matter of law, that he must take a particular precaution or measure, or do just what a prudent man would under all circumstances. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855.

A man's hat blew off in front of an approaching engine, and he was killed in trying to recover it. *Held*, that his error of judgment in thinking that he had time to recover his hat could not be declared contributory negligence, as a matter of law, where the proof leaves it uncertain as to the distance of the train and the time between the attempt and its striking him. In such case the question of negligence should be left to the jury. *Bernhard v. Rensselaer & S. R. Co.*, 1 Abb. App. Dec. (N. Y.) 131, 23 How. Pr. 166; affirming 32 Barb. 165, 19 How. Pr. 199.—APPROVED IN *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451. FOLLOWED IN *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326. QUOTED IN *Wichita & W. R. Co. v. Davis*, 32 Am. & Eng. R. Cas. 65, 37 Kan. 743, 16 Pac. Rep. 78.

In such case even if the jury believe that the company was not negligent in first colliding with the deceased, still where there is evidence tending to show that the deceased's clothing got caught in the engine and it was some time before he was killed, and that the engine might have been stopped at the rate of speed it was going before he was killed, though this evidence is contradicted, still a verdict against the company will not be disturbed. *Bernhard v. Rensselaer & S. R. Co.*, 1 Abb. App. Dec. (N. Y.) 131, 23 How. Pr. 166; affirming 32 Barb. 165, 19 How. Pr. 199.

Where a passenger steps from a car and is struck by a train on an adjoining track, the question of his contributory negligence in failing to look is for the jury, and it is error to direct a nonsuit. *Green v. Erie R. Co.*, 11 Hun (N. Y.) 333.

The question of plaintiff's contributory negligence was a question of fact for the jury, where it appeared that he was in charge of an omnibus running to and from a station and on the evening in question was at the station about ten feet from the track, but, being unable to see along the track in either direction, he left the omnibus and went upon the track where he could have seen an approaching train, but failing to look and listen, although aware that a freight train was then on the track near the crossing, he started to cross over, when the omnibus and harness were struck and damaged. It did not appear that the driver of the train had given any warning by sounding the bell or blowing the whistle. *Bennett v. Grand Trunk R. Co.*, 7 Ont. App. 470.

(3) *Standing near track*.—Plaintiff was struck and injured while standing near a track, but out of the way of danger of cars of ordinary width, by being hit by a beam which lay across the end of a flat-car. *Held*, that the question of his contributory negligence was for the jury. *Kansas Pac. R. Co. v. Ward*, 4 Colo. 30.

Plaintiff was standing near a railroad track when a train collided with a coal cart, which was thrown against him, and he was injured. *Held*, that the question of whether he was using proper care in standing where he did, was properly submitted to the jury. *Quill v. New York C. & H. R. R. Co.*, 11 N. Y. Supp. 80, 16 Daly 313, 32 N. Y. S. R. 612; *affirmed in* 126 N. Y. 629, *mem.*, 36 N. Y. S. R. 1012.

(4) *Failure to look and listen*.—The question of whether plaintiff was guilty of contributory negligence in failing to see or hear an approaching train before going upon the track is for the jury, where it appears that it was nearly dark; that he did stop and listen, but his view of the track was obstructed by buildings, and snow was falling and a strong wind blowing against the train. *Brown v. Rome, W. & O. R. Co.*, 16 N. Y. S. R. 456, 1 N. Y. Supp. 286; *affirmed in* 121 N. Y. 669, *mem.*

Plaintiff was crossing at a point where there were five tracks. The view was obstructed by standing cars until about the time he reached the tracks. He stopped on one of the tracks to look and listen, when very near to him was a space of five feet between tracks, where he could have stopped and had a good view. *Held*, that the question of his contributory negligence was for the jury. *Beisegel v. New York C. R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 29.

Where a person not an employé of the company is assisting in moving a car on a siding out to where it is to be unloaded, the question of his negligence in not watching for trains which might back up against the car, or in not anticipating the approach of a train which injures him, is for the jury. *Conlan v. New York C. & H. R. R. Co.*, 74 Hun 115, 26 N. Y. Supp. 659, 56 N. Y. S. R. 316.

It cannot be said that a person traveling along a way must at all times look where he steps or be charged with negligence, as matter of law, it being a question for the jury under all of the testimony. *Retan v.*

Lake Shore & M. S. R. Co., 94 Mich. 146, 53 N. W. Rep. 1094.

Upon the question of contributory negligence, where the evidence was conflicting, the duty of discovering the truth devolved upon the jury, the court announcing the legal principles applicable to any state of facts found by them to be true. If plaintiff was sober at the time, but could not move from his perilous position by reason of his foot being fastened, his duty to look and listen is not involved in the consideration of this case, as the performance of such duty would be unavailing. If the agents of the company saw his dangerous situation, and by proper exertions could have stopped the train before it came in contact with him, or if he was lying on the track in a helpless condition produced by intoxication, and they saw him and could have stopped the train in time to avoid the accident, but failed to do so, defendant was liable in the action. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325.

(5) *Sudden peril—Choosing between courses of action*.—Where a person is put in sudden peril, the question of his contributory negligence, or whether he exercised ordinary care to extricate himself, under the circumstances, is for the jury. *Remer v. Long Island R. Co.*, 48 Hun (N. Y.) 352, 15 N. Y. S. R. 884, 1 N. Y. Supp. 124; *affirmed in* 113 N. Y. 669, *mem.*, 21 N. E. Rep. 1116, 23 N. Y. S. R. 994.

It is a question for the jury to determine whether a person is guilty of contributory negligence in hurrying forward along a track when a train is approaching from behind instead of jumping in a ditch filled with water at the side of the track. *Remer v. Long Island R. Co.*, 36 Hun (N. Y.) 253.

The fact that a person who was injured while passing over a defective crosswalk knew of the defect and that there was some risk in so passing, and he might easily have gone around the dangerous place, does not, as matter of law, establish contributory negligence. *McKeigue v. Junesville*, 68 Wis. 50, 31 N. W. Rep. 208.

(6) *Drath*.—In the absence of direct testimony as to the care exercised by a person killed or injured on a railroad where he had the right to be, it is the province of the jury to determine from the facts and circumstances proved whether he was guilty

of contributory negligence, as it is not to be presumed he carelessly imperiled his own life. *Cahill v. Cincinnati*, N. O. & T. P. R. Co., 49 Am. & Eng. R. Cas. 390, 92 Ky. 345.

Where a person is killed at a crossing by a moving train, in view of the noise made by the train it cannot be said, as a matter of law, that he was negligent in failing to hear the warning of men near by to get off the track; but the question of his contributory negligence is for the jury. *O'Connor v. Missouri Pac. R. Co.*, 32 Am. & Eng. R. Cas. 61, 94 Mo. 150, 13 West. Rep. 587, 7 S. W. Rep. 106.

When, in a suit to recover damages for the killing of another, alleged to have been done by the negligent conduct of defendant, the circumstances attending the killing are such that a jury may deduce the conclusion that the deceased was not himself guilty of contributory negligence, and the verdict is for the plaintiff, the supreme court will on appeal rarely set the verdict aside. The amount of testimony requisite to show the absence of contributory negligence is for the jury, and their finding will generally be deemed conclusive. *International & G. N. R. Co. v. Kuehn*, 35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484.

Where a railroad company is sued for negligently causing the death of a person, the question as to whether the deceased was guilty of contributory negligence is for the jury, under all the circumstances of the case and proper instructions from the court. It is no more a question of law for the court than is the question of defendant's negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.—QUOTING *Sullivan v. New York, N. H. & H. R. Co.*, 154 Mass. 524, 28 N. E. Rep. 911. RECONCILING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 615.

84. When different minds could come to different conclusions.—Where the circumstances of a particular case are such as to warrant different inferences, so that one impartial and sensible man may draw the inference and conclusion that the injured person was guilty of contributory negligence, while another man, equally impartial and sensible, may draw a different conclusion, the court will not decide, as a matter of law, the question of contributory negligence, but will leave it to

the jury under proper instructions. *Cleveland, C., C. & I. R. Co. v. Harrington*, 49 Am. & Eng. R. Cas. 358, 131 Ind. 426, 30 N. E. Rep. 37. *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20.—QUOTING *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586.—*Wood v. Chicago, M. & St. P. R. Co.*, 24 Am. & Eng. R. Cas. 91, 68 Iowa 491, 27 N. W. Rep. 473.—OVERRULING *Wood v. Chicago, M. & St. P. R. Co.*, 59 Iowa 196.—*Nugent v. Boston, C. & M. R. Co.*, 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797. *Roux v. Blodgett & D. Lumber Co.*, 85 Mich. 519, 48 N. W. Rep. 1092.—QUOTING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.—*Adams v. Iron Cliffs Co.*, 41 Am. & Eng. R. Cas. 414, 78 Mich. 271, 44 N. W. Rep. 270. *Mynning v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 665, 64 Mich. 93, 31 N. W. Rep. 147.—REVIEWED IN *Van Auker v. Chicago & W. M. R. Co.*, 96 Mich. 307.—*Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. Rep. 1112. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819. *Petty v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 618, 88 Mo. 306. *Davis v. Kansas City Belt R. Co.*, 46 Mo. App. 180. *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.—FOLLOWING *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.—*Solen v. Virginia & T. R. Co.*, 13 Nev. 106.—QUOTING *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 663; *Wheeler v. Boston & A. R. Co.*, 105 Mass. 206; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *Maloy v. New York C. R. Co.*, 58 Barb. (N. Y.) 184. REVIEWING *French v. Taunton Branch R. Co.*, 116 Mass. 541; *Craig v. New York, N. H. & H. R. Co.*, 118 Mass. 437; *Johnson v. Winona & St. P. R. Co.*, 11 Minn. 296; *Schierhold v. North Branch & M. R. Co.*, 40 Cal. 447; *Maginnis v. New York C. & H. R. R. Co.*, 52 N. Y. 220; *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 368; *Hackford v. New York C. & H. R. R. Co.*, 53 N. Y. 654.—FOLLOWED IN *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.—*Erickson v. Twenty-third St. R. Co.*, 71 Hun (N. Y.) 108. *Northrup v. New York, O. & W. R. Co.*, 37 Hun (N. Y.) 295.—QUOTING *Ernst v. Hudson River R. Co.*, 36 How. Pr. (N. Y.) 91; *Wasmer v. Delaware, L. & W.*

R. Co., 80 N. Y. 218; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622; *Kellogg v. New York C. & H. R. R. Co.*, 79 N. Y. 72.—*Pendril v. Second Ave. R. Co.*, 2 J. & S. (N. Y.) 481, 43 *How. Pr.* 399. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 *How. Pr.* 61, 3 *Abb. Pr. N. S.* 82; *reversing* 32 *Barb.* 159.—QUOTING *Ireland v. Oswego, H. & S. Plankroad Co.*, 13 N. Y. 533; *Keller v. New York C. R. Co.*, 24 *How. Pr.* 177; *Bernhardt v. Rensselaer & S. R. Co.*, 23 *How. Pr.* 168.—DISTINGUISHED IN *Behrens v. Kansas Pac. R. Co.*, 8 Am. & Eng. R. Cas. 184, 5 *Colo.* 400; *Gillespie v. Newburgh*, 54 N. Y. 468. FOLLOWED IN *Wolfskiel v. Sixth Ave. R. Co.*, 38 N. Y. 49; *Thrings v. Central Park R. Co.*, 7 *Robt. (N. Y.)* 616. QUOTED IN *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454. REVIEWED IN *Lake Shore & M. S. R. Co. v. Miller*, 25 *Mich.* 274.

The evidence adduced to establish contributory negligence must be such that fair-minded men could not draw different inferences from it, before the court will be justified under this defense in withdrawing the facts from the consideration of the jury by directing a verdict for the plaintiff. *Mackey v. Baltimore & P. R. Co.*, 8 *Mackey (D. C.)* 282.

When the question of contributory negligence depends upon a variety of circumstances from which different minds may arrive at different conclusions as to whether the plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instructions. *Cleveland, C., C. & I. R. Co. v. Schneider*, 35 *Am. & Eng. R. Cas.* 334, 45 *Ohio St.* 678, 17 *N. E. Rep.* 321.—FOLLOWING *Baltimore & O. R. Co. v. Whitacre*, 35 *Ohio St.* 627.—*Baltimore & O. R. Co. v. Whitacre*, 35 *Ohio St.* 627.—FOLLOWED IN *Cleveland, C., C. & I. R. Co. v. Schneider*, 35 *Am. & Eng. R. Cas.* 334, 45 *Ohio St.* 678.

And the instructions ought to have reference to the circumstances of the case, and be so given as to secure the fair consideration and judgment of the jury upon the points at issue. *Marietta & C. R. Co. v. Picklesley*, 24 *Ohio St.* 654, 7 *Am. Ry. Rep.* 186.—QUOTED IN *Blackmore v. Toronto St. R. Co.*, 38 *U. C. Q. B.* 172.

Where the conduct of a plaintiff is such that honest men might differ as to the inference to be drawn therefrom, whether he was guilty of negligence or not, the case

should be submitted to the jury. *Nash v. New York C. & H. R. R. Co.*, 14 *N. Y. S. R.* 531.—QUOTED IN *Atwater v. Veteran*, 26 *N. Y. S. R.* 945.

And should never be taken from the jury when to do so will prevent their giving to either party the benefit of any inference which might be drawn from a comparison of all the facts. *Staal v. Grand Rapids & I. R. Co.*, 57 *Mich.* 239, 23 *N. W. Rep.* 795.

85. Where facts are doubtful or in dispute.—Where the evidence upon the question of contributory negligence is conflicting, or the inferences to be drawn from it are doubtful or not clear, the court will not decide, as a matter of law, whether there was or was not contributory negligence, but will, under proper instructions, leave the question to the jury as one of fact. *Indiana Car Co. v. Parker*, 100 *Ind.* 181.—DISTINGUISHED IN *Indianapolis & St. L. R. Co. v. Watson*, 33 *Am. & Eng. R. Cas.* 334, 114 *Ind.* 20, 12 *West. Rep.* 285, 14 *N. E. Rep.* 721.—*Chicago & E. I. R. Co. v. Hedges*, 25 *Am. & Eng. R. Cas.* 550, 105 *Ind.* 398, 7 *N. E. Rep.* 801. *Colorado C. R. Co. v. Martin*, 17 *Am. & Eng. R. Cas.* 592, 7 *Colo.* 592, 4 *Pac. Rep.* 1118. *Philadelphia, W. & B. R. Co. v. State*, 10 *Am. & Eng. R. Cas.* 792, 58 *Md.* 372. *Brown v. Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 87, 99 *Mo.* 310, 12 *S. W. Rep.* 655. *Taylor v. Missouri Pac. R. Co.*, 26 *Mo. App.* 336.—QUOTED IN *Ridings v. Hannibal & St. J. R. Co.*, 33 *Mo. App.* 527.—*New York, L. E. & W. R. Co. v. Steinbrenner*, 23 *Am. & Eng. R. Cas.* 330, 47 *N. J. L.* 161. *Bonnell v. Delaware, L. & W. R. Co.*, 39 *N. J. L.* 189. *Orange & N. Horse R. Co. v. Ward*, 25 *Am. & Eng. R. Cas.* 359, 47 *N. J. L.* 560, 4 *Atl. Rep.* 331. *Dwyer v. New York, L. E. & W. R. Co.*, 28 *Am. & Eng. R. Cas.* 155, 48 *N. J. L.* 373, 7 *Atl. Rep.* 417. *Pendril v. Second Ave. R. Co.*, 2 J. & S. (N. Y.) 481, 43 *How. Pr.* 399. *Pennsylvania R. Co. v. Richter*, 2 *Am. & Eng. R. Cas.* 220, 42 *N. J. L.* 180. *Central R. Co. v. Moore*, 24 *N. J. L.* 824.—FOLLOWED IN *Aycrigg v. New York & E. R. Co.*, 30 *N. J. L.* 460.—*Wallace v. Western N. C. R. Co.*, 34 *Am. & Eng. R. Cas.* 553, 98 *N. Car.* 494, 2 *Am. St. Rep.* 346, 4 *S. E. Rep.* 503. *Vannatta v. Central R. Co.*, 154 *Pa. St.* 262, 26 *Atl. Rep.* 384. *Hill v. New Haven*, 37 *Vt.* 501.—FOLLOWED IN *Germond v. Central Vt. R. Co.*, 65 *Vt.* 126.—*Dahl v. Milwaukee City R. Co.*, 19 *Am. & Eng. R. Cas.* 121, 62 *Wis.* 652, 22

N. W. Rep. 755.—FOLLOWING *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 357.—*Hoth v. Peters*, 55 Wis. 405, 13 *N. W. Rep.* 219.

Upon the controverted issue of contributory negligence, the determination of the question is peculiarly for the jury under proper instructions, and it would be usurpation for the trial court to take such an issue from the jury. *Cook v. Missouri Pac. R. Co.*, 19 Mo. App. 329. *Drain v. St. Louis, I. M. & S. R. Co.*, 86 Mo. 574; reversing 10 Mo. App. 531.—FOLLOWED IN *Brooks v. Hannibal & St. J. R. Co.*, 35 Mo. App. 571.

The question of contributory negligence should not be withdrawn from the jury so long as there is any rational doubt, not only as to the facts, but also as to the inference to be deduced from the facts. *Germond v. Central Vt. R. Co.*, 65 Vt. 126, 26 *Atl. Rep.* 401.—FOLLOWING *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Hill v. New Haven*, 37 Vt. 501; *Worthington v. Central Vt. R. Co.*, 64 Vt. 107; *Stackus v. New York C. & H. R. R. Co.*, 79 N. Y. 464.

Where contributory negligence is made a defense, and the evidence relating thereto is conflicting, the court should refuse to dismiss, and leave the question to the jury. *Keese v. New York, N. H. & H. R. Co.*, 67 *Barb. (N. Y.)* 205, 4 *Hun* 673.

For the court cannot decide the question of plaintiff's contributory negligence unless it clearly appears. *New York, L. E. & W. R. Co. v. Steinbrenner*, 23 *Am. & Eng. R. Cas.* 330, 47 *N. J. L.* 161.

Whenever material facts are disputed, or even in doubt, or inferences of fact are to be drawn from the testimony, it is the exclusive province of the jury to determine the facts and apply to them the law declared by the court. *Fisher v. Monongahela Connecting R. Co.*, 131 *Pa. St.* 292, 18 *Atl. Rep.* 1016.

When the circumstances under which a plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, the question should be submitted to the jury. What is ordinary care in such case, even where the facts are undisputed, is peculiarly a question for the jury, under proper instructions. *Bell v. New York C. & H. R. R. Co.*, 29 *Hun (N. Y.)* 560.—REVIEWING *Fletcher v. Auburn & S. R. Co.*, 25 *Wend. (N. Y.)* 462; *People ex rel. v. Dutchess & 3 D. R. D.*—19.

C. R. Co., 58 N. Y. 153; *Worster v. Forty-second St. & G. S. F. R. Co.*, 50 N. Y. 203.

Where the issue before the jury is upon the negligence of the parties, and the testimony upon the points in controversy is conflicting or uncertain, it is not erroneous for the presiding judge, after stating to the jury, in language to which no exception is taken, the degree of care required on either side, and that the plaintiff's right to recover depends upon proof to their satisfaction that the injuries were received by the fault of the defendants, without fault on the part of the passenger contributing to the result, to decline upon request to determine as matter of law whether a certain state of facts, claimed on one side to exist and denied on the other, would or would not constitute negligence. *Hobbs v. Eastern R. Co.*, 66 *Me.* 572, 19 *Am. Ky. Rep.* 210.

86. Contributory negligence, when a mixed question of law and fact.—

The question of negligence is a mixed one of law and fact, and when a case is merely one of negligence against negligence, if from the entire evidence it clearly appears that the injured party acted otherwise than as a man of ordinary prudence, and was guilty of negligence contributing to the injury, the question becomes one of law and may be determined by the court without submitting it to the jury. *Denver & B. P. Rapid Transit Co. v. Dwyer*, 3 *Colo. App.* 408.

In an action for damages for alleged negligence, the question of contributory negligence on the part of the plaintiff is usually a mixed question of law and fact, to be decided by the jury under proper instructions from the court; but if all the material facts touching the alleged negligence be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of negligence becomes a matter of law merely, and the court should so charge the jury. *Cleveland, C. & C. R. Co. v. Crawford*, 24 *Ohio St.* 631, 7 *Am. Ky. Rep.* 172.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252. QUOTED IN *Pennsylvania Co. v. Rathgeb*, 32 *Ohio St.* 66; *Blackmore v. Toronto St. R. Co.*, 38 *U. C. Q. B.* 172.—*Cleveland, C. & I. R. Co. v. Elliott*, 28 *Ohio St.* 340, 14 *Am. Ky. Rep.* 123.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Morgan*, 42 *Am. & Eng. R. Cas.* 184, 43 *Kan.* 1.—*Pittsburgh, C. & St. L. R. Co. v. Fleming*, 30 *Ohio St.* 480. *Pennsylvania Co. v. Rathgeb*,

32 *Ohio St. 66*.—QUOTING *Cleveland, C. & C. R. Co. v. Crawford*, 24 *Ohio St. 631*. REVIEWING *Baltimore & P. R. Co. v. Jones*, *Wkly. Cin. L. Bull.* Jan. 7, 1878.—QUOTED IN *Horn v. Baltimore & O. R. Co.*, 54 *Fed. Rep.* 301, 6 *U. S. App.* 381, 4 *C. C. A.* 346.

The question whether one, in an action brought by him to recover damages for injuries received in attempting the rescue of another, should be charged with contributory negligence in so acting is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. *Pennsylvania Co. v. Langendorf*, 49 *Am. & Eng. R. Cas.* 317, 48 *Ohio St.* 316, 28 *N. E. Rep.* 172.—DISTINGUISHING *Evansville & C. R. Co. v. Hiatt*, 17 *Ind.* 102. FOLLOWING *Eckert v. Long Island R. Co.*, 43 *N. Y.* 502.

The question of contributory negligence is a mixed question of law and fact, and while it is a question for the jury to determine, it must be determined by them by applying the law to the facts; and where instructions are given by the court pertaining to the questions at issue which compound the law correctly, they cannot be disregarded in reaching the verdict; and if instructions asked for by the plaintiff, and given, are calculated to mislead the jury, and such instructions are excepted to by the defendant, a verdict in accordance therewith will not be sustained. *Fisher v. West Virginia & P. R. Co.*, (*W. Va.*) 58 *Am. & Eng. R. Cas.* 337, 19 *S. E. Rep.* 578.

87. Contributory negligence, when a question of law, generally.—It is only in very exceptional cases that contributory negligence can be adjudged as a necessary legal conclusion from the facts found. *Meagher v. Cooperstown & C. V. R. Co.*, 75 *Hun* 455, 27 *N. Y. Supp.* 504, 57 *N. Y. S. R.* 679.

Cases, however, frequently do arise wherein it becomes the duty of the trial court to determine the question of the negligence of the party as a matter of law. *Colorado C. R. Co. v. Martin*, 17 *Am. & Eng. R. Cas.* 592, 7 *Colo.* 592, 4 *Pac. Rep.* 1118. *Baltimore & O. R. Co. v. Shipley*, 31 *Md.* 368.

But in order to justify such course, the evidence must show rashness or culpable negligence of the party injured. *Parker v. Lake Shore & M. S. R. Co.*, 20 *Ill. App.* 280.

Ordinarily the question of contributory negligence is one of fact for the jury; but

if it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the question of negligence is one of law to be decided by the court. *Nehrbas v. Central Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 670, 62 *Cal.* 320. *Woodward Iron Co. v. Jones*, 80 *Ala.* 123. *Orcutt v. Pacific Coast R. Co.*, 85 *Cal.* 291, 24 *Pac. Rep.* 661.—APPROVING *Fernandes v. Sacramento City R. Co.*, 52 *Cal.* 45.—*Glascok v. Central Pac. R. Co.*, 73 *Cal.* 137, 14 *Pac. Rep.* 518. *Jackson v. Crilly*, 16 *Colo.* 103, 26 *Pac. Rep.* 331. *Collins v. Burlington, C. R. & N. R. Co.*, 83 *Iowa* 346, 49 *N. W. Rep.* 848. *Brown v. Milwaukee & St. P. R. Co.*, 22 *Minn.* 165, 19 *Am. Ry. Rep.* 298. *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106. *Central R. Co. v. Moore*, 24 *N. J. L.* 824.

When the testimony shows affirmatively that the party who is injured through the negligence of another was himself negligent, and that such negligence contributed to bring about the result complained of, and such testimony is neither conflicting nor contradictory, it becomes a question of law for the court to decide whether there is any fact disclosed by the testimony to go to the jury upon the question of contributory negligence. *Apsey v. Detroit, L. & N. R. Co.*, 83 *Mich.* 440, 47 *N. W. Rep.* 513.

Upon motion by defendant for a peremptory instruction it is necessary for the court to determine whether that defense has been so fully developed by the plaintiff's own evidence as to justify sustaining the motion. *Chill v. Cincinnati, N. O. & T. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 390, 92 *Ky.* 345.

Contributory negligence is a question of law for the court in the following cases:

Where it so clearly appears from the circumstances or uncontradicted evidence as to leave no inference or fact in doubt. *Halsey v. Rome, W. & O. R. Co.*, 12 *N. Y. S. R.* 319, 46 *Hun* 678, *mem.*; affirmed in 113 *N. Y.* 622, *mem.*, 20 *N. E. Rep.* 876, 22 *N. Y. S. R.* 992. *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 *Mo.* 93, 13 *S. W. Rep.* 893. *Corcoran v. St. Louis, I. M. & S. R. Co.*, 105 *Mo.* 399, 16 *S. W. Rep.* 411.

Where plaintiff's own evidence shows such contributory negligence. *Hudson v. Wabash Western R. Co.*, 101 *Mo.* 13, 14 *S.*

W. Rep. 15. *Warmington v. Atchison, T. & S. F. R. Co.*, 46 *Mo. App.* 159.

Where such contributory negligence is shown as defeats plaintiff's right of action and disproves his case. *Warmington v. Atchison, T. & S. F. R. Co.*, 46 *Mo. App.* 159.

Where the facts in evidence, and all the inferences from those facts, make it clear that plaintiff's own negligence produced, or contributed as the proximate cause to produce, the injury for which recovery is sought. *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 *Miss.* 601, 7 *So. Rep.* 401.

Where it is clear that no recovery can be had upon any view which can properly be taken of the facts which the evidence tends to establish. *Dunlap v. Northeastern R. Co.*, 130 *U. S.* 649, 9 *Sup. Ct. Rep.* 647.—FOLLOWING *Kane v. Northern C. R. Co.*, 128 *U. S.* 91; *Jones v. East Tenn., V. & G. R. Co.*, 128 *U. S.* 443.—*Seefeld v. Chicago, M. & St. P. R. Co.*, 32 *Am. & Eng. R. Cas.* 109, 70 *Wis.* 216, 35 *N. W. Rep.* 278.—APPROVED IN *Siegel v. Milwaukee & N. R. Co.*, 79 *Wis.* 404. REVIEWED IN *Worthington v. Central Vt. R. Co.*, 64 *Vt.* 107.

Where the facts necessary to show the injury suffered by plaintiff also inevitably establish that he was guilty of some fault or omission or commission without which the accident could not have occurred. *Rogen v. Morgan*, 16 *N. Y. S. R.* 693, 1 *N. Y. Supp.* 273.—APPLYING *Powers v. New York, L. E. & W. R. Co.*, 98 *N. Y.* 274; *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun* 430. QUOTING *Hawley v. Northern C. R. Co.*, 82 *N. Y.* 370.—*Woods v. Southern Pac. Co.*, 9 *Utah* 146, 33 *Pac. Rep.* 628.—FOLLOWING *Olsen v. Oregon S. L. & U. N. R. Co.*, 9 *Utah* 129, 33 *Pac. Rep.* 623. MODIFYING *Smith v. Rio Grande Western R. Co.*, 9 *Utah* 141, 33 *Pac. Rep.* 626.

Where the evidence shows plaintiff guilty of an act which at once strikes the minds of men in general as a desperate or plainly reckless act, being such an act as no one fit to be a juror would entertain a question of. *Chicago & A. R. Co. v. Byrum*, 48 *Ill. App.* 41. *Baltimore & O. R. Co. v. Shipley*, 31 *Md.* 368.

Where there is no evidence that the injury was wilfully, wantonly, or intentionally inflicted by the defendant, and the uncontroverted facts of the case show contributory negligence on the part of the plaintiff. *Donaldson v. Milwaukee & St. P. R. Co.*, 21

Minn. 293, 20 *Am. Ry. Rep.* 15.—NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 *N. Car.* 686.

Where there is no dispute about the facts. *Granlich v. Germantown Branch R. Co.*, 9 *Phila. (Pa.)* 78. *Halpin v. Third Ave. R. Co.*, 8 *J. & S. (N. Y.)* 175.—FOLLOWING *Squire v. Central Park, N. & E. R. R. Co.*, 4 *J. & S. (N. Y.)* 436. QUOTING *Morrison v. Erie R. Co.*, 56 *N. Y.* 302; *Reynolds v. New York C. & H. R. R. Co.*, 58 *N. Y.* 248.—*Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 390, 92 *Ky.* 345. *Grows v. Maine C. R. Co.*, 67 *Me.* 100. *Hobson v. New Mexico & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 360, 11 *Pac. Rep.* 545. *Lenix v. Missouri Pac. R. Co.*, 76 *Mo.* 86.—FOLLOWING *Powell v. Missouri Pac. R. Co.*, 76 *Mo.* 80.—*Wallace v. Western N. C. R. Co.*, 34 *Am. & Eng. R. Cas.* 553, 98 *N. Car.* 494, 2 *Am. St. Rep.* 346, 4 *S. E. Rep.* 503.—APPLYING *Smith v. North Carolina R. Co.*, 64 *N. Car.* 235.

Where there is no contradiction in the evidence, and the facts are undisputed, and the conclusion and inference to be drawn from it are indisputable, involving only a common instinct of mankind—self-preservation. *Louisville & N. R. Co. v. Yniestra*, 29 *Am. & Eng. R. Cas.* 297, 21 *Fla.* 700.

Where the facts covering the question of contributory negligence are fully stated in answers to the interrogatories, or in a special verdict, and lead to only one conclusion. *Korraday v. Lake Shore & M. S. R. Co.*, 131 *Ind.* 261, 29 *N. E. Rep.* 1069.

Where there appears to have been an omission of a duty enjoined, or commission of an act forbidden by statute. *Chicago & A. R. Co. v. Byrum*, 48 *Ill. App.* 41.

It is the duty of the court to withdraw the case from the jury in the following cases:

Where the facts show negligence on the part of the plaintiff contributing to the accident. *Mau v. Morse*, 3 *Colo. App.* 359.

Where there is no conflict of evidence on the question of plaintiff's negligence. *Ecliff v. Wabash, St. L. & P. R. Co.*, 64 *Mich.* 96, 31 *N. W. Rep.* 180.

Where it appears, without any conflict of evidence from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury. *Weber v. Kansas City Cable R. Co.*, 41 *Am. & Eng. R. Cas.* 117, 100 *Mo.* 194, 12 *S. W. Rep.* 804, 13 *S. W. Rep.* 581, 7 *L. R. A.* 819.

Where there is no conflict in the testimony, and all the material facts come from the plaintiff himself, and it appears that an act of his own which amounted to negligence *per se*, caused or directly contributed to the production of the injury. *Dietrich v. Baltimore & H. S. R. Co.*, 11 Am. & Eng. R. Cas. 115, 58 Md. 347. *Sauerborn v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 784, 23 N. Y. Supp. 478, 69 Hun 429.

Where the conduct of the plaintiff relied on, as amounting in law to contributory negligence, is established by clear and uncontradicted evidence. *McMahon v. Northern C. R. Co.*, 39 Md. 438.

Where the proof of contributory negligence is clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion. *Valin v. Milwaukee & N. R. Co.*, 82 Wis. 1, 51 N. W. Rep. 1084.

Where it appears that no reasonable jury could find a verdict for the plaintiff by reason of his own negligence. *Wright v. Midland R. Co.*, 51 L. T. 539.

The court must instruct the jury that plaintiff cannot maintain his action by reason of his own negligence in the following cases:

Only where the evidence is open to no other inference, and presents a clear case against the plaintiff. As long as there is any uncertainty the question should be left to the jury. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.—CRITICISED IN *Behrens v. Kansas Pac. R. Co.*, 8 Am. & Eng. R. Cas. 184, 5 Colo. 400. DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. FOLLOWED IN *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657; *Germond v. Central Vt. R. Co.*, 65 Vt. 126. QUOTED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

Or when a plaintiff offers no evidence that he was in the exercise of due care, but on the contrary the whole evidence on which he rests his case shows that he was careless. *Gahagan v. Boston & L. R. Co.*, 1 Allen (Mass.) 187.—APPLIED IN *Louisville & N. R. Co. v. Berry*, 88 Ky. 222. DISTINGUISHED IN *Meesel v. Lynn & B. R. Co.*, 8 Allen (Mass.) 234; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441.—*Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.—DISTINGUISHED IN *Graf v. Chicago & N. W. R. Co.*, 94 Mich. 579. QUOTED IN *Cumberland Valley R. Co. v. Maugans*, 18

Am. & Eng. R. Cas. 182, 61 Md. 53; *Emery v. Raleigh & G. R. Co.*, 37 Am. & Eng. R. Cas. 253, 102 N. Car. 209, 9 S. E. Rep. 139.

Or when the uncontradicted evidence, free from any adverse inferences, establishes contributory negligence on the part of the plaintiff. *Columbus & W. R. Co. v. Bradford*, 38 Am. & Eng. R. Cas. 214, 86 Ala. 574, 6 So. Rep. 90.

Or when the evidence offers no inference but the negligence of the plaintiff. *Colorado C. R. Co. v. Martin*, 17 Am. & Eng. R. Cas. 592, 7 Colo. 592, 4 Pac. Rep. 1118.

But the court must not declare one guilty of contributory negligence as a matter of law:

Where the evidence does not make out a clear case of such negligence. *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. Rep. 1103.—DISTINGUISHING *Yancey v. Wabash, St. L. & P. R. Co.*, 93 Mo. 433; *Barker v. Hannibal & St. J. R. Co.*, 98 Mo. 50.

Or unless the facts on which such a ruling must rest are clear and undisputed. *Harmon v. Washington & G. R. Co.*, 7 Mackey (D. C.) 255.

Or unless the recklessness or heedlessness of the plaintiff should be very apparent. *Ridings v. Hannibal & St. J. R. Co.*, 33 Mo. App. 527.—QUOTING *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336.

Or unless the conclusion of negligence, or a want of it, necessarily results from the statement of the facts. *Illinois C. R. Co. v. Nowicki*, 46 Ill. App. 566.

88. Directing compulsory nonsuit.*—Plaintiff cannot be nonsuited on the ground that his contributory negligence conclusively appears from his own testimony, if his conduct, under the peculiar circumstances of the case, is compatible with the exercise of reasonable care. *Crowley v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 119.

When in an action, brought for damages against a railway company, it appears from the evidence that the plaintiff has been guilty of great imprudence, which was, at least, one of the proximate causes of the evil which befel him, the law does not afford any compensation for the damages which have resulted. In such case, the question

* Nonsuits on the ground of contributory negligence, see notes, 19 AM. & ENG. R. CAS. 276; 2 Id. 17.

of the existence of negligence in the conduct of the defendants becomes wholly immaterial, and the plaintiff may properly be nonsuited. *Harper v. Erie R. Co.* 32 N. J. L. 88.—QUOTED IN *Patnode v. Harter*, 20 Nev. 303, 21 Pac. Rep. 682.

The proof by plaintiff of gross contributory negligence on his part does not authorize a nonsuit; contributory negligence is a matter of defense and presents a question of fact to be solved by a jury. *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.—APPLYING *Carter v. Columbia & G. R. Co.*, 19 So. Car. 20.—APPLIED IN *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515. FOLLOWED IN *Donahue v. Enterprise R. Co.*, 32 So. Car. 299, 11 S. E. Rep. 95.

And when plaintiff's own testimony shows a clear case it is not destroyed, as matter of law, by the contradictory testimony of another witness, though called by himself. *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346, 19 Atl. Rep. 1049.—DISTINGUISHED IN *Brown v. Barnes*, 151 Pa. St. 562.

In an action to recover damages for injuries resulting from the alleged negligence of defendant, although plaintiff's testimony in chief might warrant a submission of the case to the jury, yet if his admissions on cross-examination establish contributory negligence, it is not error to enter a judgment of compulsory nonsuit. *Butler v. Gettysburg & H. R. Co.*, 126 Pa. St. 160, 19 Atl. Rep. 37.

To justify the granting of a nonsuit on the ground of contributory negligence:

Contributory negligence must be clearly established. *MacDougall v. Central R. Co.*, 12 Am. & Eng. R. Cas. 143, 63 Cal. 431.

Or it must appear on the plaintiff's own showing, that he contributed, by his own carelessness, to the accident. *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. L. 525, 13 Am. Ry. Rep. 75.—FOLLOWING *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *New Jersey R. & T. Co. v. West*, 33 N. J. L. 430; *Central R. Co. v. Moore*, 24 N. J. L. 824.

Or the undisputed facts must show the omission or commission of some act which the law adjudges negligence. *Stackus v. New York C. & H. R. R. Co.*, 79 N. Y. 464; reversing (P) 7 Hun 559.—APPLIED IN *Ganiard v. Rochester City & B. R. Co.*, 50

Hun (N. Y.) 22, 18 N. Y. S. R. 692; *Harnett v. Bleecker St. & F. F. R. Co.*, 17 J. & S. (N. Y.) 185. FOLLOWED IN *Salter v. Utica & B. R. R. Co.*, 8 Am. & Eng. R. Cas. 437, 88 N. Y. 42; *Weil v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. Rep. 487, 28 N. Y. S. R. 944; *Germond v. Central Vt. R. Co.*, 65 Vt. 126. QUOTED IN *Suiter v. New York, L. E. & W. R. Co.*, 7 N. Y. S. R. 687. REVIEWED IN *Spaulding v. Jarvis*, 32 Hun (N. Y.) 621.—*Bonnell v. Delaware, L. & W. R. Co.*, 39 N. J. L. 189.

Or plaintiff's negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. *Stackus v. New York C. & H. R. R. Co.*, 79 N. Y. 464; reversing 7 Hun 559. *Ganiard v. Rochester City & B. R. Co.*, 18 N. Y. S. R. 692, 2 N. Y. Supp. 470. *Munroe v. Third Ave. R. Co.*, 18 J. & S. (N. Y.) 114.

But it has been held proper to grant a nonsuit on the ground of contributory negligence in the following cases:

Where, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must be set aside. *Franklin v. Southern Cal. Motor Road Co.*, 85 Cal. 63, 24 Pac. Rep. 723.

Or when upon his own showing the plaintiff is guilty of negligence proximately contributing to his injury. *Bonnell v. Delaware, L. & W. R. Co.*, 39 N. J. L. 189. *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434; affirming 32 N. J. L. 166. *Central R. Co. v. Moore*, 24 N. J. L. 824. *Orange & N. H. R. Co. v. Ward*, 25 Am. & Eng. R. Cas. 359, 47 N. J. L. 566 4 Atl. Rep. 331.

Where proof is undisputed and decisive that plaintiff's negligence contributed to the injury. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61, 3 Abb. Pr. N. S. 82; reversing 32 Barb. 159. *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346, 19 Atl. Rep. 1049. *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67. *Milwaukee & C. R. Co. v. Hunter*, 11 Wis. 160.—QUOTING *Button v. Hudson River R. Co.*, 18 N. Y. 248.—*Haring v. New York & E. R. Co.*, 13 Barb. (N. Y.) 9.—QUOTED IN *Suydam v. Grand St. & N. R. Co.*, 17 Abb. Pr. (N. Y.) 304; *Mellwitz v. Manhattan R. Co.*, 43 N. Y. S. R. 354; *Bloom v. Manhattan R. Co.*, 43 N. Y. S. R. 378. REVIEWED IN *Terry v. New York C. R. Co.*, 22 Barb. (N. Y.) 574.

Or where it clearly appears that plaintiff's own negligence contributed to his injuries.

Pennsylvania R. Co. v. Richter, 2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180. *Jordan v. New York, L. E. & W. R. Co.*, 46 N. J. L. 206. *Dwyer v. New York, L. E. & W. R. Co.*, 28 Am. & Eng. R. Cas. 155, 48 N. J. L. 373, 7 Atl. Rep. 417.

89. Rule where court sits as a jury.—It is the province of the court, trying the facts as well as the law, to say, from all the facts and circumstances, whether or not a plaintiff has been guilty of contributory negligence. *Gulf, C. & S. F. R. Co. v. McLean*, 74 Tex. 646, 12 S. W. Rep. 843.

90. Whether plaintiff used reasonable and ordinary care.—Where the facts are clearly settled and the course which common prudence would dictate can be readily discerned, the question of contributory negligence is a matter of law; but it is always a mixed question of law and fact when the facts are doubtful and must be submitted to the jury under proper instructions. But when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue, it becomes purely a question of law. And where, though all the facts are admitted, a question arises whether the act imputed to the party as negligence is such as persons of ordinary prudence would have performed under the circumstances, and the court is unable to determine that question from the nature of the act itself and other undisputed facts, it should be left to the jury. *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 20 Am. Ry. Rep. 101.—FOLLOWING *Fleming v. Western Pac. R. Co.*, 49 Cal. 253; *Deville v. Southern Pac. R. Co.*, 50 Cal. 383. QUOTING *Clayards v. Dethick*, 12 Q. B. 439; *Ireland v. Oswego, H. & S. Plankroad Co.*, 13 N. Y. 533; *Keller v. New York C. R. Co.*, 24 How. Pr. 177; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208.—APPROVED IN *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291.

The most that the court can do in cases where there is a contrariety of evidence, and the question of care or negligence depends upon the consideration of a variety of circumstances, is to define the degree of care and caution exacted of the parties and leave to the practical judgment and discretion of the jury the work of comparing the acts and conduct of the parties concerned with what would be the natural and ordinary course of prudent and dis-

creet men under similar circumstances. *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32.—REVIEWED IN *Baltimore & O. R. Co. v. State*, 36 Md. 366.

Where a plaintiff sues for injuries resulting from negligence, and contributory negligence is made a ground of defense, the question whether plaintiff exercised the proper degree of care under the circumstances is for the jury. *Galveston Oil Co. v. Thompson*, 76 Tex. 235, 13 S. W. Rep. 60.

The question whether ordinary care was exercised is one of fact for a jury, if there is any conflict in the evidence going to establish any of the circumstances upon which it depends, if there are inferences to be drawn from the proof which are not certain and incontrovertible, or if it is necessary to determine what a man of ordinary care and prudence would be likely to do under the circumstances. *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451.—APPROVING *Bernhard v. Rensselaer & S. R. Co.*, 1 Abb. App. Dec. (N. Y.) 131.—QUOTED IN *Wichita & W. R. Co. v. Davis*, 32 Am. & Eng. R. Cas. 65, 37 Kan. 743, 16 Pac. Rep. 78.

Where the measure of duty is ordinary and reasonable care, and where the degree of care varies according to the circumstances, the question of negligence is for the jury; but where facts constituting negligence are either admitted or conclusively established by undisputed evidence, it is the duty of the court to declare the law applicable thereto. *Gates v. Pennsylvania R. Co.*, 154 Pa. St. 566, 26 Atl. Rep. 598.

Where a party jumps from a moving train to avoid apparently impending danger, the question is properly submitted to the jury whether, under the circumstances, he acted rashly and under an undue apprehension of danger. *South Covington & C. St. R. Co. v. Ware*, 27 Am. & Eng. R. Cas. 206, 84 Ky. 267, 1 S. W. Rep. 493.

91. What constitutes proper care.—In ordinary cases what constitutes ordinary care is a question for the jury. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346.

What constitutes proper care and prudence under the facts of a case is a question for the determination of the jury. *Cleveland, C., C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434.

In an action to recover for a personal

injury occasioned by the negligence of defendant it is the province of the jury to determine what circumstances will be sufficient to charge a plaintiff with want of ordinary care, and prevent a recovery. Therefore an instruction which directs the jury what circumstances will constitute want of ordinary care in plaintiff is properly refused. *Wabash R. Co. v. Elliott*, 4 *Am. & Eng. R. Cas.* 651, 98 *Ill.* 481.

92. Whether plaintiff's negligence was proximate cause.—If there is negligence shown on part of party injured, it is for the jury to determine the degree, as well as to determine whether it proximately contributed to the injury. *Texas & P. R. Co. v. Geiger*, 79 *Tex.* 13, 15 *S. W. Rep.* 214.

Where the facts in respect to the contributory negligence are controverted the issue should be submitted to the jury upon the whole evidence, with instructions that the plaintiff cannot recover if his own carelessness was the contributory and proximate cause of the injury. *Smith v. Richmond & D. R. Co.*, 34 *Am. & Eng. R. Cas.* 557, 99 *N. Car.* 241, 5 *S. E. Rep.* 896. —QUOTING *Farmer v. Wilmington & W. R. Co.*, 88 *N. Car.* 564.

Where a railroad company is sued for negligently causing death, the question whether plaintiff's evidence justifies the inference that the negligence of the deceased contributed proximately to the accident, is for the jury. *Johnson v. Hudson River R. Co.*, 5 *Duer (N. Y.)* 21.

If a passenger left his place on the car where it is customary for passengers to ride, and at the request of a fireman commenced to clean the headlight of an engine, at which place he received the injury complained of, he was guilty of negligence, and it should have been submitted to the jury to determine if such negligence proximately contributed to the injury, and if so, to further determine if the conduct of the defendant was wanton and intentional, or so reckless as to be the equivalent thereof. *Brown v. Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

93. Whether plaintiff's negligence defeats action or mitigates damages.—In Tennessee it is the jury's province, upon the evidence and a proper charge by the court, to determine whether the contributory negligence defeats the action entirely or only mitigates the damages, and, if the latter, to what extent. *Louisville &*

N. R. Co. v. Stacker, 86 *Tenn.* 343, 6 *Am. St. Rep.* 840, 6 *S. W. Rep.* 737.

94. Whether plaintiff has proper capacity.*—The judge properly left it to the jury to say whether the plaintiff was of sufficient age, intelligence, and discretion to be brought within the rule of contributory negligence. *Bridger v. Asheville & S. R. Co.*, 25 *So. Car.* 24.

95. Weight of evidence.—A railroad company was sued for killing a man at a crossing, and the evidence failed to show that he was free from negligence himself; but there were other facts and circumstances which tended to show that the accident might have occurred without his negligence. *Held*, in such case, that it was a question for the jury, as the weight of the evidence must be passed upon exclusively by the jury. *Beckwith v. New York C. & H. R. R. Co.*, 54 *Hun (N. Y.)* 446, 28 *N. Y. S. R.* 130, 292, 7 *N. Y. Supp.* 719; *affirmed in* 125 *N. Y.* 759, *mem.*, 36 *N. Y. S. R.* 1010. —APPLYING *Newell v. Ryan*, 40 *Hun (N. Y.)* 286; *Palmer v. New York C. & H. R. R. Co.*, 112 *N. Y.* 234.

IV. EVIDENCE; BURDEN OF PROOF.

1. In General.

96. Admissibility, generally.—Where there was a legitimate inquiry as to whether plaintiff ought not, as a prudent man, to have taken another route by crossing the track, the court properly admitted evidence as to the height of the track at the place where it was claimed he ought to have crossed. *Andrews v. Mason City & Ft. D. R. Co.*, 77 *Iowa* 669, 42 *N. W. Rep.* 513.

Evidence that plaintiff, who was traveling with cattle and had got upon the top of the train, proceeded to the caboose at the request of the conductor in order to sign a statement that the cattle were in good order at the end of the defendant's line, which they were then nearing, is admissible as bearing upon the question of the plaintiff's contributory negligence in attempting to enter the caboose from the top. *Missouri Pac. R. Co. v. Callahan*, (*Tex.*) 41 *Am. & Eng. R. Cas.* 85, 12 *S. W. Rep.* 833.

* Child of tender years not guilty of contributory negligence. When that of one of more mature years is for jury, see note, 3 *L. R. A.* 385.

97. Custom, usage, and habits.—Plaintiff's injuries having been caused by her mule falling through a hole in a bridge over a railroad crossing, the habit the animal had of stumbling is relevant to the question of contributory negligence; and a witness may testify to his *character* in that respect, when it is apparent that the word is used as the synonym of habit. *Patterson v. South & N. Ala. R. Co.*, 89 Ala. 318, 7 So. Rep. 437.

A custom or usage obviously dangerous, and the facts alleged in the plaintiff's declaration showing that it would be dangerous, is not admissible to excuse contributory negligence by the plaintiff, more especially where it did not appear that such custom or usage had been adopted by the defendant, or that it prevailed at the place or on the particular railway concerned. *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. Rep. 459.

98. Circumstantial evidence.—Though care on behalf of a plaintiff be charged in the declaration generally, the proof thereof to sustain it may be made up of many circumstances. If plaintiff's care is not averred in the declaration it must nevertheless be proved. *Illinois C. R. Co. v. Larson*, 42 Ill. App. 264.

In connection with the question of contributory negligence the jury may take into consideration the natural instinct of self-preservation. *Slaughter v. Metropolitan St. R. Co.*, 58 Am. & Eng. R. Cas. 604, 116 Mo. 269, 23 S. W. Rep. 760.

Where the suit is to recover for negligently killing a person, in determining whether the deceased was guilty of contributory negligence the jury is bound to consider all the facts and circumstances bearing upon that question, and not select one particular fact or circumstance as controlling the case to the exclusion of all others. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.

A jury may infer ordinary care and diligence on the part of an injured person from the love of life or the instinct of self-preservation and the known disposition of men to avoid injury; but this presumption is overthrown when there is direct proof to the contrary. *Dewald v. Kansas City, Ft. S. & G. R. Co.*, 47 Am. & Eng. R. Cas. 557, 44 Kan. 586, 24 Pac. Rep. 1101. *Dunlavy v. Chicago, R. I. & P. R. Co.*, 21 Am. & Eng. R. Cas. 542, 66 Iowa 435, 23 N. W. Rep.

911.—**DISTINGUISHING** *Way v. Illinois C. R. Co.*, 40 Iowa 345.—**FOLLOWED IN** *Reynolds v. Keokuk*, 72 Iowa 371.

Where evidence is conflicting as to whether a person injured contributed by negligence to his own injury, the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves. *Northern C. R. Co. v. State*, 31 Md. 357.—**REVIEWED IN** *Dun v. Seaboard & R. R. Co.*, 16 Am. & Eng. R. Cas. 363, 78 Va. 645.

In determining whether a party is or is not chargeable with negligence, regard must be had to his moral, intellectual, and physical capacity. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; *affirmed in* 51 N. Y. 666, *mem.*

The car in which plaintiff was riding was uncoupled and ran rapidly backward down a grade, entirely free from control. There was much excitement and confusion among the passengers, and in her fright and excitement plaintiff either jumped off or was pulled off and injured. *Held*, that her excitement, surprise, or bewilderment could only be taken into account in determining the quality of her acts, and their quality in respect to negligence was a question for the jury. *Joliet St. R. Co. v. McCarthy*, 42 Ill. App. 49.

An engineer was required, by a rule of the company in whose employ both he and the plaintiff were engaged, to stop the engine at a "stopboard" 400 feet from the crossing. *Held*, in an action for an injury caused by the alleged negligence of the defendant, that the failure to stop in strict obedience to such rule was not conclusive evidence of negligence on the part of such employes. *Hanson v. Minneapolis & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 13, 37 Minn. 355, 34 N. W. Rep. 223.

99. Sufficiency, generally.—While it is true that in an action for personal injuries, based upon the negligence of the defendant, it is an essential element of the plaintiff's case that the injured party must have been in the exercise of ordinary care, yet it is not indispensable that such fact should be directly shown by affirmative evidence. *Illinois C. R. Co. v. Nowicki*, 46 Ill. App. 566.

Contributory negligence is matter of defense, and—*held*, that before the appellate court can reverse a judgment for the plain-

tiff it must hold that as a matter of law the facts shown in evidence conclusively proved contributory negligence. It is not enough that the facts are consistent with such negligence, nor that in connection with other facts they would prove it. *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 582.

The effect and force of clear and positive testimony, coupled with corroborative circumstances, cannot be broken by the bare announcement of a highly improbable theory, which is itself dispelled by competent and uncontradicted testimony, nor by the naked statement of a party that he was confused by surroundings which he had contributed to produce. *French v. Detroit, G. H. & M. R. Co.*, 89 Mich. 537 50 N. W. Rep. 914.

The rule that negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ, if allowed to prevail, would render the appellate court powerless to reverse any cause for contributory negligence. *Hicks v. Missouri Pac. R. Co.*, 46 Mo. App. 304.

Where plaintiff sues to recover for injuries resulting from defendant's negligence, it is not enough to show that such negligence caused the injury, but it must also appear that the exercise of ordinary prudence and caution on the part of the plaintiff would not have prevented the accident. *Moore v. Central R. Co.*, 24 N. J. L. 268.—QUOTING *Beers v. Housatonic R. Co.*, 19 Conn. 571.—FOLLOWED IN *Runyon v. Central R. Co.*, 25 N. J. L. 556; *Telfer v. Northern R. Co.*, 30 N. J. L. 188. QUOTED IN *Patnode v. Harter*, 20 Nev. 303, 21 Pac. Rep. 682.

The jury may regard the disposition of men to take care of themselves and to keep out of difficulty, as an element tending to negative a charge of contributory negligence; but a bare presumption is not sufficient. There must be some tangible proof, or the attending circumstances must be such as to show that the party was not in fault. Then it becomes a question for the jury. *Squire v. Central Park, N. & E. R. R. Co.*, 4 J. & S. (N. Y.) 436.—FOLLOWING *Button v. Hudson River R. Co.*, 18 N. Y. 248.

Where a party sues for a personal injury, mere proof that he was intoxicated will not establish contributory negligence, unless it shows that he was intoxicated to a degree disqualifying him from the exercise of or-

dinary care and prudence. *O'Hagan v. Dillon*, 10 J. & S. (N. Y.) 456.

When, in an action for negligence, the defendants rely on the doctrine *volenti non fit injuria*, they must obtain a finding at the trial that the plaintiff voluntarily took the risk upon himself, and had a full knowledge of the nature and extent of the danger. Otherwise the court will not give judgment for the defendant on the ground that such a finding is the only inference which can properly be drawn from the facts. *Osborne v. London & N. W. R. Co.*, 21 Q. B. D. 220, 57 L. J. Q. B. 618, 6 Ry. & C. T. Cas. lxviii.

The fact that a plaintiff was drunk is evidence tending to prove contributory negligence, but is not negligence *per se*. *Holmes v. Oregon & C. R. Co.*, 5 Fed. Rep. 523, 6 Sawy. (U. S.) 276. *Holmes v. Oregon & C. R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 75.—DISTINGUISHING *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa 661.

100. Absence of negligence on plaintiff's part must appear.—(1)

The rule.—In actions claiming damages resulting from defendant's negligence it must appear that the injury complained of was not in the slightest degree occasioned or contributed to by the plaintiff. *Delafield v. Union Ferry Co.*, 10 Bosw. (N. Y.) 216; *affirmed* (?) 51 N. Y. 671, *mem.*

Or it should appear that plaintiff was guilty of no contributory negligence but for which, notwithstanding defendant's negligence, the injury would have been avoided. *White v. Vicksburg, S. & P. R. Co.*, 42 La. Ann. 990, 8 So. Rep. 475.

In order to maintain an action for an injury it must be proved that the injuries were caused by the negligence of the defendant or his agents, and it must not appear from the evidence that want of ordinary care and prudence on the part of the plaintiff directly contributed to the injury. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241.—QUOTED IN *Sheeler v. Chesapeake & O. R. Co.*, 81 Va. 188.—*Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485.

(2) — and its illustrations. — Where plaintiff seeks to recover for injuries resulting from his being struck and run over by defendant's car, and there is no evidence that the injury was wilfully, wantonly, or intentionally inflicted, to sustain the action it must appear that the injury was occasioned by negligence on defendant's part,

and that there was not contributory negligence on plaintiff's part. *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293, 20 Am. Ry. Rep. 15.—DISTINGUISHED IN *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410. NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 686.

In order to hold the employer responsible for the act or omission of his agents, where rights of others are concerned, such act or omission must be satisfactorily proved, and also it must appear that the plaintiff was not guilty of any contributory negligence. *Stewart v. Philadelphia, W. & B. R. Co.*, (Del.) 17 Atl. Rep. 639.

In order to enable a plaintiff to recover it must appear that there was no want of care and no imprudence on the part of the plaintiff, by which the injury was in any manner directly brought about, and that the injury was occasioned by the negligence of the company or its officers, either in not having provided the necessary apparatus and fixtures to a locomotive or train, by which the accident might have been guarded against, or by the carelessness or malfeasance of its agents. If it appear that the injury would have happened equally with or without such guards to the locomotive or train, then the want of them will not increase the responsibility of the company. *Hill v. New Orleans, O. & G. W. R. Co.*, 11 La. Ann. 292.

101. Preponderance of evidence.*

—Where a defendant relies upon the contributory negligence of the plaintiff as a defense, such contributory negligence must be shown by a preponderance of the evidence. *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. Rep. 79. *Edity v. Wallace*, 52 Am. & Eng. R. Cas. 265, 49 Fed. Rep. 801, 4 U. S. App. 264, 1 C. C. A. 435. *Davis v. Kansas City Belt R. Co.*, 46 Mo. App. 180.

In an action for damages to recover for injuries received by reason of the negligence of the defendant, the burden is upon the defendant to show by a preponderance of evidence contributory negligence on the part of the plaintiff, if that is set up as a defense. *Harmon v. Washington & G. R. Co.*, 7 Mackey (D. C.) 255.

In establishing such preponderance the

defendant is not confined to the testimony offered in his own behalf, but he may adopt such of the plaintiff's testimony as tends to show contributory negligence. *Harmon v. Washington & G. R. Co.*, 7 Mackey (D. C.) 255.—APPROVING *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 298.

Ordinarily when there has been no fault on the part of the plaintiff, it will sufficiently appear by showing the fault of the defendant and that it caused the injury, and when it does so appear no further evidence on the subject is necessary; but the fact that plaintiff exercised due care must appear in some way, but in what particular mode is unimportant. The evidence of each may be direct and positive or only circumstantial. Whatever the nature of the evidence, if there is no conflict as to the fact, there must be a preponderance of evidence in favor of plaintiff, or the action will fail. *Button v. Hudson River R. Co.*, 18 N. Y. 248.—DISTINGUISHING *Trow v. Vermont C. R. Co.*, 24 Vt. 487.—FOLLOWED IN *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146; *Squire v. Central Park, N. & E. R. R. Co.*, 4 J. & S. (N. Y.) 436.

102. Presumptive evidence and its rebuttal.*—Where the circumstances attending an accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care. *Chicago & A. R. Co. v. Crowder*, 49 Ill. App. 154.

Where, from the specific facts alleged in a complaint, it might well be presumed that the plaintiff was guilty of contributory negligence, yet such presumption is one of fact, and will not be allowed to overcome or outweigh the positive averment of plaintiff to the contrary. *Pittsburgh, C. & St. L. R. Co. v. Conn.*, 104 Ind. 64, 3 N. E. Rep. 636.—DISTINGUISHING *Cincinnati, W. & M. R. Co. v. Peters*, 80 Ind. 168.

The law will not presume that a plaintiff has been negligent, in the absence of some evidence tending to show it; but when his evidence tends to create the presumption, then he must rebut the presumption by sufficient proof to produce a belief in the minds of the jury that negligence on his

* Contributory negligence as a defense must be shown by preponderance of evidence, see 49 AM. & ENG. R. CAS. 389, *abstr.*

* Presumption of due care on part of persons negligently killed, see note, 16 L. R. A. 261.

Due care inferable from ordinary habits of prudent man, see note, 19 AM. & ENG. R. CAS. 358.

part did not in fact exist. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. Rep. 326.—FOLLOWING *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427.—RECONCILED IN *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

2. Burden of Proof.*

103. Generally.—The onus of proof as to contributory negligence is in all cases on the defendant, though the plaintiff's evidence sometimes relieves from the necessity of discharging it. *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

Where there is no evidence of contributory negligence on plaintiff's part by reason of any omission, and no question in regard to the surrounding circumstances, and the only inquiry is as to whether the injured person, in view of the conceded circumstances, was negligent in what he did, and upon proof of his acts it appears that he was not guilty of any negligence in what he did, the burden of proof is shifted upon defendant, if it claims that plaintiff was negligent. *Raymond v. Burlington, C. R. & N. R. Co.*, 18 Am. & Eng. R. Cas. 217, 13 Am. & Eng. R. Cas. 6, 65 Iowa 152, 17 N. W. Rep. 923, 21 N. W. Rep. 495.—APPROVING *Mayo v. Boston & M. R. Co.*, 104 Mass. 140.

Courts and text writers are divided as to where lies the burden of proof on the question of contributory negligence, but all agree that, if plaintiff's own evidence establishes or strongly suggests his own contributory negligence, that bars recovery, no matter where the burden rests, unless he shall remove or explain the adverse presumption thus created. *Ryan v. Louisville, N. O. & T. R. Co.*, 44 La. Ann. 806, 11 So. Rep. 30.

In order to recover for an injury on the ground of negligence of the defendant, it must appear that the plaintiff was in the exercise of due care, and that the injury in no part is due to his own want of care, and the burden is on the plaintiff to make this appear; but it is not necessary that it be proved by affirmative testimony. If it be

shown by evidence which excludes fault on the part of the plaintiff, due care is established as effectually as by affirmative testimony; or where all the circumstances attending the injury are proved, if they show no negligence on the part of plaintiff, the inference of due care may be drawn from the absence of all appearance of fault. *Mayo v. Boston & M. R. Co.*, 104 Mass. 137.—DISTINGUISHING *Todd v. Old Colony & F. R. R. Co.*, 7 Allen (Mass.) 207; *Hickey v. Boston & L. R. Co.*, 14 Allen 429; *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Forsyth v. Boston & A. R. Co.*, 103 Mass. 510; *Bancroft v. Boston & W. R. Corp.*, 97 Mass. 275.—APPROVED IN *Raymond v. Burlington, C. R. & N. R. Co.*, 65 Iowa 152.

The Minnesota statute of 1887, subjecting railroad companies to liability to their servants for the negligence of fellow-servants, does not change the rule as to the burden of proof of contributory negligence. *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391, 51 N. W. Rep. 125.

Section 1816 a, S. & B. Wisconsin Ann. St. (providing that every railroad company shall be liable for damages sustained by any employé "without contributory negligence on his part, when such damage is caused by the negligence of" other employés specified), does not change the rule as to the burden of proving contributory negligence. *Dugan v. Chicago, St. P. & O. R. Co.*, 85 Wis. 699, 55 N. W. Rep. 894.—APPLYING *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391. FOLLOWING *Hoye v. Chicago & N. W. R. Co.*, 67 Wis. 15.

104. When on plaintiff to show absence of contributory negligence.

—(1) *Illinois*.—Before a plaintiff can recover for a personal injury on the ground of negligence, he must introduce evidence tending to prove some of the acts of negligence charged against the defendant, and that such acts contributed to the injury, and that at the time of the injury he was in the exercise of ordinary care. *Hawk v. Chicago, B. & N. R. Co.*, 147 Ill. 399, 35 N. E. Rep. 139.

For the burden of proof is upon the plaintiff, to establish, either that he himself was in the exercise of due care, or that the injury was in no degree attributable to any want of ordinary care on his part. If he shows that he brought the injury on himself by his own carelessness, he cannot re-

* Burden of proof as regards contributory negligence, see notes, 5 AM. & ENG. R. CAS. 634; 28 AM. REP. 563.

Persons suing for personal injuries who are not passengers must show negligence and absence of contributory negligence, see note, 49 AM. REP. 628.

cover. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 Ill. 416, 18 N. E. Rep. 799; affirming 27 Ill. App. 22. *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585.

And it is error to instruct the jury that the burden of proof to show negligence of plaintiff rests on defendant. *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63, 21 Am. Ry. Rep. 284.

Where the action is based on negligence the law does not presume that either party has been guilty of negligence, and before a recovery can be had the plaintiff must prove that he was in the exercise of reasonable care, and that the injury was occasioned by the negligent acts of the defendant. *Chicago & A. R. Co. v. Robinson*, 8 Ill. App. 140.

When the case is made out on the part of the plaintiff the defendant is called upon to disprove only the acts of negligence sought to be established. Thus, if the plaintiff relies upon a failure to ring a bell or sound a whistle, the defendant is not bound to show that its fences or cattle-guards were in good condition. *Chicago & A. R. Co. v. Robinson*, 8 Ill. App. 140.

(2) *Indiana*.—Before plaintiff is entitled to recover in an action for personal injuries or injuries to his property he must not only show negligence on the part of the defendant, but the absence of contributory negligence on his part. *Cincinnati, H. & I. R. Co. v. Butler*, 23 Am. & Eng. R. Cas. 262, 103 Ind. 31, 2 N. E. Rep. 138.—FOLLOWED IN *Indiana, B. & W. R. Co. v. Greene*, 25 Am. & Eng. R. Cas. 322, 106 Ind. 279, 55 Am. Rep. 736.—*Lyons v. Terre Haute & I. R. Co.*, 101 Ind. 419. *Louisville & N. R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580.

Where a person is injured while crossing a track, either in person or property, by a collision with a train, the fault is *prima facie* his own, and he must affirmatively show that his fault or negligence did not contribute to the injury, to recover. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863.

(3) *Iowa*.—To enable a plaintiff to recover he must show that the defendant was guilty of negligence as charged in the complaint, and that such negligence was the proximate cause of the injury, and that he was free from negligence proximately contributing to the injury. *Rebelsky v. Chicago & N. W. R. Co.*, 79 Iowa 55, 44 N. W. Rep. 536. *Theissen v. Belle Plaine*, 81 Iowa 118,

46 N. W. Rep. 854.—NOT FOLLOWING *Parkhill v. Brighton*, 61 Iowa 103.—*Benton v. Central R. Co.*, 42 Iowa 192.—FOLLOWED IN *Lang v. Holiday Creek R. Co.*, 42 Iowa 677.

For the *onus* is on the plaintiff to establish not only the negligence of the company, but that he himself was not negligent. *Carlin v. Chicago, R. I. & P. R. Co.*, 37 Iowa 316, 8 Am. Ry. Rep. 141.

Yet the absence of contributory negligence may be inferred from circumstances, without being directly shown. *Nelson v. Chicago, R. I. & P. R. Co.*, 38 Iowa 564.

Nor is the burden of proof changed by the fact that the defendant in its answer unnecessarily pleaded the plaintiff's contributory negligence, and an instruction from which the jury might infer such change of burden was erroneous. *Hawes v. Burlington, C. R. & N. R. Co.*, 19 Am. & Eng. R. Cas. 220, 64 Iowa 315, 20 N. W. Rep. 717.

(4) *Louisiana*.—Where a plaintiff seeks to recover for the negligence of the defendant, the burden of proof is on him to show that he was free from negligence—that is, that he was using due care and skill. *Moore v. Shreveport*, 3 La. Ann. 645.

(5) *Maine*.—It is settled law in this state that in actions against railroad companies for injuries to persons, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed did not, by his want of ordinary care, contribute to produce the accident. *State v. Taine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622. *Gallagher v. Proctor*, 84 Me. 41, 24 Atl. Rep. 459.

(6) *Massachusetts*.—It is for the plaintiff, by affirmative evidence, to establish to the satisfaction of the jury his own freedom from negligence contributing to an injury which he claims is the result of defendant's negligence. The courts must take notice of what is matter of common knowledge and experience, and when plaintiff's case fails to disclose the existence of ordinary care, as judged of in the light of such knowledge and experience, he shows no right to a recovery. *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208.—DISTINGUISHED IN *Forsyth v. Boston & A. R. Co.*, 103 Mass. 510; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222; *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51

Am. Rep. 354. FOLLOWED IN *Grethen v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 342, 22 Fed. Rep. 609; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602. QUOTED IN *Tully v. Fitchburg R. Co.*, 14 Am. & Eng. R. Cas. 682, 134 Mass. 499.

(7) *Michigan*.—The plaintiff is bound in all cases where his action is based upon defendant's negligence to show that such negligence is entirely responsible for the injury. It must appear from his showing that all the material negligence that led to the injury was on the part of defendant, and that plaintiff did not contribute towards it. In other words, plaintiff must completely establish whose fault it was. *Michigan C. R. Co. v. Coleman*, 28 Mich. 440. *Mynning v. Detroit, L. & N. R. Co.*, 67 Mich. 677, 12 West. Rep. 427, 35 N. W. Rep. 811. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

(8) *Mississippi*.—A plaintiff suing for an injury cannot recover merely by showing negligence on the part of the defendant. He must also affirmatively show freedom from contributory negligence. *Vicksburg v. Hennessy*, 54 Miss. 391. *Mississippi C. R. Co. v. Mason*, 51 Miss. 234.

(9) *New York*.—A plaintiff suing for an injury alleged to have resulted from negligence is bound to establish his own freedom from negligence contributing to the injury; and if he fails to do so a nonsuit is properly allowed. *Powell v. New York C. & H. R. R. Co.*, 2 Silv. App. 9, 109 N. Y. 613, mem., 15 N. E. Rep. 891, 14 N. Y. S. R. 74; affirming 38 Hun 640, mem.

There is no presumption that a party suing for an injury has been free from fault. A plaintiff must prove by satisfactory evidence that he did not contribute to the injury by any negligence of his own. This proof in some form constitutes a part of the plaintiff's case. It must appear, either from the circumstances of the case or from evidence directly establishing the fact, to the satisfaction of the court and jury that plaintiff is free from any fault contributing to the injury. *Warner v. New York C. R. Co.*, 44 N. Y. 465; reversing 45 Barb. 299. —DISAPPROVED IN *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92; *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146.

To enable a party to recover for an injury claimed to have resulted from negligence the person injured must not have con-

tributed to the injury; but it is not a rule of law of universal application that the plaintiff must affirmatively prove that his own conduct was cautious and prudent. The *onus probandi* generally depends upon the position of the affair as it stands upon the undisputed facts. Thus if a carriage be driven furiously upon a crowded thoroughfare and a person is there run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; affirming 6 Duer 633. —REFERRING TO *Button v. Hudson River R. Co.*, 18 N. Y. 248. —APPLIED IN *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209; *Diabola v. Manhattan R. Co.*, 29 N. Y. S. R. 149; *Diabola v. Manhattan R. Co.*, 8 N. Y. Supp. 334. DISTINGUISHED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354. FOLLOWED IN *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 23 How Pr. 492; *Deyo v. New York C. R. Co.*, 34 N. Y. 9. QUOTED IN *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146; *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190. REVIEWED IN *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622; *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256; *Cosgrove v. New York C. & H. R. R. Co.*, 13 Hun (N. Y.) 329; *Jones v. Utica & B. R. Co.*, 36 Hun (N. Y.) 115. —But compare also *Johnson v. Hudson River R. Co.*, 5 Duer 21.

It is not incumbent on plaintiff in the first instance to give evidence for the direct and special object of establishing due care. It is enough if the proof introduced of the defendant's negligence and the circumstances of the injury *prima facie* establish that the injury was caused by defendant's negligence. Ordinarily, when there has been no fault on the part of plaintiff, it will sufficiently appear by showing the fault of the defendant and that it caused the injury; and when it does so appear no further evidence on the subject is necessary. *Button v. Hudson River R. Co.*, 18 N. Y. 248. —FOLLOWING *Butterfield v. Forrester*, 11 East 60; *Harlow v. Humiston*, 6 Cow. (N. Y.) 189; *Rathbun v. Payne*, 19 Wend. (N. Y.) 399; *Bush v. Brainard*, 1 Cow. 78; *Hartfield v. Roper*, 21 Wend. 615; *Brown v. Maxwell*, 6 Hill (N. Y.) 592; *Spencer v. Utica & S. R. Co.*, 5 Barb. (N. Y.) 337; *Holbrook v. Utica & S. R. Co.*, 12 N. Y.

236.—APPROVED IN *Owens v. Richmond & D. R. Co.*, 88 N. Car. 502. FOLLOWED IN *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121; *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146. QUOTED IN *Milwaukee & C. R. Co. v. Hunter*, 11 Wis. 167. REFERRED TO IN *Johnson v. Hudson River R. Co.*, 20 N. Y. 65.

Where a person seeks to recover for an injury resulting from the negligence of a railroad company he must show himself free from contributory negligence, the burden of proving which is on him, and he is not entitled to the benefit of any presumption to establish the lack of negligence on his part; and where the circumstances point as much to negligence as to its absence, he is not entitled to recover. *Fowler v. New York C. & H. R. R. Co.*, 74 Hun (N. Y.) 141, 26 N. Y. Supp. 218, 56 N. Y. S. R. 307.

The plaintiff must present a case of unmixed negligence—a case where the injury is the result exclusively of the defendant's negligence—where no negligence or fault of his own contributed in any degree to produce such injury. *Ernst v. Hudson River R. Co.*, 24 How. Pr. (N. Y.) 97; reversing 19 How. Pr. 205.—DISAPPROVED IN *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61.

To maintain an action for an injury by the negligence of another, it is incumbent upon the plaintiff to establish the fact that no negligence of his own contributed to the injury. Proof of the fact need not be positive, but may be circumstantial; still the non-negligence of the plaintiff must result as the rational conclusion from adequate evidence. *Geoghegan v. Atlas Steamship Co.*, 51 N. Y. S. R. 868, 22 N. Y. Supp. 749.

In actions for damages arising from negligence, the plaintiff, to sustain his action, must prove defendants' negligence and the plaintiff's freedom from any negligence contributing to the injury. *McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144.

In order to entitle a plaintiff to recover for an injury negligently inflicted he must satisfy the jury that he was not guilty of negligence contributing to the injury, but he is not called upon to make such proof in the first instance unless the circumstances disclosed by his own witnesses tend to show him guilty of negligence. When negligence

is not thus established it is to be affirmatively proved by the defendant. *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146.—FOLLOWING *Hackford v. New York C. & H. R. R. Co.*, 43 How. Pr. (N. Y.) 222.

Contributory negligence is a matter of defense, and is not to be affirmatively disproved in order to entitle the injured party to recover. *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146.—DISAPPROVING *Warner v. New York C. R. Co.*, 44 N. Y. 465. FOLLOWING *Button v. Hudson River R. Co.*, 18 N. Y. 248. QUOTING *Johnson v. Hudson River R. Co.*, 20 N. Y. 65.

It is as much the duty of the plaintiff to show, either by direct testimony or by facts and circumstances by which it may be reasonably inferred, that he was himself free from negligence as to establish the fact that defendants were guilty of negligence. *Muhr v. Mayor, etc., of N. Y.*, 16 N. Y. S. R. 688, 2 N. Y. Supp. 59.

The absence of contributory negligence is an element of plaintiff's cause and a part of his case, and he has the burden of showing that he or his intestate was guilty of no negligence contributing to the injury or death. No particular kind or species of evidence is required to establish the absence of contributory negligence. It is enough if, from all the evidence given by both parties, the inference can be fairly and justly drawn that there was no contributory negligence. *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831.

Where the plaintiff's evidence shows an injury through the negligence of defendant, without any contributory negligence on his part, the burden of proving the latter is upon the defendant. *Chadbourne v. Delaware, L. & W. R. Co.*, 6 Daly (N. Y.) 215. But see *Johnson v. Hudson River R. Co.*, 5 Duer (N. Y.) 21.—APPLYING *Gough v. Bryan*, 2 M. & W. 790; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244.—QUOTED IN *Owen v. Hudson River R. Co.*, 2 Bosw. (N. Y.) 374. REVIEWED IN *Norfolk & W. R. Co. v. Gilman*, 88 Va. 239.

(10) *Vermont*.—Where a plaintiff sues to recover for an injury resulting from defendant's negligence, the burden is on him to show due care on his own part, though this may require him to prove a negative; and an error in the court in instructing the jury that this burden is not on the plaintiff is

not cured by a further instruction, correct in itself, that the whole case must show that no want of due care on the part of plaintiff contributed to the injury. *Bovee v. Danville*, 53 *Vt.* 183.

105. When on defendant to show contributory negligence.*—(1) *General rule stated.*—In Alabama contributory negligence is a mere matter of defense, the burden of showing which rests upon the defendant. *Montgomery & E. R. Co. v. Chambers*, 79 *Ala.* 338.—FOLLOWED IN *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 *Ala.* 372.—*Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 *Ala.* 372, 5 *So. Rep.* 735.—FOLLOWING *Montgomery & E. R. Co. v. Chambers*, 79 *Ala.* 338.

And this is the rule in Arizona. *Lopez v. Central Arizona Mining Co.*, 1 *Ariz.* 464. *Hobson v. New Mexico & A. R. Co.*, (*Ariz.*) 28 *Am. & Eng. R. Cas.* 360, 11 *Pac. Rep.* 545.—QUOTING *Sioux City & P. R. Co. v. Stout*, 17 *Wall.* (U. S.) 657; *Oldfield v. New York & H. R. Co.*, 14 *N. Y.* 310.

And in Arkansas. *Little Rock & Ft. S. R. Co. v. Atkins*, 46 *Ark.* 423. *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 *Am. & Eng. R. Cas.* 459, 48 *Ark.* 333, 3 *S. W. Rep.* 50. *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 *Ark.* 106, 2 *S. W. Rep.* 505.

And in California. *MacDougall v. Central R. Co.*, 12 *Am. & Eng. R. Cas.* 143, 63 *Cal.* 431. *Glascocock v. Central Pac. R. Co.*, 73 *Cal.* 137, 14 *Pac. Rep.* 518.—FOLLOWED IN *Trouclair v. Pacific Coast Steamship Co.*, 80 *Cal.* 521.—*Nehrbas v. Central Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 670, 62 *Cal.* 320. *Robinson v. Western Pac. R. Co.*, 48 *Cal.* 409, 7 *Am. Ry. Rep.* 244.

And in Colorado. *Sanderson v. Frazier*, 8 *Colo.* 79, 5 *Pac. Rep.* 632. *Kansas Pac. R. Co. v. Twombly*, 3 *Colo.* 125, 21 *Am. Ry. Rep.* 447.

And in Dakota. *Sanders v. Reister*, 1 *Dak. T.* 145, 46 *N. W. Rep.* 680.—QUOTING *Washington & G. R. Co. v. Gladmon*, 15 *Wall.* (U. S.) 401.—*Mares v. Northern Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 620, 3 *Dak.* 336, 21 *N. W. Rep.* 5.—APPROVING *Kelly v. Chicago & N. W. R. Co.*, 60 *Wis.* 480, 19 *N. W. Rep.* 521; *Randall v. Northwestern Tel. Co.*, 54 *Wis.* 140, 11 *N. W. Rep.* 419;

Abbett v. Chicago, M. & St. P. R. Co., 30 *Minn.* 482.

And in the District of Columbia. *Harmon v. Washington & G. R. Co.*, 7 *Mackey* (D. C.) 255.

And in Florida. *Louisville & N. R. Co. v. Yniestra*, 21 *Fla.* 700.

And in Georgia. *Thompson v. Central R. & B. Co.*, 54 *Ga.* 509. *Contra*, *Campbell v. Atlantic & R. A. L. R. Co.*, 53 *Ga.* 488.

And in Idaho. *Hopkins v. Utah Northern R. Co.*, 2 *Idaho* 277, 13 *Pac. Rep.* 343.—FOLLOWING *Washington & G. R. Co. v. Gladmon*, 15 *Wall.* (U. S.) 401; *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.

And in Kansas. *St. Louis & S. F. R. Co. v. Weaver*, 28 *Am. & Eng. R. Cas.* 341, 35 *Kan.* 412, 11 *Pac. Rep.* 408. *Kansas Pac. R. Co. v. Pointer*, 14 *Kan.* 37. *Kansas City, L. & S. R. Co. v. Phillibert*, 25 *Kan.* 582.

And in Kentucky. *Bogenschutz v. Smith*, 84 *Ky.* 330, 1 *S. W. Rep.* 578. *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 390, 92 *Ky.* 345. *Paducah & M. R. Co. v. Hoehl*, 12 *Bush* (Ky.) 41, 18 *Am. Ry. Rep.* 338.

And in Maryland. *Baltimore & O. R. Co. v. State*, 12 *Am. & Eng. R. Cas.* 149, 60 *Md.* 449.

And in Minnesota. *Clark v. Chicago, M. & St. P. R. Co.*, 28 *Minn.* 69, 9 *N. W. Rep.* 75.—DISTINGUISHING *Brown v. Milwaukee & St. P. R. Co.*, 22 *Minn.* 165. FOLLOWING *Wilson v. Northern Pac. R. Co.*, 26 *Minn.* 278.—*Whittier v. Chicago, M. & St. P. R. Co.*, 24 *Minn.* 394.—FOLLOWING *Hocum v. Weitherick*, 22 *Minn.* 152.

And in Missouri. *Buesching v. St. Louis Gaslight Co.*, 73 *Mo.* 219, 39 *Am. Rep.* 503.—QUOTED IN *Petty v. Hannibal & St. J. R. Co.*, 88 *Mo.* 306.—*Crumpley v. Hannibal & St. J. R. Co.*, 111 *Mo.* 152, 19 *S. W. Rep.* 820. *Fulks v. St. Louis & S. F. R. Co.*, 52 *Am. & Eng. R. Cas.* 280, 111 *Mo.* 335, 19 *S. W. Rep.* 818. *Williams v. Missouri Pac. R. Co.*, 109 *Mo.* 475, 18 *S. W. Rep.* 1098. *Huckshold v. St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 659, 90 *Mo.* 548, 2 *S. W. Rep.* 794. *Schuerman v. Missouri R. Co.*, 3 *Mo. App.* 565. *Florida v. Pullman Palace Car Co.*, 37 *Mo. App.* 598. Unless such contributory negligence was disclosed by the plaintiff's evidence. *O'Connor v. Missouri Pac. R. Co.*, 32 *Am. & Eng. R. Cas.* 61, 94 *Mo.* 150, 13 *West. Rep.* 587, 7 *S. W. Rep.* 106.

* As to whether contributory negligence is matter of defense, or must be disproved by plaintiff, see note, 39 *AM. REP.* 511.

And in Nebraska. *Lincoln v. Walker*, 18 Neb. 244, 20 N. W. Rep. 113.

And in New Jersey. *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434; *affirming* 32 N. J. L. 166.—NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 686.

And in North Carolina. *Cawfield v. Asheville St. R. Co.*, 111 N. Car. 597, 16 S. E. Rep. 703. *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.—EXPLAINING *Owens v. Richmond & D. R. Co.*, 88 N. Car. 502. But note carefully the rule as laid down in *Owens v. Richmond & D. R. Co.*, 88 N. Car. 502 (Ruffin, J., dissenting).—APPROVING *Button v. Hudson River R. Co.*, 18 N. Y. 248. NOT FOLLOWING *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401. QUOTING *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *Robison v. Gary*, 28 Ohio St. 241.—DISTINGUISHED IN *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589. FOLLOWED IN *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321. QUOTED IN *Smith v. Richmond & D. R. Co.*, 34 Am. & Eng. R. Cas. 557, 99 N. Car. 241, 5 S. E. Rep. 896.

And in Ohio. *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627.

And in Pennsylvania. *Bradwell v. Pittsburgh & W. E. Pass. R. Co.*, 139 Pa. St. 404, 20 Atl. Rep. 1046.

And in Rhode Island. *Cassidy v. Angell*, 12 R. I. 447.

And in South Carolina. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52. *Kaminitzky v. Northeastern R. Co.*, 25 So. Car. 53. *Crouch v. Charleston & S. R. Co.*, 29 Am. & Eng. R. Cas. 495, 21 So. Car. 495.—REVIEWING *Carter v. Columbia & G. R. Co.*, 19 So. Car. 28.—FOLLOWED IN *Donahue v. Enterprise R. Co.*, 32 So. Car. 299, 11 S. E. Rep. 95.—*Carter v. Columbia & G. R. Co.*, 15 Am. & Eng. R. Cas. 414, 19 So. Car. 20, 45 Am. Rep. 754.—APPLIED IN *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32; *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.—FOLLOWED IN *Donahue v. Enterprise R. Co.*, 32 So. Car. 299, 11 S. E. Rep. 95. REVIEWED IN *Crouch v. Charleston & S. R. Co.*, 29 Am. & Eng. R. Cas. 495, 21 So. Car. 495.

And in Texas. *Dallas & W. R. Co. v. Spicker*, 21 Am. & Eng. R. Cas. 160, 61 Tex. 427, 48 Am. Rep. 297. *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. Rep. 513.—

REVIEWING *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427.

And in Utah. *Bowers v. Union Pac. R. Co.*, 4 Utah 215, 7 Pac. Rep. 251.

And in Virginia. *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. (Va.) 805. *Norfolk & W. R. Co. v. Gilman*, 88 Va. 239, 13 S. E. Rep. 475. *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.

And in Washington. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32. *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. Rep. 346.

And in West Virginia. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145. *Comer v. Consolidated C. & M. Co.*, 34 W. Va. 533, 12 S. E. Rep. 476.

And in Wisconsin. *Kelly v. Chicago & N. W. R. Co.*, 60 Wis. 480, 19 N. W. Rep. 521.—APPROVED IN *Mares v. Northern Pac. R. Co.*, 17 Am. & Eng. R. Cas. 620, 3 Dak. 336.—Contra, *Milwaukee & C. R. Co. v. Hunter*, 11 Wis. 160. *Chamberlain v. Milwaukee & M. R. Co.*, 7 Wis. 425.

And the same rule is laid down in the federal courts. *Hough v. Texas & P. R. Co.*, 100 U. S. 213. *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401. *Washington & G. R. Co. v. Harmon*, 58 Am. & Eng. R. Cas. 380, 147 U. S. 571, 13 Sup. Ct. Rep. 557. *Holmes v. Oregon & C. R. Co.*, 5 Fed. Rep. 523, 6 Sawy. (U. S.) 276. *Holmes v. Oregon & C. R. Co.*, 5 Fed. Rep. 75, 6 Sawy. (U. S.) 262.

And in England. *Wakelin v. London & S. W. R. Co.*, 12 App. Cas. 41.

(2) *Its extent and limits.*—The presumption is that a plaintiff suing for negligence was himself without fault, and the burden of proving the opposite is on the defendant. *Thompson v. Central R. & B. Co.*, 54 Ga. 509. *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.—FOLLOWED IN *Gordon v. Richmond*, 83 Va. 436.—But for the reverse of the above rule, see *Campbell v. Atlanta & R. A. L. R. Co.*, 53 Ga. 488.

The burden still remains on defendant to prove the defense of plaintiff's contributory negligence, even where it was negated in plaintiff's complaint. *Montgomery & E. R. Co. v. Chambers*, 79 Ala. 338.

Nor can the burden be shifted to the plaintiff by a denial of the plaintiff's allegation that the injury occurred without fault on his part. *Hudson v. Wabash & W. R.*

Co., 32 *Mo. App.* 667; transferred to supreme court, 101 *Mo.* 13.

Contributory negligence is a defense to be established by the evidence of defendant, unless it appears from plaintiff's evidence, *Montgomery & E. R. Co. v. Chambers*, 79 *Ala.* 338. *Texas & St. L. R. Co. v. Orr*, 46 *Ark.* 182. *MacDongall v. Central R. Co.*, 12 *Am. & Eng. R. Cas.* 143, 63 *Cal.* 431. *Sanders v. Reister*, 1 *Dak. T.* 145, 46 *N. W. Rep.* 680. *Baltimore & O. R. Co. v. Whitacre*, 35 *Ohio St.* 627. *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.—FOLLOWING *Washington & G. R. Co. v. Gladmon*, 15 *Wall. (U. S.)* 401.—APPROVED IN *Harmon v. Washington & G. R. Co.*, 7 *Mackey (D. C.)* 255; *Lemon v. Chanslor*, 68 *Mo.* 340; *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252. DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 *Am. & Eng. R. Cas.* 72, 42 *Kan.* 714, 6 *L. R. A.* 646, 22 *Pac. Rep.* 703. FOLLOWED IN *Hopkins v. Utah Northern R. Co.*, 2 *Idaho* 277. QUOTED IN *Nelson v. Chesapeake & O. R. Co.*, 88 *Va.* 971. REVIEWED IN *Little Rock & Ft. S. R. Co. v. Miles*, 13 *Am. & Eng. R. Cas.* 10, 40 *Ark.* 298.—*Horn v. Baltimore & O. R. Co.*, 54 *Fed. Rep.* 301, 6 *U. S. App.* 381, 4 *C. C. A.* 346. *Wakelin v. London & S. W. R. Co.*, 12 *App. Cas.* 41.

Or unless it may be fairly inferred from all the circumstances. *Baltimore & O. R. Co. v. Whittington*, 30 *Gratt. (Va.)* 805. *Norfolk & W. R. Co. v. Gilman*, 88 *Va.* 239, 13 *S. E. Rep.* 475. *Waterman v. Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

Negligence on the part of a plaintiff which contributes to the injury of which he complains is a matter of defense which the defendant must set up and maintain by proof, unless the plaintiff's own evidence in support of his cause of action shows that a presumption of contributory negligence is plainly inferable from said evidence; in which case the burden of proof is shifted, and it becomes the duty of the plaintiff to remove such presumption. *Louisville & N. R. Co. v. Yniestra*, 21 *Fla.* 700.

Where a company sets up contributory negligence as a defense, in an action against it for personal injury, the plaintiff is not required in the first instance to show himself free from negligence, where his petition does not allege the same. *Gulf, C. & S. F. R. Co. v. Williams*, (*Tex.*) 7 *S. W. Rep.* 88,

3 *D. R. D.*—20.

San Antonio & A. P. R. Co. v. Bennett, 76 *Tex.* 151, 13 *S. W. Rep.* 319.

The rule sometimes laid down, that the plaintiff must present a case clear of contributory negligence, was never intended to mean that the plaintiff, after proving affirmatively that the defendant's negligence caused the injury, must also prove negatively that he himself was not guilty of negligence that contributed to the result.* *Bradwell v. Pittsburgh & W. E. Pass. R. Co.*, 139 *Pa. St.* 404, 20 *Atl. Rep.* 1046.

Under the N. Car. statute (ch. 33, Acts of 1887) which requires that, in actions for the recovery of damages resulting from the negligence of the defendant, contributory negligence, if relied upon as a defense, shall be set up in the answer and proved on the trial, there can be no presumption of contributory negligence; therefore it was error in the judge to charge that the burden of proof was upon the plaintiff, in such an action, to show that she was not herself guilty of negligence, though the defendant offered no testimony. *Jordan v. Asheville*, 112 *N. Car.* 743, 16 *S. E. Rep.* 760.

106. Rule where plaintiff's evidence shows contributory negligence.—Contributory negligence is matter of defense, the *onus* of proving which is ordinarily on the defendant; but when the plaintiff's own evidence as to the charge of negligence on the part of the defendant inculpates himself also, this rule does not apply. *North Birmingham St. R. Co. v. Calderwood*, 89 *Ala.* 247, 7 *So. Rep.* 360. *Nehrbas v. Central Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 670, 62 *Cal.* 320. *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 *Ark.* 106, 2 *S. W. Rep.* 505. *Robinson v. Western Pac. R. Co.*, 48 *Cal.* 409, 7 *Am. Ky. Rep.* 244.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252.—*Florida v. Pullman Palace Car Co.*, 37 *Mo. App.* 598.—FOLLOWING *Scaling v. Pullman Palace Car Co.*, 24 *Mo. App.* 29.

Negligence on the part of a plaintiff which contributes to the injury of which he complains is a matter of defense which the defendant must set up and maintain by proof, unless the plaintiff's own evidence in support of his cause of action shows that a presumption of contributory negligence is plainly inferable from such evidence; in

* Compare for further statements of a similar rule, *ante*, 104 (9).

which case the burden of proof is shifted, and it becomes the duty of the plaintiff to remove such presumption. *Louisville & N. R. Co. v. Yniestra*, 29 Am. & Eng. R. Cas. 297, 21 Fla. 700. *Dallas & W. R. Co. v. Spicker*, 21 Am. & Eng. R. Cas. 160, 61 Tex. 427, 48 Am. Rep. 297.—FOLLOWED IN *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. Rep. 326. QUOTED IN *Murray v. Gulf, C. & S. F. R. Co.*, 38 Am. & Eng. R. Cas. 177, 73 Tex. 2, 11 S. W. Rep. 125. REVIEWED IN *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181.

107. Burden on plaintiff after his negligence has been shown.—After contributory negligence is shown the plaintiff cannot relieve himself of the burden of proving some subsequent act or omission of the defendant to have been the proximate cause, by offering testimony that merely raises a conjecture. He must show the nature of such act or omission, so that the jury may fairly infer that it was the immediate cause of the injury. *Norwood v. Raleigh & G. R. Co.*, 111 N. Car. 236, 16 S. E. Rep. 4.

Where the contributory negligence of a plaintiff who sues a railroad for personal injuries is established, and he seeks to avoid the effect thereof by showing that the injury was wilful and reckless, the burden is on him to show that the company had actual knowledge of his danger and could have avoided the injury by the exercise of ordinary care and prudence. *Richmond & D. R. Co. v. Didzoneit*, 1 App. Cas. (D. C.) 482.

V. INSTRUCTIONS.

108. Duty to instruct upon question of contributory negligence.—Where the defense of contributory negligence is pleaded it should not be omitted from the instructions. *Gilson v. Jackson County Horse R. Co.*, 12 Am. & Eng. R. Cas. 132, 76 Mo. 282.

In every case of alleged personal injury by negligence, where there was any considerable interval of time between the discovery of the negligence and its injurious effects, the jury ought to be made acquainted with the rule of law which puts the plaintiff on the exercise of ordinary care to avoid the consequences of the defendant's negligence. *Akridge v. Atlanta & W. P. R. Co.*, 90 Ga. 232, 16 S. E. Rep. 81.

When the question of contributory neg-

ligence arises at all, the better practice is to submit a separate issue upon it. *Lay v. Richmond & D. R. Co.*, 42 Am. & Eng. R. Cas. 110, 106 N. Car. 404, 11 S. E. Rep. 412. —FOLLOWING *Bullock v. Wilmington & W. R. Co.*, 105 N. Car. 180.

It is not error for the court to instruct the jury upon the doctrine of contributory negligence and apportionment of damages in a case where the jury would be authorized, under the testimony, to find that both parties were at fault in occasioning the injury for which the action was brought. *Western & A. R. Co. v. Meigs*, 74 Ga. 857.

Where contributory negligence is not pleaded, the answer being simply a denial, and there is no demurrer to the evidence and no instructions offered on that point, the mere introduction of evidence without objection would not make an issue on which instructions should be given. *Hyatt v. Hannibal & St. J. R. Co.*, 19 Mo. App. 287.

109. Where there is no evidence tending to show contributory negligence.—Charges on the subject of contributory negligence are not objectionable on the ground that their effect is to exclude from the jury the consideration of negligence of third persons with whom or for whose acts or negligence the testimony falls entirely to show any privity or responsibility upon the part of the plaintiff. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

In actions for injury done plaintiff by negligence of defendant company, instructions asked for by defendant, with a view to present the question of contributory negligence on plaintiff's part, should be refused when no evidence of such negligence has been introduced to the jury. *Petersburg R. Co. v. Hite*, 81 Va. 767. *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303. *Lanning v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 493, 68 Iowa 502, 27 N. W. Rep. 478. *Brower v. Edison*, 47 Mich. 91, 10 N. W. Rep. 121. *Jones v. Missouri Pac. R. Co.*, 31 Mo. App. 614. *Jones v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 459, 20 So. Car. 249.

Where it devolves on defendant to plead contributory negligence in order to raise such issue, and the answer does not tender such issue, and the evidence is not such as to justify the trial court in taking the case from the jury on the ground that

plaintiff's evidence showed contributory negligence, it cannot devolve on plaintiff in framing his instructions to submit such issue to the jury. Instructions must be drawn in conformity with the issues. *Brown v. Hannibal & St. J. R. Co.*, 31 Mo. App. 661.

When there is no evidence tending to show that the driver of a vehicle was not generally careful and competent in the discharge of his duties, or that plaintiff had reason to believe him imprudent, all charges asked, based on this idea of contributory negligence on his part, are properly refused. *Elyton Land Co. v. Mingea*, 43 Am. & Eng. R. Cas. 309, 89 Ala. 521, 7 So. Rep. 666.

110. Instructions ignoring contributory negligence.—Where plaintiff's claim is based on the defendant's negligence, due care on his own part is necessary to a recovery, and an instruction purporting to state the requisites to a recovery by plaintiff, and omitting that of the exercise of ordinary care, is erroneous as ignoring the question of contributory negligence. *Chicago, S. F. & C. R. Co. v. Bentz*, 38 Ill. App. 485. *Chicago City R. Co. v. Freeman*, 6 Ill. App. 608. *Moody v. Peterson*, 11 Ill. App. 180. *Chicago, B. & Q. R. Co. v. Housh*, 12 Ill. App. 88. *Lake Erie & W. R. Co. v. Morain*, 36 Ill. App. 632.

In an action based on defendant's negligence, an instruction to the effect that plaintiff could recover if he showed by a preponderance of evidence that the loss resulted from the negligence of defendant, was defective in failing to instruct the jury that plaintiff could not recover if his own negligence contributed to the loss. *McCormick v. Chicago, R. I. & P. R. Co.*, 47 Iowa 345. *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732.

Where the issue of plaintiff's contributory negligence is made, an instruction is erroneous which hypothesizes the facts as to defendant's negligence and authorizes a verdict for plaintiff therein, without in the same instruction limiting such right of recovery to the absence of such contributory negligence on the part of plaintiff. *Sullivan v. Hannibal & St. J. R. Co.*, 88 Mo. 169.—NOT FOLLOWING *Owens v. Kansas City, St. J. & C. B. R. Co.*, 33 Am. & Eng. R. Cas. 524, 95 Mo. 169, 15 West. Rep. 88, 8 S. W. Rep. 350. REVIEWING *Thomas v.*

Babb, 45 Mo. 384.—*Willard v. Pinard*, 44 Vt. 34.

Nor is such defect in the instruction cured by other instructions given in the case which so limit plaintiff's right of recovery, if he was guilty of contributory negligence. (Black and Norton, JJ., dissenting.) *Sullivan v. Hannibal & St. J. R. Co.*, 88 Mo. 169.—OVERRULED IN *Dougherty v. Missouri R. Co.*, 34 Am. & Eng. R. Cas. 488; see also 37 Am. & Eng. R. Cas. 206, 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900, 11 S. W. Rep. 251.

It was error to instruct a jury so that they might infer that if a train did not stop five minutes the company, under the law, was liable, irrespective of the question of contributory negligence on the part of the injured man. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

111. Interpretation.—The use of the expression "gross negligence," in a charge to a jury, does not of itself define, nor does it include only, that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain; and it cannot be held as having been intended to submit the case to a jury for consideration as one of that character; and particularly so where other charges have recognized contributory negligence as a defense to the action. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

In an action for damages against a street-railway company for injuries resulting from the carelessness and negligence of defendant, if it appeared that plaintiff in any manner directly contributed to such injuries by his own wrongful or negligent act, he cannot recover. And an instruction given to the jury, after they had retired to consider their verdict, omitting the element of contributory negligence, if standing alone, would undoubtedly be bad; but if that point was fully met by other instructions, such omission would be no ground for reversal of the cause. Instructions are to be considered and construed in their combination and entirety, and not as though each separate instruction was intended to embody the whole law of the case. *McKeon v. Citizens' R. Co.*, 43 Mo. 405.

In an action for being run over by a street-car the plaintiff requested a charge, to the effect that intoxication on the part

of the plaintiff would not constitute contributory negligence unless it contributed to the injury; to which the court responded, "That is so; the intoxication is of no consequence, unless it made him more careless." *Held*, that the jury could not have understood by the use of the word "more" that plaintiff might be somewhat careless and still recover, where they had already been told that any contributory negligence would defeat a recovery. *Morris v. Eighth Ave. R. Co.*, 52 N. Y. S. R. 61, 22 N. Y. Supp. 666.

112. What requests to charge should be given, generally.—In an action to recover for injuries received by colliding with a train, contributory negligence was made a ground of defense. The company requested a charge that if plaintiff was guilty of any fault or negligence whatever which contributed to the injury he could not recover. *Held*, that it was error to refuse this charge and simply instruct the jury that if plaintiff was guilty of negligence he could not recover. *Bunn v. Delaware, L. & W. R. Co.*, 6 Hun (N. Y.) 303.

The court instructed the jury that if they believed from the evidence "that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped the train with safety to the same and to the passengers and railroad employes on the same in his then situation, and could prudently have avoided collision with his team, his failure so to stop amounts to negligence and renders the defendant liable for damages; and such attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence." *Held*, that although this instruction is carelessly drawn, the principle of law embodied therein is not erroneous. *Bunting v. Central Pac. R. Co.*, 6 Am. & Eng. R. Cas. 282, 16 Nev. 277.—QUOTING *Radley v. London & N. W. R. Co.*, L. R. 1 App. Cas. 759; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 465.

In charging on the question of contributory negligence the court may properly grant the following requests for instructions:

An instruction that if the plaintiff did not exercise ordinary care and caution she could not recover if the company was free from negligence; but if she was negligent,

and the company was also, she might recover. *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. Rep. 706.

An instruction to the effect that the negligence of plaintiff must have contributed "directly" to the injury, to excuse defendant. *Locke v. Sioux City & P. R. Co.*, 46 Iowa 109, 16 Am. Ry. Rep. 138.—FOLLOWING *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa 45.—*Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa 45.—FOLLOWED IN *Locke v. Sioux City & P. R. Co.*, 46 Iowa 109.

An instruction that plaintiff may recover though they find that he was in some respects negligent, if such negligence did not contribute or tend to produce the injury. *Hatfield v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 153, 61 Iowa 434, 16 N. W. Rep. 336.—NOT FOLLOWING *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188.

An instruction that though the decedent was negligent in stepping on the track, yet if after the occurrence of such negligence defendant's servants in charge of the engine discovered, or could have discovered by the use of ordinary care, her condition and its danger, and could have avoided injuring her by the use of ordinary care and failed to do so, her negligence was no defense to the action. *Sullivan v. Missouri Pac. R. Co.*, 117 Mo. 214, 23 S. W. Rep. 149.

An instruction that although a person who is rightfully upon a track may be guilty of contributory negligence in failing to look out for the approach of cars, the company is nevertheless liable if by the exercise of ordinary care, after the discovery by the company's servants of the danger in which such person stood, the accident could have been prevented, or if the company failed to discover the danger through the negligence or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and avoided the injury. *Kelly v. Union R. & T. Co.*, 35 Am. & Eng. R. Cas. 396, 95 Mo. 279, 14 West. Rep. 721, 8 S. W. Rep. 420.

An instruction that in considering the question of reasonable care and prudence on the part of the plaintiff they had a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger. *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

113. — and what requests should be refused.—Where contributory negligence is not presented by the pleadings, instructions concerning it are properly refused. *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336.

Unless a conclusive inference of such negligence arises from the plaintiff's testimony. *Keitel v. St. Louis C. & W. R. Co.*, 28 Mo. App. 657.

It is not error for the trial judge to refuse to charge that certain acts or omissions of the plaintiff amount to contributory negligence, when the evidence in regard to them is conflicting. *Scott v. Wilmington & W. R. Co.*, 96 N. Car. 428, 2 S. E. Rep. 151.

Where ordinary care is the degree of diligence involved in the issue, and contributory negligence is set up as a defense, it is error to charge that if the plaintiff, by his own fault, has contributed to his injury the defendant must then show that he was without fault himself; and that no man can be shown without fault unless he has done all in his power to avoid the injury. *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1. —QUOTING *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570. *REVIEWING Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 195.

It is error for the trial court to instruct the jury, upon the question of the contributory negligence of the injured person, that "if any reasonable mind can come to a different conclusion than that the plaintiff was guilty of negligence, if there is any doubt upon the subject, or a reasonable mind can form an opposite opinion, instead of that he was guilty of negligence, then it would be for them to deliberate upon the testimony, and ascertain if, from all of it, they can come to the conclusion that the plaintiff was not guilty of contributory negligence, and hence ought to recover." *Mynning v. Detroit, L. & N. R. Co.*, 67 Mich. 677, 12 West. Rep. 427, 35 N. W. Rep. 811.

The court instructed the jury that though the decedent was guilty of negligence in stepping on the track, and the defendant's servants in charge of the engine, after seeing her danger, could not have avoided injuring her, yet if their inability to avoid such injury after discovering her danger was caused by their running at an illegal rate of speed, and that if the engine had been running at a legal rate of speed de-

fendant's servants could have avoided injuring her by the use of ordinary care, then the negligence of the deceased was no defense. *Held*, erroneous. *Sullivan v. Missouri Pac. R. Co.*, 117 Mo. 214, 23 S. W. Rep. 149.

As bearing on the question of contributory negligence, the following requests for instructions should be refused:

An instruction to find for the defendant if it appears that plaintiff did not exercise ordinary care "at the time of the accident and prior thereto," as the defendant was only required to show a want of care at the time of the injury. *Chicago & E. I. R. Co. v. O'Connor*, 13 Ill. App. 62.

An instruction not based upon a theory deducible from the facts in evidence. *Price v. St. Louis, K. C. & N. R. Co.*, 3 Am. & Eng. R. Cas. 365, 72 Mo. 414.—FOLLOWED IN *Abbot v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271.

An instruction which tells the jury that, before plaintiff can recover, they must believe that he "did not in any manner contribute directly" to the injury complained of. *Schuerman v. Missouri R. Co.*, 3 Mo. App. 565.

An instruction that the instincts of self-preservation were not proper to be considered in determining whether or not plaintiff was guilty of contributory negligence. *Slaughter v. Metropolitan St. R. Co.*, 58 Am. & Eng. R. Cas. 604, 116 Mo. 269, 23 S. W. Rep. 760. *Davis v. Kansas City Belt R. Co.*, 46 Mo. App. 180.

An instruction that "the law presumes that he exercised ordinary care," where the evidence tends to show contributory negligence. *Rapp v. St. Joseph & I. R. Co.*, 106 Mo. 423, 17 S. W. Rep. 487.—FOLLOWING *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 98 Mo. 183.

An instruction which will preclude a plaintiff from recovery for personal injuries unless he exercised extraordinary prudence and foresight to avoid injury, there being no rule of law which requires him to use more than ordinary caution to shield himself from the consequences of contributory negligence. *Hays v. Gainesville St. R. Co.*, 34 Am. & Eng. R. Cas. 97, 70 Tex. 602, 8 S. W. Rep. 491.

An instruction that if plaintiff contributed to the injury his right to recover is not affected thereby, unless he was in fault in so contributing to the injury. *Richmond &*

D. R. Co. v. Yeamans, 86 Va. 860, 12 S. E. Rep. 946.—APPROVING *Dun v. Seaboard & R. R. Co.*, 78 Va. 645.

An instruction that a person who voluntarily places himself in a dangerous position and thereby contributes to an injury cannot recover, unless it is qualified so as to embrace the element of common prudence. *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 Am. & Eng. R. Cas. 249, 64 Wis. 447, 24 N. W. Rep. 618, 54 Am. Rep. 634.

An instruction that facts contained in certain hypothetical statements prepared by defendant's counsel, and supposed to conform to the proofs, would show such contributory negligence. *Veerhusen v. Chicago & N. W. R. Co.*, 53 Wis. 689, 11 N. W. Rep. 433.

114. General and specific instructions.—Where the vital and controlling issue submitted to a jury is whether the plaintiff at the time of receiving an injury was in the exercise of ordinary care, or whether he was guilty of such contributory negligence as to bar his right of recovery, in a close case upon such issue it is of great importance that the jury should be accurately instructed. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; reversing 31 Ill. App. 563.

An instruction which leaves the question of contributory negligence to the jury without any guidance or giving them any rule for determining when a plaintiff's negligence is to be regarded as contributory, should not be granted. *Harmon v. Washington & G. R. Co.*, 7 Mackey (D. C.) 255.

115. Assuming facts not in evidence.—After charging that any contributory negligence of plaintiff at the time of the accident would prevent a recovery, the court did not err in refusing to charge that if plaintiff had a good opportunity or means of knowing a certain defect as defendant had, but overlooked it, this was negligence which would prevent a recovery. And especially was this not error where there was no evidence that plaintiff was familiar with the car or had ever before coupled it. *Wedgwood v. Chicago & N. W. R. Co.*, 44 Wis. 44, 19 Am. Ry. Rep. 393.

116. Misleading instructions.—(1) *What are.*—Negligence on the part of the plaintiff himself, to be available as a defense to an action, "must have contributed proximately to the injury;" "contributed in any

way to the happening of the injury" is not an accurate expression, and is probably misleading in an instruction. *Thompson v. Duncan*, 76 Ala. 334.

Upon the trial of a suit for personal injuries it was error to charge as follows: "If by the exercise of ordinary care and diligence the plaintiff could have avoided the consequences to herself of the defendant's negligence, she cannot recover; but if both parties were at fault and the alleged injury was the result of the fault of both, then, notwithstanding the plaintiff's negligence, she would be entitled to recover; but the amount of the recovery would be abated in proportion to the amount of the default on her part." The error consisted in stating, in immediate connection with each other and without proper explanation, two distinct rules of law, and thus qualifying the former by the latter, which is not the purpose of the statute. *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. Rep. 105.

Where there is no evidence, in an action for damages resulting from the alleged negligence of the defendant, tending to show that the injuries were caused by such gross negligence on the part of the defendant or his servants as to imply wanton or wilful injury, an instruction that if the jury believe from the evidence that the accident in question was attributable to the want of ordinary care on the part of the plaintiff he cannot recover, unless the jury further believe from the evidence that the defendant was guilty of such gross negligence as implies wilful injury, is misleading. *Kansas Pac. R. Co. v. Peavey*, 11 Am. & Eng. R. Cas. 260, 29 Kan. 169, 44 Am. Rep. 630.

It is misleading to instruct the jury that the negligence of plaintiff's intestate, to prevent a recovery, must have directly contributed to the injury, where the facts show that if there was such negligence it was at the very time of the accident, and therefore its influence was direct. *Button v. Hudson River R. Co.*, 18 N. Y. 248—APPROVING *Trow v. Vermont C. R. Co.*, 24 Vt. 487; *Hawkins v. Cooper*, 8 C. & P. 473. REVIEWING *Dowell v. General S. Nav. Co.*, 5 El. & Bl. 195.

Although the court charged the jury that the plaintiff cannot recover if his own negligence contributed to the injury, and yet, in connection with such charge, so instructed the jury that they might reasonably believe that this rule only applies when the defend-

ant is not negligent, such charge is misleading. *Baltimore & O. R. Co. v. Whittaker*, 24 Ohio St. 642, 7 Am. Ry. Rep. 182.

It is misleading to charge that the jury must be "thoroughly satisfied that the accident did not occur in consequence of the carelessness of the plaintiff, * * * because the duty of the plaintiff is not only to prove negligence on the part of the defendant, but also to prove that he was clear of contributory negligence." *Bradwell v. Pittsburgh & W. E. Pass. R. Co.*, 139 Pa. St. 404, 20 Atl. Rep. 1046. See also *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.

By the expression "thoroughly satisfied," as used in an instruction, the jury would doubtless be misled to understand that their belief of the plaintiff's freedom from contributory negligence must be so strong as to exclude every reasonable doubt; whereas the standard of proof ordinarily is preponderance of evidence, not such a degree of proof as will produce "thorough" satisfaction. *Bradwell v. Pittsburgh & W. E. Pass. R. Co.*, 139 Pa. St. 404, 20 Atl. Rep. 1046.

After instructing the jury as to the law of contributory negligence, the court added: "A plaintiff may under certain circumstances be entitled to recover damages for an injury although he may by his own negligence have contributed to produce it." Held, erroneous because misleading. *Richmond & D. R. Co. v. Picklesimer*, 85 Va. 798, 13 Va. L. J. 646, 10 S. E. Rep. 44.

(2) — and what are not.—The court below charged: "If plaintiff, by his negligence, contributed to his injury to such an extent that but for it he would not have been hurt, you will find for the defendant." This was a proper charge, and not on the weight of evidence, nor misleading. *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. Rep. 34.—FOLLOWING International & G. N. R. Co. v. Ormond, 64 Tex. 489.

A charge instructing the jury that to establish the defense of contributory negligence "they must be satisfied from the evidence that plaintiff was guilty of negligence which was proximate to and essentially contributed to the injury," is neither erroneous nor misleading. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735.

A charge that "if plaintiff was injured, and the proximate cause of the injury was

plaintiff's contributory negligence, defendant would be entitled to a verdict, even though defendant may have been negligent also; and if plaintiff and defendant were equally negligent, plaintiff could not recover," is calculated to mislead the jury as to the doctrine of comparative negligence; but this is sufficiently corrected where, in another part of the charge, the jury are further instructed that if they believe the defendant guilty of negligence, then in order to find for plaintiff they must believe such negligence to have been the proximate cause of the injury, without any contributory negligence on the part of plaintiff. *Gulf, C. & S. F. R. Co. v. Buford*, 2 Tex. Civ. App. 115, 21 S. W. Rep. 272.

117. Ambiguous or inconsistent instructions.—An instruction, in an action against a horse-railway company, that although the jury may believe that plaintiff was guilty of negligence at the time of the injury, yet if they believe that such negligence did not contribute to or cause the injury, or if they find that defendant's servants were negligent in the management of the car, or in the use of unsuitable horses, and that if there had been no such negligence on the part of defendant said injury would not have happened, notwithstanding the negligence of plaintiff, they should find for plaintiff, is erroneous, as being inconsistent with itself and as abolishing the doctrine of contributory negligence. *Dougherty v. Missouri R. Co.*, 34 Am. & Eng. R. Cas. 488; see also 37 Am. & Eng. R. Cas. 206, 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900, 11 S. W. Rep. 251.

Where the carelessness of the plaintiff, as well as that of the defendant, operated directly to produce the injury complained of, the plaintiff has no right to recover. And in a case where the defendant is entitled to and requests a charge to that effect, the refusal or neglect of the court to so instruct the jury, in unambiguous terms, is error for which a judgment in favor of the plaintiff will be reversed. *Pittsburg, Ft. W. & C. R. Co. v. Krichbaum*, 24 Ohio St. 119, 7 Am. Ry. Rep. 200.—REVIEWED IN *Omaha Horse R. Co. v. Doolittle*, 7 Neb. 481.

118. Invading the province of the jury.—Plaintiff's own negligence is not a defense to an action for damages unless it contributed to his injury; and a charge which assumes that it did so contribute is

an invasion of the province of the jury. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.

A trial court cannot legally instruct the jury "that the plaintiff was guilty of contributory negligence in standing on the platform of the caboose, and that they should find for the defendant." Whether his action in taking a position on the platform was negligent was for the jury under the circumstances in evidence. *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. Rep. 572.

A refusal to charge the jury that certain acts of the plaintiff, at the time the accident occurred, constituted negligence and prevented a recovery, was not error. *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349. *Chicago v. McLean*, 133 Ill. 148, 8 L. R. A. 765, 24 N. E. Rep. 527.

There was no error in refusing to charge that if, among different modes of performing his duty, some of which were safe, plaintiff chose one which was less safe, he took the risk of his choice, and could not recover, and in charging instead that this was a circumstance for the jury to consider with the other facts in deciding whether the plaintiff was at fault or not. The question of fault or negligence was for the jury alone, and was fairly submitted to them. *Central R. Co. v. De Bray*, 71 Ga. 406.

119. Modifying Instructions.—

Where a judge is requested to charge "that if the jury find from the evidence that the injury to the plaintiff was the result of an accident, without fault on the part of the railroad company or its servants, then the company is not liable," it is error to add: "That is, if there was no negligence at all established against the company, it is not liable," for the jury may have understood this qualification to mean that the defendant must be free from all fault, whether the cause of the injury or not. *White v. Augusta & K. R. Co.*, 30 So. Car. 218, 9 S. E. Rep. 96.

It is error to modify a proper instruction as to the effect of plaintiff's contributory negligence upon his right of recovery, by inserting in the following provisory clause "unless the perilous position of plaintiff was known to defendant's employés, and that by use of ordinary care, after knowledge thereof, the accident could have been avoided," the words "or by use of ordinary diligence could have been known." *Rich-*

mond & D. R. Co. v. Yeamans, 86 Va. 860, 12 S. E. Rep. 946.

120. Further instructions.—It is no error to refuse instructions asked by the defendant on the question of contributory negligence, where those given by the court of its own motion cover every phase of that defense. *Kalm v. Union R. & T. Co.*, 90 Mo. 314, 2 S. W. Rep. 427.

Where a jury has been fully instructed as to the effect of contributory negligence, it is not error to refuse to instruct that plaintiff cannot recover, if the jury find that his want of due care caused the accident or contributed thereto, or that it could have been avoided by the exercise of due care. *Houston & T. C. R. Co. v. Brin*, 77 Tex. 174, 13 S. W. Rep. 886.

Where the jury had been instructed as to the duty of a plaintiff, in a suit for damages for an injury, to use reasonable and proper care for her recovery, in such manner as to indicate that otherwise she could not recover damages at all, the defendant cannot complain of a refusal of an instruction that, if she did not use such care, she could only recover for such loss of time and medical bills as would reasonably result under proper treatment. *Alexander v. Richmond & D. R. Co.*, 112 N. Car. 720, 16 S. E. Rep. 896.

In an action against a railroad for an injury to a woman, where the defense of contributory negligence is relied on, it is not error to refuse to charge the jury that in determining whether there was such contributory negligence they might consider her age, sex, and physical condition, where the jury have already been charged that they may take into consideration all the circumstances in evidence. *Little Rock & Ft. S. R. Co. v. Harkey*, (Ark.) 15 S. W. Rep. 456.

Though under ch. 33 of the N. Car. Acts of 1887 a defendant, who relies on contributory negligence on the part of a plaintiff must allege it in the answer, it is not error to fail to submit a special issue as to such contributory negligence, when there is an issue whether plaintiff sustained injuries by the negligence of defendant, under which the question might be considered; certainly not when the defendant declined to submit such issue when requested. *De Berry v. Carolina C. R. Co.*, 100 N. Car. 310, 6 S. E. Rep. 723.

When contributory negligence is pleaded

the jury can ordinarily be made to comprehend the law more clearly if not only the issues involving the question of negligence of plaintiff and defendant, respectively, are submitted, but another involving the question, where it is raised by the evidence or the discussion, whether, notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of ordinary care, have avoided the injury. *McAdoo v. Richmond & D. R. Co.*, 41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316.—**DISTINGUISHED IN** *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589.

121. Instructions relating to the burden of proof.—An instruction that if at the time of the accident plaintiff was exercising ordinary care for his safety, and that defendant was guilty of negligence as charged, and that this caused the accident, then they will find the defendant guilty, is not, in substance, equivalent to an instruction that the burden of proof was upon the plaintiff to prove that he was in the exercise of ordinary care. *North Chicago St. R. Co. v. Louis*, 138 Ill. 9, 27 N. E. Rep. 451; reversing 35 Ill. App. 477.

Instructions so drawn as to put upon the plaintiff the *onus* of showing that he was not guilty of contributory negligence are properly refused. *Swigert v. Hannibal & St. J. R. Co.*, 9 Am. & Eng. R. Cas. 322, 75 Mo. 475. *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282. *MacDougall v. Central R. Co.*, 12 Am. & Eng. R. Cas. 143, 63 Cal. 431.

An instruction is properly refused which holds that if the evidence tended to show that the plaintiff was guilty of contributory negligence the burden of proof was on him. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165, 11 So. Rep. 886.

A charge which asserts that "before the plaintiff can be entitled to recover the jury must be satisfied from the evidence: (1) that the defendant, his agents, or servants, have been guilty of fault or negligence; (2) that plaintiff has been thereby injured; and (3) that this damage has been without the lack of any reasonable care on his part," misplaces the burden of proof, and is erroneous. *Thompson v. Duncan*, 76 Ala. 334.

In an action to recover for personal injuries received by being struck by a train, the court charged that the plaintiff must affirmatively prove that she was in the exercise of due care. *Held*, error, as the jury

were by this instruction given to understand they must find for the defendant, unless the plaintiff, by evidence on her own part, disproved or rebutted the presumption of negligence against her. *Robinson v. New York C. & H. R. R. Co.*, 65 Barb. (N. Y.) 146.

A charge of the court to the effect that the burden of proof was on the defendant to "satisfy" the jury of alleged contributory negligence on the part of plaintiff—*held*, not correct. The burden of proof requires no more than a preponderance of evidence on that point. *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.

122. — relating to the degree of contributory negligence.—Where contributory negligence is set up as a defense, it is the duty of the court to instruct the jury as to the degree of care which a plaintiff must exercise, and then leave it to them to determine whether, under all the facts proved, he was guilty of contributory negligence. *Chicago W. D. R. Co. v. Klaubner*, 9 Ill. App. 613.

In an action by a boy about seven years old to recover for personal injuries, it is error to instruct the jury that there may be a recovery although plaintiff did not exercise all such care and caution for his own safety as might have been expected under the circumstances and from one of his age and intelligence, as that was precisely the care and caution which were required of him. *Quincy Horse R. & C. Co. v. Gruse*, 26 Ill. App. 397.—**QUOTING** *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

Plaintiff is only required to exercise ordinary care to avoid an injury, and an instruction to the jury that they must find for the defendant if they find plaintiff was guilty of any negligence whatever contributing to the injury is error as requiring the exercise of extreme care. *Strader v. Marietta & C. R. Co.*, 2 Cin. Super. Ct. 268; reversed on other grounds in 29 Ohio St. 448.

It is not error to refuse to instruct the jury that "it lay upon plaintiff to show that he had used that degree of care and prudence which was necessary to have prevented a collision with defendants' cars, and that he must show this affirmatively;" nor that "in a public street and not dangerous *per se*, if a person comes against an obstruction in the daytime and receives injury, he cannot recover against a wrong-doer, without showing affirmatively that he had used that

amount of care which was required, under the peculiar circumstances of the case, to pass by it, and having used the same is nevertheless damaged." Such standards of care are not reasonable, as, under them, the occurring of the accident would have been proof of negligence. *Pennsylvania R. Co. v. McTighe*, 46 Pa. St. 316.

It was correct after charging the jury that plaintiff could not recover if there was negligence both on the part of the plaintiff and of the railroad company, to further charge, "It is not the least degree of fault on the part of plaintiff that will prevent him from a recovery; but it must be such a degree as to amount to a want of ordinary or reasonable care on his part, under the circumstances, at the time of the injury." *Houston & T. C. R. Co. v. Gorbett*, 49 Tex. 573.

123. Directing verdict.—It is error to direct a verdict for the defendant in a negligence case on the ground of plaintiff's contributory negligence, when, in order to convict plaintiff of such negligence, it is necessary to assume that he must have heard what other unimpeached witnesses did not hear, or have seen what they did not see. *Little v. Grand Rapids St. R. Co.*, 78 Mich. 205, 44 N. W. Rep. 137.

It is not error, even when contributory negligence is pleaded, since the enactment of N. Car. Laws 1887, ch. 33, to submit only the question whether the injury was caused by defendant's negligence, and instruct the jury to respond in the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. *McAdoo v. Richmond & D. R. Co.*, 41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316.

The court may properly direct the jury to find a verdict for the defendant in the following cases:

Where the plaintiff's evidence shows that his own negligence contributed to the injury. *Griffin v. Chicago, R. I. & P. R. Co.*, 68 Iowa 638, 27 N. W. Rep. 792. *Rupard v. Chesapeake & O. R. Co.*, 88 Ky. 280, 11 S. W. Rep. 70.

Where the circumstances are not complicated, and the undisputed evidence discloses conduct which would be condemned as careless by men of common prudence. *Wills v. Lynn & B. R. Co.*, 2 Am. & Eng. R. Cas. 27, 129 Mass. 351.—DISTINGUISHED IN *Fleck v. Union R. Co.*, 16 Am. & Eng. R. Cas. 372, 134 Mass. 480; *O'Connor v. Bos-*

ton & L. R. Corp., 15 Am. & Eng. R. Cas. 362, 135 Mass. 352.

Where, upon the undisputed facts, if plaintiff had exercised the ordinary caution which men of ordinary prudence usually observe, he might have avoided the injury complained of. *Melzer v. Peninsular Car Co.*, 76 Mich. 94, 42 N. W. Rep. 1078. *Powell v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 467, 76 Mo. 80.—QUOTING *Wilds v. Hudson River R. Co.*, 24 N. Y. 433.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283. FOLLOWED IN *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 86. QUOTED IN *Diahi v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645.

Where contributory negligence is established by the uncontroverted facts of the case. *Missouri Pac. R. Co. v. Moseley*, 57 Fed. Rep. 921.

Where it appeared that the plaintiff voluntarily placed himself upon the track in front of an approaching engine. *Mills v. Orange, A. & M. R. Co.*, 2 MacArth. (D. C.) 314.

Where the evidence of contributory negligence is so conclusive as would compel the court to set aside a verdict in plaintiff's favor. *Goodlett v. Louisville & N. R. Co.*, 33 Am. & Eng. R. Cas. 1, 122 U. S. 391, 7 Sup. Ct. Rep. 1254.—FOLLOWED IN *Graham v. Pennsylvania R. Co.*, 39 Fed. Rep. 596, 12 N. J. L. J. 231.

124. Erroneous but harmless instructions.—When the defense of contributory negligence is not presented by the pleadings the defendant cannot complain of a charge which "leaves it to the jury to say whether, under the evidence in the case, the plaintiff was guilty of contributory negligence." *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. Rep. 262.

An error in the charge upon contributory negligence by the plaintiff is not material when there was no testimony to contributory negligence and no injury resulted. *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 14 S. W. Rep. 993.

Plaintiff sued for an injury received while riding on a car platform, and the company alleged contributory negligence. The court charged "that no fault of the plaintiff could excuse the defendants from liability unless it had the effect to produce the collision that caused the injury." *Held*, error, but not ground for reversal where the jury specially find that there was no contributory negligence. *Colegrove v. New York & N.*

H. R. Co., 20 *N. Y.* 492; affirming 6 *Duer* 382.

125. Improper remarks of judge.

—In a negligence suit, contributory negligence was made a defense. After instructing the jury as to the law of contributory negligence and submitting the question to them, the court remarked, referring to the very act which was charged as contributory negligence, that he did not see how such act was unreasonable, or a thing which an ordinary man would not do. *Held*, error. *Andrews v. Runyon*, 65 *Cal.* 629, 4 *Pac. Rep.* 669.

Plaintiff sued for a personal injury while riding in a street-car and contributory negligence was made a defense on the ground that plaintiff stood up. The court instructed the jury, among other things, "I think I must charge you that the evidence establishes fairly and affirmatively in favor of the plaintiff, that she was not guilty of contributory negligence;" but in passing to another point remarked: "If this be answered in the affirmative, then you come to the next question." He had already told the jury that the question was one to be decided by them. *Held*, that the remark was a strong intimation of the opinion of the court on the question of contributory negligence, but, taken in connection with the other portions of the charge, it did not withdraw the question from the jury, and was therefore not reversible error. *Griffith v. Utica & M. R. Co.*, 17 *N. Y. Supp.* 692; affirmed in 137 *N. Y.* 566, 33 *N. E. Rep.* 339.

CONTROL.

By company, of work in hands of contractor, see *INDEPENDENT CONTRACTORS*, 11.

Meaning of, in contract, see *CONTRACTS*, 34.

Of passenger over driver, see *IMPUTED NEGLIGENCE*, 25.

—railroads by government, see *GOVERNMENT RAILROADS*; *LAND GRANT RAILROADS*; *STATE AID*; *WAR*, 4.

CONVERSION.

Effect of stipulation limiting liability where carrier is guilty of, see *BILLS OF LADING*, 86.

Of baggage by carrier, see *BAGGAGE*, 8.

—bonds into stock, see *BONDS*, 8.

—goods, liability of carrier for, see *CARRIAGE OF MERCHANDISE*, 159-164, 303-305.

Of trust property by trustee, see *TRUSTS AND TRUSTEES*, 11.

Reparable damage is not, see *CARRIAGE OF MERCHANDISE*, 160.

Right of transferee of bill of lading to sue for, see *BILLS OF LADING*, 119.

What amounts to, see *TROVER, ETC.*, 9, 10, 13.

When limitation begins to run in cases of, see *LIMITATIONS OF ACTIONS*, 26.

CONVEYANCES.

Acquirement of easements by, see *EASEMENTS*, 5.

Acquisition of right of way by, see *RIGHT OF WAY*, 1.

By husband, of perpetual easement in wife's land, see *HUSBAND AND WIFE*, 2.

— — — right of way over homestead, see *HOMESTEAD*, 1.

—mortgagor, judgment directing, see *MORTGAGES*, 210.

For depot purposes, see *UNION DEPOT COMPANIES*, 6.

From owner, taking land by, see *EMINENT DOMAIN*, 191-232.

Of land held adversely, see *ADVERSE POSSESSION*, 14.

—rights of way, upon conditions, see *EMINENT DOMAIN*, 211-213.

—riparian rights, see *RIPARIAN RIGHTS*, 11.

—servient estate, effect of on easement, see *EASEMENTS*, 13.

Power of corporations to make, see *CORPORATIONS*, 10.

Recitals in, weight of as evidence, see *EVIDENCE*, 264.

When presumed, see *ADVERSE POSSESSION*, 13.

See also *DEEDS*; *FRAUDULENT CONVEYANCES*; *LAND GRANTS*; *MORTGAGES*.

CONVICTS.

Employment of, see *CRIMINAL LAW*, 3.

COPIES.

Of process, service by leaving, see *PROCESS*, 41.

—public records as evidence, see *EVIDENCE*, 227.

—written instruments as secondary evidence, see *EVIDENCE*, 158.

COPYRIGHT.

1. What is the subject of.—A compilation of information respecting railroads, etc., is a proper subject of a copyright.

Bullinger v. Mackey, 15 *Blatchf.* (U. S.) 550.

2. What is not.—A railway ticket is not a map, chart, or musical composition, nor is it a print or engraving, within the meaning of section 5 of the Con. Stat. C. ch. 81, although it may be printed or engraved, and is not subject to copyright. *Griffin v. Kingston & P. R. Co.*, 17 *Ont.* 660.

CORONERS.

Depositions taken before, as evidence, see EVIDENCE, 261.

Evidence of proceedings at inquests, see DEATH BY WRONGFUL ACT, 247, 252.

1. Jurisdiction—Place of holding inquest.—By an inquisition taken by a coroner of a borough upon a body lying dead there, it appeared that the death was caused accidentally, by the deceased falling, in the county, from a carriage, and that he died in the borough; and the jury found the death to have happened accidentally, and laid a deodand on the carriage. The court (before 6 & 7 Vict. c. 12) quashed the inquisition, as the coroner of the borough had no jurisdiction to inquire, in the case of death occasioned by accident happening out of the borough. *Reg. v. Great Western R. Co.*, 3 *Q. B.* 333. 3 *Railw. Cas.* 161, 2 *G. & D.* 773, 6 *Jur.* 823.

Where a death occurred in the county of W. from an injury received in the county of S., the coroner's inquest was rightly held in the county of W. *Reg. v. Grand Junction R. Co.*, 3 *P. & D.* 57, 11 *A. & E.* 128, *n.*

2. Action against company for removing corpse.—A coroner cannot recover against a railroad for removing bodies of persons killed in a collision, whereby he was prevented from holding an inquest and getting his fees. *Fryer v. Central R. & B. Co.*, 50 *Ga.* 581.

CORPORATIONS.

Acts of officers, when binding on, see OFFICERS, 4.

— creating, judicial notice of, see EVIDENCE, 99.

Agent of, when agent of other party to contract, see AGENCY, 9.

Charter in two or more states, see CHARTERS, 12-16.

Competency of members of, as witnesses, see WITNESSES, 10.

Construction of charter in favor of public, see CHARTERS, 57.

Corporate bonds, assignability of, see ASSIGNMENT, 5.

— character, appearance as an admission of, see APPEARANCE, 6.

— existence, averment of, see PLEADING, 9.

— burden of proof as to, see EVIDENCE, 135.

— effect of acceptance of charter to prove, see CHARTERS, 9.

— right to question, see ESTOPPEL, 5; INCORPORATION, ETC., 11.

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I. GENERAL PRINCIPLES.

1. Status — How far deemed per-
sons.*—Corporations are "persons" within
 the meaning of the 14th amendment to the
 U. S. constitution, providing that no state
 shall deny to any person within its jurisdic-
 tion the equal protection of the law. *Santa*
Clara County v. Southern Pac. R. Co., 24
Am. & Eng. R. Cas. 523, 118 *U. S.* 394, 6
Sup. Ct. Rep. 1132.—**FOLLOWED IN** *Minne-*
apolis & St. L. R. Co. v. Beckwith, 129 *U.*
S. 26; *Charlotte, C. & A. R. Co. v. Gibbes*,
 142 *U. S.* 386.

A commercial or other business corpora-
 tion is constituted so as to do business in a
 corporate name and capacity, totally distinct
 from that of any or all of its members
 considered as individuals. A corporation

is a person; its property is not the property
 of its stockholders, nor are its rights their
 rights. *Forbes v. Memphis, E. P. & P. R.*
Co., 2 *Woods (U. S.)* 323.

A corporation, except where it is other-
 wise provided in the charter, expressly or
 by clear implication, in the use of its prop-
 erty, the exercise of its powers, and the
 transaction of its business, stands upon the
 same footing as individuals, and is subject
 to the same control under the police powers
 of the state or a municipal corporation.
Richmond, F. & P. R. Co. v. Richmond, 26
Gratt. (Va.) 83. — **QUOTING** *Dartmouth*
College v. Woodward, 4 *Wheat. (U. S.)* 518;
Providence Bank v. Billings, 4 *Pet. (U. S.)*
 514; *Richmond, F. & P. R. Co. v. Louisa R.*
Co., 13 *How. (U. S.)* 71.

2. Public and private corpora-
tions.—There are three classes of corpora-
 tions: public municipal corporations, the
 object of which is to promote the public
 interest; corporations technically private,
 but of a *quasi* public character, having in
 view some public enterprise in which the
 public interests are involved, such as rail-
 road, turnpike, and canal companies, and
 corporations strictly private. *Miners' Ditch*
Co. v. Zellerbach, 37 *Cal.* 543.—**QUOTED IN**
Leavenworth County Com'rs v. Miller, 7
Kan. 479.

Public corporations are such as are cre-
 ated for political purposes; but a corpora-
 tion is not public merely because its object
 is of a public character. *Tinsman v. Belvi-*
dere Delaware R. Co., 26 *N. J. L.* 148.

Railroad companies are *quasi* public cor-
 porations, and the public have an interest
 in the location of their lines and depots.
Holladay v. Patterson, 5 *Oreg.* 177, 18 *Am.*
Ry. Rep. 260.—**QUOTING** *Marsh v. Fairbury*,
P. & N. W. R. Co., 64 *Ill.* 414; *Walther v.*
Warner, 25 *Mo.* 281; *Pacific R. Co. v. Seely*,
 45 *Mo.* 212.

A railroad company, though it derives its
 power from the state, does not act in behalf
 of the state, or as its instrument or agent,
 but under a special grant acquired for a
 valuable consideration, for the promotion
 of its own direct and private advantage.
Bradley v. New York & N. H. R. Co., 21
Conn. 294.

3. Joint-stock companies.—Where
 the essential franchises of a corporation
 are conferred upon a joint-stock company,
 it is none the less a corporation for being
 called something else. *Fargo v. Louisville*,

* As to how far and for what purposes corpo-
 rations are regarded as "persons," see note, 19
L. R. A. 223.

N. A. & C. R. Co., 10 *Biss. (U. S.)* 273, 6 *Fed. Rep.* 787.

In Iowa a railroad corporation is a voluntary association, self-organized under a general incorporation act, and is invested with the privileges and franchises which belong to other joint-stock companies. *State ex rel. v. County of Wapello*, 13 *Iowa* 388.

II. CORPORATE POWERS.

4. In general.*—Corporate powers are only such as are not possessed in common with individuals and partnerships or natural persons. *Southern Pac. R. Co. v. Orton*, 32 *Fed. Rep.* 457.

The ordinary incidents to a corporation are to have perpetual succession and the power of electing or otherwise providing for members in the place of those removed by death or otherwise; to sue and be sued; to grant and receive and to purchase and hold lands and chattels by its corporate name; to have a common seal; to make by-laws for the government of the corporation; and sometimes the power of motion or removal of members. *Southern Pac. R. Co. v. Orton*, 32 *Fed. Rep.* 457.

A corporation created by statute possesses no rights and can exercise no powers which are not expressly given or to be necessarily implied. *Stockton v. Central R. Co.*, 51 *Am. & Eng. R. Cas.* 1, 50 *N. J. Eq.* 52, 24 *Atl. Rep.* 964.—FOLLOWING AND QUOTING *National Trust Co. v. Miller*, 33 *N. J. Eq.* 162.

In the absence of statutory authority a railroad corporation cannot, by contract, bind itself to a particular mode of propelling power, regardless of the interests of the people, which may require it to adopt a different one. *People v. Long Island R. Co.*, 60 *How. Pr. (N. Y.)* 395, 9 *Abb. N. Cas.* 181.

A corporation cannot engage in any separate, distinct business not authorized by its charter, as a means of raising funds to accomplish the object authorized by its charter. *Clark v. Farrington*, 11 *Wis.* 306.—FOLLOWED IN *Waldo v. Chicago, St. P. & F. du L. R. Co.*, 14 *Wis.* 575; *Lyon v. Ewings*, 17 *Wis.* 61; *Andrews v. Hart*, 17 *Wis.* 297; *Blunt v. Walker*, 11 *Wis.* 334.

* Powers possessed by corporation, see note, 2 *AM. & ENG. R. CAS.* 327.

Corporate powers limited to those conferred by statute or charter, see note, 5 *L. R. A.* 726.

A railway company cannot, against the will of any dissentient minority, undertake a business foreign to its original object. *Lyde v. Eastern Bengal R. Co.*, 36 *Beav.* 10.

The legislature may give additional powers from time to time to corporations; and acts of the corporation in pursuance of such authority are binding, unless they conflict with vested rights or impair the obligation of contracts. *Gifford v. New Jersey R. & T. Co.*, 10 *N. J. Eq.* 171.

When the legislature confers upon a corporation additional beneficial powers, without prescribing any mode for their acceptance, the exercise of such powers is sufficient evidence of their acceptance. And this rule obtains when the powers are conferred by a general law, which is declared applicable to any one of a class of corporations that may accept its provisions. *Goodin v. Evans*, 18 *Ohio St.* 150.

Persons dealing with corporations must take notice of what is contained in the law of their organization; and they must be presumed to be informed as to the restrictions annexed to the grant of power by the law by which the corporation is authorized to act. *Siltman v. Fredericksburg, O. & C. R. Co.*, 27 *Gratt. (Va.)* 119, 17 *Am. Ry. Rep.* 157.—REVIEWING *Clark v. Des Moines*, 19 *Iowa* 209.

So long as a government does not cause the charter of a corporation to be revoked, courts must treat it as competent to contract with third parties. *Southern Pac. Co. v. United States*, 28 *Cl. of Cl.* 77.

5. Implied or incidental powers.—Corporations organized under the general law are vested with the powers conferred by the general act and those contemplated by the certificate, and such incidental powers with respect of the general and special powers as are necessary, in the sense of convenient, reasonable, and proper. *Ellerman v. Chicago J. R. & U. S. Y. Co.*, 49 *N. J. Eq.* 217, 23 *Atl. Rep.* 287.

While railroad corporations will be restrained strictly to their charter powers, and all their acts done outside such powers are void, yet they may adopt any of the usual and necessary means to accomplish the purposes for which they are chartered; and in the choice of the means adapted to such purposes they will not be restricted with narrow and illiberal rigor. *Clark v. Farrington*, 11 *Wis.* 306.

In executing the powers conferred upon

it a corporation may adopt any proper and convenient means tending directly to their accomplishment and not amounting to the transaction of a separate, unauthorized business. *Clark v. Farrington*, 11 Wis. 306. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.

Where a corporation does not go beyond the powers granted, it possesses, in the exercise of means to execute them, the powers of an individual. *Clark v. Farrington*, 11 Wis. 306.

The right to execute a bond in a judicial proceeding is one of the incidental powers of all corporations that can sue and be sued. *Collins v. Hammock*, 59 Ala. 448.

Although the charter of a corporation may not, in terms, authorize the company to incur expense on account of injury received by its employes, yet it may, in exercising its franchises, incur such liability. *Toledo, W. & W. R. Co. v. Rodriguez*, 47 Ill. 188.

A corporation having power to buy and sell real estate and personal property for the purpose of "sustaining and carrying on an institution of learning, and not otherwise," has the power to donate money to aid in the construction of a railroad, where it appears that the railroad, when constructed, will be a benefit to the association. *Louisville & N. R. Co. v. Literary Soc. of St. Rose*, (Ky.) 15 S. W. Rep. 1065.

A company having a general railway franchise may loan its surplus funds and recover the same by the proper action. *North Carolina R. Co. v. Moore*, 70 N. Car. 6.

Where a company is empowered by its charter to locate and construct a railroad, open books of subscription, etc., this impliedly confers the power to make all contracts and agreements which the execution and management of its works and its convenience and interests in the construction of the road may require, so far as such contracts are not forbidden by any restrictive clause. *Western Bank v. Tallman*, 17 Wis. 530.—FOLLOWING *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, 11 Wis. 334.

In such a case the company might take a bond for the payment of stock subscriptions in instalments falling due at specified periods, and a mortgage on land to secure such bond. *Western Bank v. Tallman*, 17 Wis. 530.

A charter provision authorizing the directors to require payment on subscrip-

tions at such times, and in such proportion, not exceeding 25 per cent. at any one instalment, and under such conditions as they shall deem fit, does not, by implication, prohibit the company from taking such bond and mortgage. *Western Bank v. Tallman*, 17 Wis. 530.

A railway company has power to employ policemen to protect its property. *Edwards v. Midland R. Co.*, 1 Am. & Eng. R. Cas. 571, L. R. 6 Q. B. D. 287, 50 L. J. Q. B. D. 281, 43 L. T. 694, 29 W. R. 609.

The defendant railway company, having a branch terminating at Milford Haven, had authority to enter into a contract with a person whereby he undertook to provide a suitable steam-vessel to run between that place and Dublin and Cork, for the conveyance of passengers and goods in connection with the railway. *South Wales R. Co. v. Redmond*, 10 C. B. N. S. 675, 9 W. R. 806, 4 L. T. 619.

A corporation, chartered to construct and operate a railroad between two given points and to organize and carry on a banking business, has no implied authority to enter into a partnership with a private individual to purchase and run a steamboat on a river forming no part of its route. *Central R. & B. Co. v. Smith*, 25 Am. & Eng. R. Cas. 25, 76 Ala. 572, 52 Am. Rep. 353.—FOLLOWING *Gunn v. Central R. & B. Co.*, 74 Ga. 509.

Corporate power to build and operate a railroad does not include incidental authority to assume a share of all the accidental losses occurring in the through business of a connecting road. *State v. Concord R. Co.*, 62 N. H. 375.

6. Power to pass by-laws.—A joint-stock corporation has power by by-law to declare that no person, who is attorney against it in a suit, shall be eligible as a director. *Cross v. West Virginia C. & P. R. Co.*, 37 W. Va. 342, 16 S. E. Rep. 587.

An incorporated company has not the power to create a by-law, subjecting to forfeiture shares owned by individuals in the stock of the company, for the non-payment of instalments due upon such shares, unless the power to pass such by-law is expressly granted by the charter of the company. *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37.—REVIEWED IN *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470.

7. Power to borrow money.—The power to borrow money is implied in the creation of all business corporations.

Branch v. Atlantic & G. R. Co., 3 *Woods* (U. S.) 481.

A company authorized to borrow money on interest, and give bonds or notes therefor, payable at such times and places as may be agreed upon, is authorized to contract to pay interest semi-annually. *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372.

Where the power of a railway company to borrow money cannot be exercised without the sanction of the vote of the stockholders, a bank in advancing money must ascertain for itself, at its own risk, whether the loan has been authorized by the shareholders. *Commercial Bank v. Great Western R. Co.*, 13 *L. T.* 105, 3 *Moore P. C. C. N. S.* 295.

A charter empowering a railroad company to grant such evidences of debt incurred as might by the by-laws be directed, to such an amount as might be deemed necessary for transacting the company's business, does not authorize the company to issue notes for general circulation, or otherwise to exercise banking powers. *People ex rel. v. River Raisin & L. E. R. Co.*, 12 *Mich.* 389.

8. Power to acquire and hold land.

—A railroad corporation cannot, without an express grant of power, acquire or recover an interest in lands, unless necessary or proper for its corporate purpose. *Georgia Pac. R. Co. v. Gaines*, 44 *Am. & Eng. R. Cas.* 1, 88 *Ala.* 377, 7 *So. Rep.* 382.—FOLLOWING *Georgia Pac. R. Co. v. Wilks*, 86 *Ala.* 478.—*Wilks v. Georgia Pac. R. Co.*, 79 *Ala.* 180.—FOLLOWING *Waddill v. Alabama & T. R. R. Co.*, 35 *Ala.* 323.—*Waldo v. Chicago, St. P. & F. du L. R. Co.*, 14 *Wis.* 575.

Where the corporation is not authorized to acquire title to lands, the fact that lands were conveyed to the defendants for the benefit of the corporation, and that the failure of the court to direct a conveyance to the corporation will leave the defendants in the possession of property fraudulently acquired for which they gave no consideration, confers upon the corporation no cause of action. *Case v. Kelly*, 43 *Am. & Eng. R. Cas.* 1, 133 *U. S.* 21, 10 *Sup. Ct. Rep.* 216; affirming 13 *Am. & Eng. R. Cas.* 70, *Farmers' L. & T. Co. v. Green Bay & M. R. Co.*, 11 *Biss.* (U. S.) 334, 12 *Fed. Rep.* 773.

Under the provisions of the Alabama act approved December 29, 1868 (Sess. Acts 1868-9, p. 462), a railroad company had

power and capacity to acquire, by gift or purchase, "any lands in the vicinity of said road, or through which the same may pass, so far as may be deemed convenient or necessary by said company, to secure the right of way, or such as may be granted to aid in the construction of said road;" and this right having been acquired while said statute was in force, it is not taken away or affected by the subsequent repeal or modification of the law. *Georgia Pac. R. Co. v. Wilks*, 38 *Am. & Eng. R. Cas.* 665, 86 *Ala.* 478, 6 *So. Rep.* 34.—FOLLOWED IN *Georgia Pac. R. Co. v. Gaines*, 44 *Am. & Eng. R. Cas.* 1, 88 *Ala.* 377, 7 *So. Rep.* 382.

The power of a corporation to hold real estate can only be questioned by the government from which it derives its corporate powers. *Chicago, B. & Q. R. Co. v. Lewis*, 53 *Iowa* 101, 4 *N. W. Rep.* 842.

The charter of the Pacific R. Co. gave it no power to acquire land for purposes of speculation, or for the purpose of becoming a great landed proprietor. The corporation could purchase and hold land only for the purposes authorized by its charter. *Pacific R. Co. v. Seely*, 45 *Mo.* 212.—DISTINGUISHED IN *Land v. Coffman*, 50 *Mo.* 243.—*Land v. Coffman*, 50 *Mo.* 243, 3 *Am. Ry. Rep.* 1.—FOLLOWING *Chambers v. St. Louis*, 29 *Mo.* 576.

A railroad company may take by voluntary purchase, or, being the owner of, may lease to others, lands for uses not strictly within the purposes of its incorporation, when such uses contribute to the business of the company and its ability to serve the public uses for which it was incorporated. *Re New York C. & H. R. R. Co.*, 28 *N. Y. S. R.* 64, 8 *N. Y. Supp.* 290, 55 *Hun* 603, 5 *Silv. Supp.* 353; affirmed in 121 *N. Y.* 665, *mem.*—REVIEWING *Rensselaer & S. R. Co. v. Davis*, 43 *N. Y.* 137; *New York C. & H. R. R. Co. v. Metropolitan Gas Light Co.*, 63 *N. Y.* 326.

Where the charter of a corporation authorizes it to purchase land for some specified purpose, in the absence of evidence it will be presumed that any land purchased by it was acquired for the purpose authorized by the charter. *Mallett v. Simpson*, 94 *N. Car.* 37.

A railroad corporation authorized to buy land for the purpose of procuring stone and other material necessary for the construction of the road has power to buy land for the purpose of getting cross-ties and fire-

wood. *Mallett v. Simpson*, 94 N. Car. 37.

At common law, in the absence of any provision in the charter, a corporation has the power to acquire and hold real estate in fee. The statutes of mortmain have never been adopted in North Carolina. *Mallett v. Simpson*, 94 N. Car. 37.

Even if a corporation is forbidden by its charter to hold or take a title to real estate, a conveyance of land to it is not void. It is valid until vacated by a direct proceeding by the sovereign, instituted for that purpose. *Mallett v. Simpson*, 94 N. Car. 37.

The mortmain restrictions upon the acquisition of real estate by mortmain corporations were caused by the acquired property thereby becoming inalienable, not by the existence of the corporations being perpetual or continuous. *Kierzkowski v. Grand Trunk R. Co.*, 8 Low. Can. 3.

Modern civil corporations, established for commercial and trading purposes, as joint-stock or incorporated banking, manufacturing, railway companies, etc., cannot be included in such class, nor do mortmain restrictions apply to them. *Kierzkowski v. Grand Trunk R. Co.*, 8 Low. Can. 3. *Kierzkowski v. La Compagnie, etc.*, 10 Low. Can. 47.

9. Power to alienate franchises and property, generally.*—A railroad corporation may sell or mortgage personal property; and the corporation's right voluntarily to alienate property, and the creditor's power to subject it to the payment of corporate debts, stand upon the same footing. *Louisville, N. A. & C. R. Co. v. Boney*, 39 Am. & Eng. R. Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3 L. R. A. 435.

A railroad corporation may sell and convey absolutely or conditionally, all property which it is authorized to hold, or which is essential to carrying on its business. The power of chancery to put the assignees or mortgagees in possession of the property and business of the corporation would leave little to be decided as between private parties. *McAllister v. Plant*, 54 Miss. 106, 17 Am. Ry. Rep. 389.

A railroad corporation, having charter

power to make any contracts conducive to the interest of the company, may assign its stock subscriptions, unless expressly restricted therefrom. *Downie v. Hoover*, 12 Wis. 174.—FOLLOWED IN *Downie v. White*, 12 Wis. 176; *Racine County Bank v. Ayres*, 12 Wis. 512.

Under the laws of Nebraska a corporation organized for the purpose of building a railroad has no power to sell or dispose of its property or franchises until its road has been constructed. *Clarke v. Omaha & S. W. R. Co.*, 4 Neb. 458, 19 Am. Ry. Rep. 423.

A corporation created by statute cannot lease or dispose of any franchise needful in the performance of its obligations to the state, without legislative consent. *Stockton v. Central R. Co.*, 51 Am. & Eng. R. Cas. 1, 50 N. J. Eq. 52, 24 Atl. Rep. 964.—FOLLOWING AND QUOTING *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 465. QUOTING *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 513.—*American Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 188.—FOLLOWING *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

10. Power to alienate or convey lands.—Unless forbidden by its charter, a railway company may, in connection with the owner of the fee, dedicate for a public highway lands taken by it under its charter. (Ellsworth and Sanford, JJ., dissenting.) *Green v. Canaan*, 29 Conn. 157.

A charter power to mortgage lands, etc., for the means to construct and operate a road does not include the power to sell and assign the lands. *Southern Pac. R. Co. v. Esquibel*, 36 Am. & Eng. R. Cas. 410, 4 N. Mex. 337, 20 Pac. Rep. 109.

Under Laws N. Y. 1850, ch. 140, p. 211, § 28, subd. 3; p. 235, § 49, a railroad company may have a fee simply for the purpose of alienation, though only a determinable fee for the purpose of enjoyment. *Buffalo Pipe Line Co. v. New York, L. E. & W. R. Co.*, 10 Abb. N. Cas. (N. Y.) 107.

The conveyance by a railway company to another railway company of lands acquired for the purpose of the undertaking, under an arrangement by which such lands are to be held and used for the purposes of both companies, is *ultra vires* and will be set aside. *Hobbs v. Midland R. Co.*, L. R. 20 Ch. D. 418, 51 L. J. Ch. D. 320, 46 L. T. 270, 30 W. R. 516.

A railway company cannot alienate for

*Power of railroad companies to transfer franchises and property, see note, 75 AM. DEC. 548.

Authority of company to subscribe funds to public object, see note, 30 AM. & ENG. R. CAS. 521.

any purpose not included in its act any portion of its land which is not "superfluous land" or not land taken for extraordinary purposes, within section 45 of the Railways Clauses Act 1845. *Mulliner v. Midland R. Co.*, L. R. 11 Ch. D. 611, 48 L. J. Ch. D. 258, 40 L. T. 121, 27 W. R. 330.—DISTINGUISHED IN *Ware v. London, B. & S. C. R. Co.*, 52 L. J. Ch. 198, 47 L. T. 541, 31 W. R. 228.—*Pratt v. Grand Trunk R. Co.*, 8 Ont. 499.

11. Power to mortgage or pledge property.—Power to sell securities for the payment of debts includes the power to mortgage such securities for that purpose. *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 273.—FOLLOWED IN *Farmers' L. & T. Co. v. Toledo & S. H. R. Co.*, 54 Fed. Rep. 759, 4 C. C. A. 561.

Under a charter power to build and maintain a railway, and also "to make such covenants, contracts, and agreements with any person, * * * as the execution and management of the work and the convenience and interest of the company" may require, the company may sell a note and mortgage executed to it, or pledge them as security for its bonds. *Uncas Nat. Bank v. Rith*, 23 Wis. 339.

12. Power to purchase and hold stock in other corporations.*—While a railroad corporation may take the stock of another railroad corporation as security for a debt, it cannot invest its corporate funds in the purchase of such stock. Such an investment is *ultra vires*. *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20.—DISTINGUISHED IN *Re Rochester, H. & L. R. Co.*, 9 N. Y. S. R. 560, 44 Hun 625.

While holding such stock it may receive dividends upon it, but it has no right to vote on the stock, and may be enjoined at the instance of stockholders of the company whose stock is so held, from voting it. *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20. *Central R. Co. v. Collins*, 40 Ga. 582. (Warner, J., dissenting.)

A statute forbidding one corporation to subscribe for or purchase stock or securities of another corporation, except in payment of a *bona-fide* debt, does not apply to a case where one corporation, which made ad-

vances to another on the security of its mortgage bonds, which it is unable to redeem, makes further advances secured by its bonds and stock. *Taylor County v. Baltimore & O. R. Co.*, 35 Fed. Rep. 161.

The fact that a railway charter granted previous to the adoption of the constitution permitted municipal corporations to buy its stock, does not authorize a competing corporation to acquire such stock after the adoption of the constitution. *Clarke v. Central R. & B. Co.*, 52 Am. & Eng. R. Cas. 115, 50 Fed. Rep. 338.

A railroad company which has acquired a majority of the stock of another railroad company will not be allowed, in the absence of express statutory authority, to vote such stock, either by itself or by other persons acting in its interest, in the election of officers or in matters pertaining to the management and control of the latter company; at least where the two roads are rivals having substantially the same field of operation, where a conflict of interest may arise in the matter of expenditure, or in the division of patronage or of earnings, or where the profits of one company may be enhanced by a diminution of those of the other. *Memphis & C. R. Co. v. Woods*, 44 Am. & Eng. R. Cas. 257, 88 Ala. 630, 7 So. Rep. 108.—REVIEWING *Central R. Co. v. Collins*, 40 Ga. 582; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20.—*Clarke v. Central R. & B. Co.*, 52 Am. & Eng. R. Cas. 115, 50 Fed. Rep. 338.

A railroad company in Kansas has the lawful right to purchase and hold stock of a connecting road. *Atchison, T. & S. F. R. Co. v. Cochran*, 41 Am. & Eng. R. Cas. 48, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. Rep. 151.

Although a railway company is not authorized to hold stock in another company, yet if it holds such stock by means of a trustee who becomes bankrupt, the shares do not pass to the assignee. *Great Eastern R. Co. v. Turner*, 42 L. J. Ch. 83, L. R. 8 Ch. 149, 27 L. T. 697, 21 W. R. 163.

13. Power to purchase its own stock.—A railroad has power to contract for and purchase shares of the stock of its own company. *Chicago, P. & S. W. R. Co. v. Marshfield*, 84 Ill. 643.—REVIEWING *Taylor v. Miami Exporting Co.*, 6 Ohio 176; *City Bank v. Bruce*, 17 N. Y. 507; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 452; *State v. Smith*, 48 Vt. 266.

* Corporation cannot purchase shares in other corporations, see note, 9 L. R. A. 650.

Corporation cannot deal in stock of another corporation, see note, 7 L. R. A. 605.

A railway company may, for legitimate purposes, purchase shares of stock which it has issued to individuals or municipal corporations, and such sale is a sufficient consideration to support an agreement to pay money. *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145, 16 Am. Ry. Rep. 442.

III. CORPORATE LIABILITIES.

14. For torts, generally.*—The liabilities of railroad companies for torts are to be determined upon the same principles as those of private persons. *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202.

15. Injuries to or trespasses on land.—Legal possession by a railroad company of the right of way over land and authority to construct and operate its railroad thereon do not authorize or sanction a direct intrusion and trespass upon adjacent private property. *Georgetown, B. & L. R. Co. v. Eagles*, 30 Am. & Eng. R. Cas. 228, 9 Colo. 544, 13 Pac. Rep. 696.

The immunity from liability for a private injury, of a corporation exercising a power or privilege conferred by law for the public benefit, where the damage sustained is the result of the proper exercise of the power or privilege, does not extend to acts which are *ultra vires*, or to those which are equivalent to a confiscation or condemnation of property rights, unless provision is made for due compensation. *Hudson River Tel. Co. v. Waterliet T. & R. Co.*, 135 N. Y. 393, 32 N. E. Rep. 148, 48 N. Y. S. R. 417; reversing 61 Hun 140, 39 N. Y. S. R. 952, 966, 15 N. Y. Supp. 752.

16. Transfer of road or franchise no shield from liability.—Without due statutory authority a railroad company cannot transfer the right to operate its road so as to absolve itself from its duties to the public or its liability for the torts of the company by whom the road is operated. *East Line & R. R. Co. v. Rushing*, 34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834.—FOLLOWED IN *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434.

By executing a deed conveying its road, franchises, etc., to trustees selected by itself, a railroad company cannot evade its legal

liabilities for injuries subsequently done to persons and property by the negligent operation of its road. *Acker v. Alexandria & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.—FOLLOWING *Nagle v. Alexandria & F. R. Co.*, 83 Va. 707.

Though an individual cannot question the power of a corporation to acquire property, yet, when his person or property is injured by its failure to perform a duty to the public, he may enforce his remedy against it and its property, although it may have attempted to divest itself of its corporate existence, its franchise, or its property. *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. Rep. 686.

IV. SUITS BY AND AGAINST CORPORATIONS.

17. Power to sue and be sued.—The president and directors of a corporation, having the power to institute an action, have the power to dismiss it. *Shawhan v. Zinn*, 79 Ky. 300.

Where, in the settlement of a controversy between individual directors and third persons, the corporation is made to pay damages occasioned by the fraudulent acts of the directors, the person receiving the money, with knowledge of the facts, is liable to the corporation for the same. *Erie R. Co. v. Vanderbilt*, 5 Hun (N. Y.) 123.

Such person cannot defeat an action brought against him by the corporation for the recovery of the money so received by him on the ground that no privity or relation existed between himself and the corporation. *Erie R. Co. v. Vanderbilt*, 5 Hun (N. Y.) 123.

18. — of de facto corporation.—A *de facto* corporation that, by regularity of proceeding, might be one *de jure*, can sue and be sued; and a party who contracts with such corporation while it is acting under its *de facto* organization is estopped, in a suit on such contract, from denying such organization at the date of the contract; but if an organization is completed when there is no law, or an unconstitutional law, authorizing such organization as a corporation, the doctrine of estoppel does not apply. *Heaton v. Cincinnati & F. W. R. Co.*, 16 Ind. 275.

19. Parties.—A corporation being a defendant to a suit in equity which seeks to have it declared null, the holders of stock in it are not proper parties to defend the suit. *Washington, A. & G. R. Co. v.*

* Liability of corporations for torts, see note, 13 AM. DEC. 596.

Liability of corporations for injuries occurring while engaged in enterprises in excess of charter powers, see note, 52 AM. REP. 358.

Alexandria & W. R. Co., 19 Gratt. (Va.) 592.

In such a case the holders of the stock, claiming that if the corporation is annulled they have equitable interests in the property, may be admitted as parties defendants to protect their interests. *Washington, A. & G. R. Co. v. Alexandria & W. R. Co., 19 Gratt. (Va.) 592.*

20. Pleading and proof of incorporation.—A domestic corporation created by a private act of the legislature, in order to maintain a suit as plaintiff, must aver and prove that it is a body corporate, duly constituted by competent authority. A petition wanting the averment that such plaintiffs are a corporation is insufficient. *Holloway v. Memphis, E. P. & P. R. Co., 23 Tex. 465.*—FOLLOWING *Bank v. Simon-ton, 2 Tex. 531.*

The general rule is, that in all collateral proceedings at the suit of an alleged corporation the introduction of the charter of the company, and proof that the company is exercising the franchises granted, afford sufficient evidence of the corporate existence of the company. In such case it is not required to show that the company is a corporation *de facto*. *Peoria & P. U. R. Co. v. Peoria & F. R. Co., 10 Am. & Eng. R. Cas. 129, 105 Ill. 110.*—FOLLOWED IN *Chicago & N. W. R. Co. v. Chicago & E. R. Co., 25 Am. & Eng. R. Cas. 158, 112 Ill. 589.*

A proceeding for the condemnation of right of way is a collateral proceeding, so far as concerns the corporate existence of the company seeking the condemnation. *Peoria & P. U. R. Co. v. Peoria & F. R. Co., 10 Am. & Eng. R. Cas. 129, 105 Ill. 110.*—OVERRULING *Allman v. Havana, R. & E. R. Co., 88 Ill. 521.*

CORRECTION.

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—expropriation proceedings under Canadian statutes, see EMINENT DOMAIN, 1226-1230.

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Of arbitrations, see ARBITRATION AND AWARD, 16.

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I. GENERAL PRINCIPLES.

1. Right to costs as dependent upon amount recovered.—Where the action in the United States circuit court was for the unlawful expulsion from defendant's railroad cars of the plaintiff and her two children as passengers, the nature of the case is quite conclusive of the plaintiff's fair and reasonable expectation of recovering more than the limit fixed by U. S. Rev. St. § 968, to entitle her to recover costs; but under the statute her motion to be allowed costs must be overruled, but the defendant's motion to compel her to pay its costs will also be overruled. *Gibson v. Memphis & C. R. Co.*, 31 *Fed. Rep.* 553.

Where an action of trespass is brought against a railroad company for entering upon plaintiff's land and felling his timber, the plaintiff is, under the provisions of § 398, 2 Rev. St. Ind. 1876, p. 195, entitled to his costs where he recovers damages to the extent of five dollars. *Baltimore, O. & C. R. Co. v. Crissman*, 11 *Am. & Eng. R. Cas.* 410, 83 *Ind.* 167.

Where an action is brought against a railroad company for failure to construct a drain and crossing, in compliance with the covenants of an indenture by which plaintiff has granted to the company a right of way over his farm, in consequence of which failure plaintiff has suffered damage, the said plaintiff is not, under the provisions of § 397, 2 Rev. St. Ind. 1876, p. 194, entitled to his costs unless he recovers damages to the extent of fifty dollars. *Baltimore, O. & C. R. Co. v. Crissman*, 11 *Am. & Eng. R. Cas.* 410, 83 *Ind.* 167.

Where the pleadings, in trespass for entry and deposit of rubbish on lands, fairly raise the question of plaintiff's title and possession, and he recovers less than \$50, a certificate that the question of title arose on the pleadings is not necessary to entitle plaintiff to costs. *Kelly v. New York & M. B. R. Co.*, 81 *N. Y.* 233; *affirming* 19 *Hun* 363.—REVIEWED IN *Bruen v. Manhattan R. Co.*, 20 *Civ. Pro. (N. Y.)* 127.

An action for damages resulting from the obstruction by a railroad of the approach to plaintiff's upland from the river, and for injunction, where no invasion of possession or injury to the freehold is alleged, involves no question of title to real estate, and plaintiffs, on recovering nominal

damages, are not entitled to costs. *Rumsey v. New York & N. E. R. Co.*, 50 *N. Y. S. R.* 253, 66 *Hun* 631, 21 *N. Y. Supp.* 193.

In an action brought to recover damages for personal injuries sustained by the plaintiff through the negligence of a street railway, where the plaintiff recovers less than \$50, he is not entitled to costs, but they should be taxed in favor of the defendant. *Kaliski v. Pelham Park R. Co.*, 20 *Civ. Pro. (N. Y.)* 315, 15 *N. Y. Supp.* 519.

Where a railway company has so acted as to render it necessary and proper for any person to come to the court for redress under the Railway and Canal Traffic Act, the court will, as a general rule, make the rule absolute, with costs. *Baxendale v. London & S. W. R. Co.*, 12 *C. B. N. S.* 758, 1 *Ry. & C. T. Cas.* 231.

An attorney-at-law employed by a railroad on a salary, but with the further agreement that he was to have such costs as could be taxed against opposing litigants, is entitled to such costs. *Harvey v. Canadian Pac. R. Co.*, 3 *Man.* 43.

Plaintiff sued three railroad companies jointly for injury to his property by laying their tracks in a city street, and recovered in the aggregate more than \$500, but under the state practice the verdicts and judgments were separated, thus reducing the recovery against each to less than \$500. *Held*, that the plaintiff was, nevertheless, entitled to costs, and that the prohibitions of U. S. Rev. St. § 968, did not apply. *Johnson v. Mississippi & T. R. Co.*, 31 *Fed. Rep.* 551.

2. Effect of offer to allow judgment.—The defendant, in an action to recover damages for obstructing an alleged natural watercourse, filed in the case with the clerk of the district court an offer, in writing, to confess judgment for \$213.01, and for costs of suit up to that date, and immediately thereafter presented the offer to the plaintiff's attorneys, who, in writing and for the plaintiff, declined the offer; and afterward, on the trial, which was more than five days after the offer was presented to the plaintiff's attorneys, the plaintiff recovered a judgment for only \$180 and costs. *Held*, that all costs accruing after the offer was presented to the plaintiff's attorneys should be assessed and taxed against the plaintiff. *Wichita & W. R. Co. v. Beebe*, 38 *Kan.* 427, 17 *Pac. Rep.* 154.

3. Payment of costs of former suit.

—Notwithstanding new circumstances have arisen, and the proceeding not being the same as the first proceeding, nor grounded upon exactly the same facts, and notwithstanding that the Midland railway company is now joined as the plaintiffs, the attempt to proceed in this action without first paying the costs of the former action is vexatious and the order asked for must be made. *Grand Junction R. Co. v. County of Peterboro*, 10 Ont. Pr. 107.—FOLLOWING *Cobbett v. Warner*, L. R. 2 Q. B. 108.

4. Allowance in addition to costs.—Minn. Gen. St. 1878, ch. 34, § 56, providing for an extra allowance of \$10 in justices' courts, and double costs in the district court, in case of recovery for stock killed by railroad companies through a failure to fence, is not unconstitutional; and as it applies to all railroad companies in the state, it is not open to the objection that it is unequal or partial legislation. *Johnson v. Chicago, M. & St. P. R. Co.*, 29 Minn. 425, 13 N. W. Rep. 673.—FOLLOWED IN *Schimmele v. Chicago, M. & St. P. R. Co.*, 34 Minn. 216.

The court cannot grant an additional allowance on overruling or sustaining a demurrer with leave to answer over, on payment of costs. There can be only one such allowance, and it is grantable only, if at all, when a final judgment is pronounced that unconditionally terminates the action and fixes the right of the successful party to tax his costs absolutely under the code. *De Stuckle v. Tehuantepec R. Co.*, 30 Hun (N. Y.) 34.

The question being whether a railroad corporation had or had not the right to construct its road on a certain line, the value of the subject-matter not being shown, an application for an additional allowance should be refused. *People v. Genesee Valley C. R. Co.*, 30 Hun (N. Y.) 565; affirmed in 95 N. Y. 666, mem.—DISTINGUISHING *People v. Albany & V. R. Co.*, 16 Abb. Pr. 465. QUOTING *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 63 N. Y. 179.

It is the better practice not to grant an additional allowance in a referred cause, on the ground that the case was "difficult and extraordinary," without a certificate to that effect of the referee who tried the cause; but the absence of such a certificate is not jurisdictional, and does not deprive the

court of the power to consider the motion and determine for itself whether the case falls within the language of the code. *Dode v. Manhattan R. Co.*, 70 Hun (N. Y.) 374.

An action to reform a contract and, incidentally, to restrain defendants from running cars on a portion of plaintiff's tracks is one to enforce an alleged right to which no commercial or money value can be attached, and hence does not afford the basis of an extra allowance of costs. *Christopher & T. St. R. Co. v. Twenty-third St. R. Co.*, 48 N. Y. S. R. 805, 20 N. Y. Supp. 556.

A railroad company brought suit to determine the validity of a lease of its road. Upon demurrer to the complaint the defendant obtained judgment and was granted an extra allowance. *Held*, that the subject-matter of the action was the lease, and that its value, not the value of the road or the rental value thereof, should have been taken as the basis of the extra allowance; and, there being no proof that the lease was of any value, the allowance made was unauthorized. *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 63 N. Y. 176; *not dismissing appeal from* 4 Hun 712, 6 T. & C. 488, which are affirmed in 16 Abb. Pr. N. S. 249.—QUOTED IN *People v. Genesee Valley C. R. Co.*, 30 Hun (N. Y.) 565.

A motion by defendant for an extra allowance, in an action brought by plaintiff, a corporation organized under the act providing for the incorporation of telegraph companies (ch. 265, Laws of 1848), to restrain defendant from operating its road by the single-trolley system upon certain streets of the city of Albany, was denied upon the ground of want of power, the reason assigned being "that the action being to restrain defendant from employing a particular system only, and over a part only of its road, the franchise was not involved, and there is, therefore, no basis on which an allowance can be estimated." *Held*, error; that as the subject-matter litigated was the right of defendant to use the single-trolley system, if the right thus sought to be enjoined had a money value, and there was any evidence to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion and dispose of the application upon the merits. *Hudson River Tel. Co. v. Water-vliet T. & R. Co.*, 135 N. Y. 393, 32 N. E. Rep. 148, 48 N. Y. S. R. 417; reversing 61 Hun

140, 39 *N. Y. S. R.* 952, 966, 15 *N. Y. Supp.* 752.

N. Y. Code, § 3253, directs the computing of the "extra allowance" on "the sum recovered." Where a verdict is rendered against a railroad in an action for negligence causing death, interest is added from the time of the death. *Held*, that the "sum recovered" includes the interest. *Bord v. New York C. & H. R. R. Co.*, 14 *Abb. N. Cas. (N. Y.)* 496, 1 *How. Pr. N. S.* 1, 6 *Civ. Pro.* 222.

5. Counsel fees—Attorneys' fees.*—Where a stockholder files a bill on behalf of himself and all others that may come in, charging that the corporation has made an illegal and void contract, and praying an injunction and the appointment of a receiver, it is premature to make an allowance for his attorney's fees, pending an appeal from the order appointing the receiver and continuing the restraining order; and where the order appointing the receiver is reversed and the property restored to the company, and the restraining order modified, the order allowing such fees will be reversed. *Jacksonville, T. & K. W. R. Co. v. American Constr. Co.*, 57 *Fed. Rep.* 66.

The provision in a railroad commission act entitling the plaintiff in actions against a railroad company for a breach of its provisions, to recover, in addition to the damages therein provided for, an attorney's fee, grants no privilege to such litigants that is forbidden by the constitution; nor can it be regarded as imposing a penalty upon the exercise of the right of defense. *Burlington, C. R. & N. R. Co. v. Dey*, 45 *Am. & Eng. R. Cas.* 391, 82 *Iowa* 312, 48 *N. W. Rep.* 98.

Attorneys' fees allowed in an action to recover damages for negligently setting out a fire by the careless operation of a railroad are a part of the judgment in favor of the injured party, and need not be found separately by the jury, except in answering a special interrogatory. *Missouri Pac. R. Co. v. Henning*, 48 *Kan.* 465, 29 *Pac. Rep.* 597.

In actions for damages, in the absence of any showing of fraud or malice, attorneys' fees cannot be recovered. *Eatman v. New Orleans Pac. R. Co.*, 35 *La. Ann.* 1018.

* Recovery of attorneys' fees in actions against railroads under various statutes, see note, 49 *AM. & ENG. R. CAS.* 515. See also *ANIMALS, ETC.*, 9.

A counsel fee, which the plaintiff may be required to pay his counsel in the cause, is not to be allowed by the jury in estimating the plaintiff's damages. *Welch v. North Eastern R. Co.*, 12 *Rich. (So. Car.)* 290.

Counsel fees for legal services in procuring the dissolution of an injunction are not recoverable in an action on the injunction bond. *Jones v. Rosedale St. R. Co.*, 75 *Tex.* 382, 12 *S. W. Rep.* 598.—*FOLLOWING Galveston, H. & S. A. R. Co. v. Ware*, 74 *Tex.* 50; *Oelrichs v. Spain*, 15 *Wall. (U. S.)* 211.

The coupons of a railroad company had been unpaid for some years for want of funds; subsequently the company offered to pay a holder the coupons without interest, and in a suit defended on the ground that the coupons had not been presented for payment. *Held*, that the act of May 3, 1866, requiring corporations to pay counsel fees of plaintiffs in suits against them in certain cases, was not applicable to such suit. *North Pa. R. Co. v. Adams*, 54 *Pa. St.* 94.

6. Security for costs.—Filing a bond by leave of court is a compliance with the statute requiring a bond for costs in actions *ex delicto*. *Hobson v. New Mexico & A. R. Co.*, (*Ariz.*) 28 *Am. & Eng. R. Cas.* 360, 11 *Pac. Rep.* 545.

Under *N. Y. Code*, § 3271, in an action by or against a personal representative, the court, in its discretion, may order plaintiff to give security for costs, although there is no evidence of bad faith or mismanagement, and aside from the question of personal liability for costs. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 92 *N. Y.* 353; reversing 29 *Hun* 143.—*OVERRULING Darby v. Condit*, 1 *Duer (N. Y.)* 599.

Waiting two years, and until after three trials before taking proceedings to obtain security for costs, is such delay as to require that the application be denied. *Wolf v. Houston & W. S. & P. F. R. Co.*, 19 *N. Y. S. R.* 762, 2 *N. Y. Supp.* 789.

Where a railroad company is sued before a justice of the peace and removes the case into the district court by *certiorari*, the plaintiff cannot be ruled to give security for costs on the motion of the company. *Texas & P. R. Co. v. Cook*, 2 *Tex. App. (Civ. Cas.)* 576.—*OVERRULING Texas & P. R. Co. v. Taylor*, 2 *Tex. App. (Civ. Cas.)* 368.

The court will not order an administrator suing for the benefit of the deceased's

widow and children to give security for costs merely on the ground that he is suing wholly for the benefit of others. *Larsen v. Monmouthshire R. & C. Co.*, 16 L. T. 289.

A foreign railway suing in England must give security for costs although it has personal property in England and some of its shareholders reside there who are responsible to the extent of their unpaid capital. *Kilkenny & G. S. & W. R. Co. v. Fielden*, 6 Railw. Cas. 785, 6 Ex. 81, 2 L. M. & P. 124, 15 Jur. 191, 20 L. J. Ex. 141. *Limerick & W. R. Co. v. Fraser*, 4 Bing. 394, 1 M. & P. 23. *S. P., Edinburgh & L. R. Co. v. Dawson*, 7 D. P. C. 573, 1 W., W. & H. 561, 3 Jur. 55.

An application for an order for security for costs was made on the ground that the plaintiffs had no corporate existence, and that their name was being used by one C., who was insolvent. *Held*, upon the evidence: (1) that there was nothing to warrant the conclusion that this action was really brought for the benefit of any other than the plaintiffs; (2) also that the question whether the plaintiffs had or had not ceased to be an existing corporation, having been raised upon the pleadings, could not be raised and determined on an application for security for costs. *Port Rowan & L. S. R. Co. v. South Norfolk R. Co.*, 13 Ont. Pr. 327. —QUOTING *Parker v. Great Western R. Co.*, 9 C. B. 766.

II. PARTICULAR ACTIONS AND PROCEEDINGS.

7. Expulsion of passenger, action for.—Where plaintiff, who was a passenger upon one of the defendant's street-cars, was wrongfully assaulted by and ejected from the car by the conductor, and the jury rendered a verdict in his favor for six cents—*held*, that the action being for an assault, plaintiff was entitled, under N. Y. Code Civ. Pro. § 3228, subd. 3, to costs not exceeding the amount of his recovery, and that he could not be charged with the payment of defendant's costs. *Feeney v. Brooklyn City R. Co.*, 36 Hun (N. Y.) 197.

8. Equity suits.—Where a large number of bonds issued by a railroad are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who, in good faith, files a bill to secure the due application of the fund, and

succeeds in bringing it under the control of the court for the common benefit of the bondholders, is entitled to have his costs, counsel fees, and necessary expenses of the litigation—that is to say, his costs as between solicitor and client—paid out of the fund before its distribution. *Internal Imp. Fund v. Greenough*, 12 Am. & Eng. R. Cas. 345, 105 U. S. 527.—FOLLOWED IN *Central R. & B. Co. v. Pettus*, 113 U. S. 116. QUOTED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. Rep. 187.

Such a complainant, however, is not entitled to an allowance for his private expenses, such as traveling fares and hotel bills; nor for his own time or personal services. *Internal Imp. Fund v. Greenough*, 12 Am. & Eng. R. Cas. 345, 105 U. S. 527.

A decree for an injunction obtained in a suit by the plaintiff express company, restraining the defendant railroad company from excluding the plaintiff's messengers and express matter from the defendant's railroad, was changed, in accordance with the decision in the Express Cases (117 U. S. 1; s. c., 6 Sup. Ct. Rep. 542, 628, 1190), to a decree dismissing the bill, and for a reference to a master to ascertain and report the amount to be paid to the defendant for carrying plaintiff's messengers and express matter during the pendency of the injunction. *Held*, that the defendant was entitled to a dismissal of the bill with costs, and the costs allowed by the master. *Fargo v. South Eastern R. Co.*, 28 Fed. Rep. 906.

Where a bill for the reformation of a lease alleges only that defendants claim as a matter of opinion contrary to the claim of the plaintiffs, and defendants do not demur, but answer asserting the claim, and that the lease as drawn expresses the true meaning of the contract, but at the hearing submit to a decree establishing plaintiffs' construction, the orators are justly entitled to the costs of taking their testimony and of the decree, but not to the cost of the bill. *Loomis v. Rutland R. Co.*, 38 Fed. Rep. 280.

9. Fires, actions for causing.—In an action brought originally in the court of common pleas, on Mass. St. 1840, ch. 85, to recover damages of a railroad corporation for injury done by fire from its engines to the plaintiff's land, the plaintiff, if he recover less than twenty dollars damages, is entitled for his costs, under Rev. St. ch. 121, § 3, to no more than a quarter part of the

damages, unless the title to real estate is in fact concerned. *Blanchard v. Fitchburg R. Co.*, 8 Cush. (Mass.) 280. — FOLLOWING *Sawyer v. Ryan*, 13 Metc. (Mass.) 144.

An action was brought to recover for the negligent management of the defendant's locomotives, whereby a division fence between plaintiff's lands was set on fire, by reason whereof certain cattle were destroyed, and also for failure to maintain a proper fence along defendant's road, by reason of which plaintiff's cattle escaped on the road and were killed. Both causes of action were controverted by the answer. Plaintiff recovered on the second cause of action, and a verdict was directed for defendant on the first, on the ground that by an ancient deed the owner of the adjacent property was required to maintain fences. *Held*, that there was a recovery by both parties, within the meaning of § 3234 of N. Y. Code, and that both were entitled to costs. *Browning v. New York, L. E. & W. R. Co.*, 46 N. Y. S. R. 505, 64 Hun 513, 19 N. Y. Supp. 453, 22 Civ. Pro. 193. — FOLLOWING *Burns v. Delaware, L. & W. R. Co.*, 42 N. Y. S. R. 171.

10. Intervention.—An intervenor who files a claim in a suit involving the operation of a railroad by a receiver, and receives payment for injuries sustained by such operation, is not entitled to a docket fee or fees for depositions taken in support of his claim. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 38 Fed. Rep. 775.

Pending an action by petitioner in the state courts against defendant company for damages for personal injuries, an action was brought in the federal court to foreclose a mortgage on defendants' property, and a receiver was appointed, whereupon petitioner intervened in the foreclosure proceeding and obtained a judgment for the damages, testimony previously taken in the state court being used on the trial of the intervention. *Held*, that the costs incurred in the state courts, as well as those in the federal court, should be allowed the petitioner. *Central Trust Co. v. Central Iowa R. Co.*, 38 Fed. Rep. 889.

The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 to the third parties that they claimed indemnity from them, under a contract to which the plaintiffs were strangers; the third parties ap-

peared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were nonsuited at the trial. *Held*, that the plaintiffs were not liable for the costs of the third parties or for the costs occasioned by joining them, nor were the defendants liable for such costs. *Tomlinson v. Northern R. Co.*, 11 Ont. Pr. 419.

11. Overcharges, actions for.—Costs allowed by the master for the preparation of a notice of action for one fair copy, where the plaintiff sued to recover overcharges, ordered to be reviewed on the ground that the sum ordered was excessive. *Edwards v. Great Western R. Co.*, 12 C. B. 419.

In an action against a railway company for overcharges, the verdict being against the company, the refusal of the master to allow as costs a charge of over £500 for a voluminous notice to admit, sustained by the court. *Edwards v. Great Western R. Co.*, 12 C. B. 419.

The court allowed the plaintiff costs of a notice of action where he sued to recover overcharges, since the charges so made must be considered as something done under the act by which the company was incorporated, and consequently it was entitled to notice of action. *Kent v. Great Western R. Co.*, 4 Railw. Cas. 699, 4 D. & L. 481, 3 C. B. 714, 16 L. J. C. P. 72.

12. Personal injuries, actions for.—A servant who induces his master to defend a suit for injuries occasioned by the servant's misconduct is liable for the costs and counsel fees therein. *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

To entitle a plaintiff to extra or double costs, under Minn. Gen. St. 1878, ch. 34, § 56, an action against a railroad company for personal injuries should not be commenced until after the expiration of the thirty days allowed the railroad company to pay or tender the actual damages. *Hooper v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 52, 33 N. W. Rep. 314.

In an action for a personal injury the plaintiff upon final judgment becomes entitled to costs, and what costs and at what rate he shall recover are not in the discretion of the court. In such a case respondent, upon the affirmance upon appeal of an order denying a new trial, is entitled

to costs of the appeal. *Reichel v. New York C. & H. R. R. Co.*, 18 *Civ. Pro.* (N. Y.) 248, 9 *N. Y. Supp.* 414, 29 *N. Y. S. R.* 843.

The plaintiff, who carried on business at Halifax, in Yorkshire, brought an action against the defendants, a railway company, to recover damages for personal injuries and loss of trade sustained by him owing to a collision which occurred on their railway near Halifax, claiming £262 for injuries and £6388 for loss of trade. The plaintiff named Middlesex as the place of trial. The defendants applied to change the venue to Leeds, but the application was refused. The jury found a verdict for the plaintiff for £800. Ordered, on an application on behalf of the defendants, under Order LXV., rule 1, that plaintiff should have his costs so far as related to the claim for personal injuries, such costs to be taxed treating the trial as having taken place at Leeds, and should pay to the defendants all their costs so far as related to the claim for loss of trade, such costs to be taxed treating the trial as having taken place in Middlesex, and also the difference in the expenses of the defendants' medical evidence, arising from the action having been tried in Middlesex instead of at Leeds. *Willey v. Great Northern R. Co.*, [1891] 2 *Q. B.* 194.

13. Special proceedings.—An application by a company for authority to construct its road on a street is a proceeding for the enforcement of a right, and hence a special proceeding, and costs as in an action may be allowed in the discretion of the court. *In re Lima & H. F. R. Co.*, 52 *N. Y. S. R.* 186, 22 *N. Y. Supp.* 967.

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Burned in warehouse of compress company, limiting liability for, see **BILLS OF LADING**, 76.

Charges for carrying in bales, see **CHARGES**, 37.

Failure to remove from compress house, liability for, see **CARRIAGE OF MERCHANDISE**, 103.

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Address by, to jury, generally, see **TRIAL**, 88-94.

— to jury, on assessment of land damages, see **EMINENT DOMAIN**, 575.

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Reading law books and statutes to the jury by, effect of, see **ANIMALS, INJURIES TO**, 525; **TRIAL**, 93.

COUNTERCLAIM.

How pleaded, generally, see **PLEADING**, 52.

In actions for killing stock, see **ANIMALS, INJURIES TO**, 380.

— suits for wages, see **EMPLOYÉS**, 16.

— on construction contracts, see **CONSTRUCTION OF RAILWAYS**, 109.

What may be the subject of, generally, see **SET-OFF**, ETC., 7, 8.

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Burden of proof to show killing within, see **ANIMALS, INJURIES TO**, 443, 499.

Duty to stop at county seat, see **CARRIAGE OF PASSENGERS**, 215.

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Jurisdiction as dependent upon county lines, see **ANIMALS, INJURIES TO**, 290, 609; **JURISDICTION**, 7.

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Validity of statutes authorizing aid to railroads by, see **MUNICIPAL AND LOCAL AID**, 8.

What proper for venue, generally, see **TRIAL**, 5-11.

— — — of action for causing death, see **DEATH BY WRONGFUL ACT**, 105.

1. Division of counties.—Under Fla. act of 1861, creating Baker county, it was made a condition precedent to demanding the issuing of bonds by Baker to Bradford that the *pro rata* of the shares of the capital stock in the Florida, Atlantic & Gulf R. Co. held by Bradford county should be "set apart" to Baker county. *Canova v. State ex rel.*, 18 Fla. 512.

Where the division is only of railroad bonded indebtedness, and there is no proof of the amount of property or of the other indebtedness of the county prior to the division, and no proof of the comparative population or wealth of the detached strip and the remaining portion of the county, it is impossible for the court to say that the division prescribed by the legislature is other than just and equitable. *Sedgwick County Com'rs v. Bailey*, 11 Kan. 631.

2. Right to become stockholders in railroad companies.*—The legislature of Iowa has no power to authorize counties to become, as corporations, stockholders in railroad companies; and has never attempted, by the provisions of § 114 of Iowa Code of 1851, or otherwise, to confer such power. *State ex rel. v. County of Wapello*, 13 Iowa 388.—FOLLOWING *Stokes v. Scott County*, 10 Iowa 166. OVERRULING *Dubuque County v. Dubuque & P. R. Co.*, 4 Greene (Iowa) 1.—DISAPPROVED IN *Gelpcke v. Dubuque*, 1 Wall. (U.S.) 175. FOLLOWED IN *Myers v. Johnson County*, 14 Iowa 47; *McMillan v. Boyles*, 14 Iowa 107; *Ten Eyck v. Keokuk*, 15 Iowa 486; *McClure v. Owen*, 26 Iowa 243; *Hanson v. Vernon*, 27 Iowa 28. NOT FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479. REAFFIRMED IN *Smith v. Henry County*, 15 Iowa 385. REVIEWED IN *Com'rs of Columbia County v. King*, 13 Fla. 451.

There is no express provision of the Kansas constitution which prohibits the legislature from authorizing counties to become stockholders in railroad companies. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.

3. Liability for cars destroyed by mob.—The cars of plaintiff were destroyed by a mob within the limits of defendant's county. Some hours previous to the destruction of their property plaintiffs caused a notice of the gathering of the mob, and

asking for aid, signed by the superintendent, to be served upon the sheriff of the county. The evidence tended to show all facts necessary to make out a case charging the county with damages resulting from the action of the mob, within ch. 428, N. Y. Laws of 1855. *Held*, no error to refuse to charge that the jury might take into consideration an admission in the notice and the presence of plaintiff's superintendent at their yards prior to the destruction of the property, when the evidence did not warrant the instruction as to the presence of plaintiff's officer. *Lake Shore & M. S. R. Co. v. Sup'rs of Erie County*, 2 N. Y. S. R. 317, 41 Hun 637.

4. When may sue and be sued.—At common law counties cannot sue or be sued. Suit must be in the name of the people. *Schuyler County v. Mercer County*, 9 Ill. 20.—DISTINGUISHED IN *Chicago & A. R. Co. v. Howard*, 38 Ill. 414.

A county is a *quasi* corporation and may sue and be sued for many purposes, and is the real party in interest, holding and controlling the highways and bridges therein for the benefit of the public. It also has such interest in its highways as entitles it to an action in its own name for an injury thereto. *Lawrence County v. Chattahoochee R. Co.*, 81 Ky. 225.—REVIEWING *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63.—FOLLOWED IN *Greenup County v. Maysville & B. S. R. Co.*, 88 Ky. 659.

5. County commissioners, generally.—The powers of a county are vested in a board of commissioners as a corporate entity, and not in the commissioners as individual officers. Therefore before a county board can act it must be convened in legal session, either regular, adjourned, or special; and a casual meeting of a majority of the commissioners does not create a legal session. A special session may be convened upon the call of the chairman, at the request of two members; but personal notice of such call must be served, if practicable, upon every member of the board. *Paola & F. R. R. Co. v. Com'rs of Anderson County*, 16 Kan. 302.

The provision in section 4 of the Ohio act further to prescribe the duties of county commissioners (S. & C. 250), declaring it to be essential to the validity of a contract entered into by the commissioners that it shall be entered in the minutes of their proceedings by the auditor, is intended for the

* See MUNICIPAL AND LOCAL AID.

protection of the county from liability on such contract, unless evidenced or authenticated in the mode prescribed; but where such contract has been fully performed on the part of the county, the other party to the contract cannot resist performance on his part, on the ground that it was not so entered; and by accepting performance by the commissioners and using the county road for its track, a railroad is precluded from raising the question. *Com'rs of Athens County v. Baltimore S. L. R. Co.*, 37 *Ohio St.* 205.

6. — their power to employ attorneys.—The power given to the county court by the charter of the Chillicothe & B. R. Co. (Mo. Laws 1864, p. 485, § 6), to appoint an "agent to represent" the interests of the county does not authorize that court to employ a special attorney to prosecute an action to protect the interests of the county as a stockholder in the company while the circuit attorney resided within the county, Wag. Mo. St. 204, § 25, having imposed that duty on the latter officer. *Dixon v. Livingston County*, 70 *Mo.* 239.

H. G. T. commenced an action of mandamus in the supreme court of Kansas against H. S. W., J. D. R., and H. O., the board of county commissioners of the county of Jefferson, to compel said board to submit to the qualified voters of Rock Creek township, in said county, the question whether stock should be taken in the name of said township in the Atchison, T. & S. F. R. Co., and the bonds of the township be issued in payment for such stock. The said county board then employed the plaintiffs in error as attorneys and counselors at law to defend said suit. The plaintiffs in error performed said services, the action of H. G. T. was defeated, and this action is now brought to recover compensation for said services. *Held*, the county commissioners had power to employ the plaintiffs in error to perform said services, and therefore that this action can be maintained. *Thacher v. Com'rs of Jefferson County*, 13 *Kan.* 182.

7. — their power to sell and transfer stock.—County commissioners have power to sell shares of stock owned by the county in a railroad company. *Shannon v. O'Boyle*, 51 *Ind.* 565.

Under Kan. Laws of 1863 the county commissioners could, without any specific legislation, and without any express authority of the voters, make a valid sale and transfer

of stock in a railroad company belonging to the county, and issued to it by such company in pursuance of a duly authorized subscription. So, too, could they in like manner sell and transfer any other personal property belonging to the county. *Missouri River, Ft. S. & G. R. Co. v. Com'rs of Miami County*, 12 *Kan.* 482.

8. County treasurer—His commissions.—County treasurers are not entitled to two per cent. commission, under Ill. Rev. St. § 23, ch. 53, for receiving and paying out money paid into the treasury in proceedings under the Eminent Domain Act. *Farley v. Chicago, B. & N. R. Co.*, 36 *Ill. App.* 517.

9. — his sureties on official bond.—The principle that the sureties of a county treasurer are, in effect, insurers as to the safe-keeping, in the proper place, of all moneys intrusted to him as treasurer, until his death, applied in a suit by a railroad company to recover a certain condemnation fund of which the treasurer should have had charge, but which he did not have at his decease. *Doolittle v. Atchison, T. & S. F. R. Co.*, 20 *Kan.* 329.

10. — county's liability for moneys collected by him.—A county is not liable for railroad-tax money collected by its treasurer which has neither been placed to its credit nor been used for its benefit. *Cedar Rapids, I. F. & N. W. R. Co. v. Cowan*, 77 *Iowa* 535, 42 *N. W. Rep.* 436.

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COUPONS.

On connecting lines, deemed distinct tickets for each line, see TICKETS AND FARES, 103.

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I. NATURE, EFFECT, NEGOTIABILITY, AND RIGHTS OF HOLDERS..... 333**II. ACTIONS ON COUPONS..... 338****I. NATURE, EFFECT, NEGOTIABILITY, AND RIGHTS OF HOLDERS.**

1. Generally.—The interest coupons attached to a bond, where they refer to the bond, partake of the same character as the bond itself; this character is not changed by cutting them off from the bond; and although an action may be maintainable upon the coupons without production of the bond, a recovery must be based upon the obligation contained in the bond, and cannot be had contrary thereto. *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 18 N. E. Rep. 237, 18 N. Y. S. R. 344, 1 L. R. A. 299, 6 Am. St. Rep. 397, 38 Alb. L. J. 410; reversing 3 N. Y. S. R. 250.—REVIEWING *McClure v. Oxford*, 94 U. S. 429; *Kenosha v. Lamson*, 9 Wall. (U. S.) 478.

In coupon bonds the contract to pay principal and interest is in the bond, and whatever the form of the coupon it answers substantially the same purpose, which is to afford to the holder evidence of his right to demand what is due on the bond and a convenient mode of collecting it. *Arents v. Commonwealth*, 18 Gratt. (Va.) 750.

Interest coupons attached to municipal bonds are not part of the principal debt, within the meaning of a constitutional provision providing that no municipality shall be allowed to create a debt above five per cent. of the value of its taxable property. *Durant v. Iowa County*, 1 Woolw. (U. S.) 69.

A recital in a mortgage that the directors of the corporation deemed it expedient to fund the coupons of a second mortgage previously given vests no right in the holders of such coupons where the mortgage was released by the trustees and the bonds which it was to secure destroyed before the corporation parted with them. *Commonwealth ex rel. v. Wilmington & N. R. Co.*, (Pa.) 17 Atl. Rep. 5.

2. Signature.—If the bonds to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defense to an action on the coupons that they are signed by only one of the county officers. *Thayer v. Montgomery County*, 3 Dill. (U. S.) 389.

The commissioners being empowered to issue coupons with the bonds, a statement in the bonds that they have caused one of their number to sign the coupons is equiv-

alent to a signing of the coupons by all of them. *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131.

3. Validity — Place of payment. — Where a county is authorized to issue its bonds with coupons, and no place of payment is named and none is specified, they are payable at the treasury; and coupons issued in Illinois and made payable in New York, which are otherwise valid, will be sustained by the rejection of the place of payment as surplusage. *Johnson v. Stark County*, 24 Ill. 75.—FOLLOWED IN *Cairo v. Zane*, 149 U. S. 122.

A statute validated the action of commissioners in issuing the bonds of a town in aid of a railroad company and in exchanging them for the stock of the company, and declared that no bonds held by any person "in good faith or for a valuable consideration" should be void or voidable by reason of any defect or omission in the consents of the tax-payers, but that the bonds should be as valid as if such defect or omission had not occurred, provided that any exchange of the bonds for such stock was made at the par value of the bonds. Certain of the bonds had been exchanged for stock of the company at par value. Afterwards they were sold at a discount to A., who sold them to T. He owned them when the legalizing act was passed, and subsequently detached certain coupons from them and sold such coupons to C. In a suit by C. to recover the amount of such coupons against the town—*held*: (1) that the legislature had power to validate the bonds; (2) the fact that the bonds stated upon their face that they were issued in exchange for stock, while the original statute only authorized them to be negotiated for cash and at par value, did not affect the position of C. as a holder in good faith of the coupons, he being a purchaser of them for value, nor was such position affected by the fact that C., when he bought the coupons, was aware that the town contested its liability upon the bonds; (3) the legalizing act validated all bonds that were originally exchanged at par value for the stock, and did not part with value on his purchase. *Cooper v. Thompson*, 13 Blatchf. (U. S.) 434.

4. When considered as negotiable instruments.—Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to

the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds; and a purchaser in good faith, before maturity, from one who has stolen them, acquires a valid title. *Evertson v. National Bank*, 66 N. Y. 14.—DISAPPROVING *Myers v. York & C. R. Co.*, 43 Me. 232; *Jackson v. York & C. R. Co.*, 48 Me. 147.—*Cooper v. Thompson*, 13 Blatchf. (U. S.) 434. *Thompson v. Perrine*, 12 Am. & Eng. R. Cas. 577, 106 U. S. 589, 1 Sup. Ct. Rep. 564.—FOLLOWING *Thompson v. Perrine*, 103 U. S. 806.—*Haven v. Grand Junction R. & D. Co.*, 109 Mass. 88. *National Exchange Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375.

Railroad coupons are not rendered non-negotiable by the fact that they are not made payable to a particular person. *Smith v. Clark County*, 54 Mo. 58.

The fact that, by their terms, they are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bonds or impair the title of one purchasing from another without production of the bonds. *Evertson v. National Bank*, 66 N. Y. 14.

Such instruments are entitled to days of grace; and one purchasing after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity. *Evertson v. National Bank*, 66 N. Y. 14.

5. When not considered negotiable.—In the absence of proof of custom as to the negotiability of coupons or interest warrants disconnected from the bonds with which they were issued, an independent negotiable character cannot be given them without the interposition of the legislature, unless the intention of the party issuing them distinctly so appears upon the face of the coupon itself. *Myers v. York & C. R. Co.*, 43 Me. 232.—DISAPPROVED IN *Evertson v. National Bank*, 66 N. Y. 14.

Where interest coupons or warrants to such bonds are not made payable to bearer or order, they are not negotiable when separated from the bonds, although the latter are themselves negotiable; and a purchaser of these detached instruments takes them subject to all defects in the title of his transferrer, and therefore subject to the claims of the true owner in case they have been stolen. *Evertson v. National Bank*, 66 N. Y. 14.

An interest coupon, not having a payee designated therein, is not a promissory note, nor negotiable in law. *Wright v. Ohio & M. R. Co.*, 1 *Disney (Ohio)* 465.

Though coupons are in the form of orders to pay money, they are not to be regarded as bills of exchange. *Arents v. Commonwealth*, 18 *Gratt. (Va.)* 750.

6. Transfer and sale.—Bonds and coupons made payable to bearer pass by mere delivery, and no assignment is necessary to enable the holder to sue. *Evans v. Cleveland & P. R. Co.*, 5 *Phila. (Pa.)* 512.

Possession of coupons uncanceled is *prima facie* evidence of title thereto, with the rights of a purchaser; but where the question is raised whether a transfer of coupons was a sale or a surrender for payment, the intent of the original holder to sell may be inferred from the fact that he had actual notice that a purchase and not payment is being made, and where he consents to take the money after such notice. So the same result follows if the holder acquiesces in the transaction, on being subsequently informed that the payment was not by the company issuing the bonds, but by a third party intending to purchase and keep the coupons alive. *Duncan v. Mobile & O. R. Co.*, 3 *Woods (U. S.)* 567.

7. Payment, generally.—Interest coupons detached from railroad bonds executed in 1860 are payable in the legal tender notes of the United States, though executed prior to the passage of the legal tender acts. *Norwich & W. R. Co. v. Johnson*, 15 *Wall. (U. S.)* 195.—FOLLOWING *Knox v. Lee*, 12 *Wall. (U. S.)* 457.

Where the liability for interest coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release for the bonds includes the liability for the coupons. *State v. North La. & T. R. Co.*, 25 *La. Ann.* 65.

Where a railroad makes a mortgage, agreeing to pay semi-annual interest on its bonds out of its surplus earnings, and no account has been kept of such earnings for a number of years, upon an accounting the holders of interest coupons are entitled to have the earnings of each six months applied to the payment of the interest representing that period. *Barry v. Missouri, K. & T. R. Co.*, 29 *Am. & Eng. R. Cas.* 384, 27 *Fed. Rep.* 1.

The holders of coupons from bonds secured by a mortgage on a railroad have a

right in equity to have payment made to them, and in the order in which the coupons fall due; and whether negotiable or not, separate from the bonds so as to enable the holders to maintain an action at law, they are when matured a constituent part of the mortgage debt, and an assignment of them carries with it by implication an interest in the mortgage security. *Sewall v. Brainerd*, 38 *Vt.* 364.—FOLLOWED IN *Miller v. Rutland & W. R. Co.*, 40 *Vt.* 399.

And the coupon holder, in a foreclosure of the mortgage, is entitled to a *pro rata* distribution with the holders of the residue of the mortgage debt. *Miller v. Rutland & W. R. Co.*, 40 *Vt.* 399.

8. Presentment—Time and place of payment.—The degree of diligence required of the holder of a coupon is to be ascertained by reference to the relations of the parties. It must be presented for payment within a reasonable time after it becomes due and payable, so as to have the liability of the guarantor in case of any injury resulting from delay. *Arents v. Commonwealth*, 18 *Gratt. (Va.)* 750.

Though it is not required that a coupon shall be presented for payment on the day it becomes due it is nevertheless regarded as due and payable on the day fixed for the payment of interest. *Arents v. Commonwealth*, 18 *Gratt. (Va.)* 750.

Though a coupon is made payable at a named banking house on presenting to it the proper coupon, it is still due and payable on the day when the interest is due, as specified in it. *Arents v. Commonwealth*, 18 *Gratt. (Va.)* 750.

When an interest coupon is payable at a particular place, presentation for payment at that place is not a condition precedent to a suit against the maker. *Smith v. Tallapoosa County*, 2 *Woods (U. S.)* 574.

9. Payment, when not an extinguishment.*—Payment of the amount due on railroad bond coupons by a third party, not the debtor, and taking them into possession without any intention to treat them as extinguished, constitute a sale of the coupons. The fact that the person making such payment is the financial agent of the railroad issuing them does not estop him, or those holding under him, from de-

* Coupons presented for payment and taken up by one who advanced money, see note, 24 *AM. & ENG. R. CAS.* 207.

manding payment, unless he acts in bad faith. *Ketchum v. Duncan*, 96 U. S. 659.

Uncanceled coupons having been taken up by parties who advanced the money to an embarrassed corporation for that purpose—although marked paid in the company's books—these parties have an equity to claim for their coupons the benefit of the lien which originally secured them. The recognition of this equity may be acquired at the hands of persons seeking the equitable powers of the court to enable them to contest the liability of the company to pay these coupons. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

B. had advanced money and taken up certain coupons on the faith of an agreement with the directors of the corporation that he should have the benefit of the mortgage. *Held*, that he should be protected, as it appears that no superior equity forbids it. *Miller v. Rutland & W. R. Co.*, 40 Vt. 399.

Interest coupons due on mortgage bonds were detached and presented for payment. The corporation being out of funds, they were paid at its office with money voluntarily supplied for the purpose by D. K. (who was president and a director of the corporation, and its creditor to a large amount), upon an understanding between him and the corporation that they were not extinguished as against it, but were to be held by him in place of the persons who presented them. These persons had no intention of assigning them to any one, and supposed that they were paid and extinguished by the corporation in regular course of business. The transaction was designed to maintain the credit of the corporation and protect D. K. as its creditor, but not to enable it to sell any of its bonds or coupons. The belief, however, thereby created, that it was able to pay, and did pay, these coupons at maturity, was held and acted on by another corporation in subsequent purchase of the bonds from individual holders of them; but these purchases were made at or below the par value of the bonds and accrued interest, and were not made till between eight and nine years afterwards, and then with a view to acquire title to lands which constituted the mortgaged security, and which this corporation had voted to buy. *Held*, that after a judicial sale of the lands upon foreclosure of the mortgage, D. K. was not estopped to maintain a claim for the

amount of the coupons paid by him, with interest from the date of payment, against a surplus of the proceeds of the sale remaining after full satisfaction of the claims of all the other creditors. *Haven v. Grand Junction R. & D. Co.*, 109 Mass. 88.—FOLLOWED IN *South Covington & C. St. R. Co. v. Gest*, 34 Fed. Rep. 628.

10. Lien.—A coupon payable to bearer, detached from a bond, and owned by one party while the bond is owned by another, is still a lien under the mortgage given to secure the bond. *Miller v. Rutland & W. R. Co.*, 40 Vt. 399.—FOLLOWING *Sewall v. Brainerd*, 38 Vt. 364.

A railroad company not having sufficient money to pay all the coupons falling due upon its first-mortgage bonds, the president borrowed money of plaintiff to make up the deficiency, and to secure him gave him the coupons in question, which were a part of the same coupons that had been previously paid by the company and delivered up to its secretary for retirement and cancellation. *Held*, that plaintiff was not a purchaser of the coupons, and that they were not entitled to the benefit of the lien of the first-mortgage bonds. *Cameron v. Tome*, 24 Am. & Eng. R. Cas. 203, 64 Md. 507, 2 Atl. Rep. 837.

11. Priority.—Interest coupons taken from railroad bonds secured by a mortgage are not entitled to priority of payment over others subsequently maturing, or the principal of the bonds, where the mortgage contains no provision giving such priority. *Duncan v. Mobile & O. R. Co.*, 3 Woods (U. S.) 567. *Ketchum v. Duncan*, 96 U. S. 659.—DISTINGUISHED IN *Hollister v. Stewart*, 111 N. Y. 644.

Interest coupons upon the bonds of a railroad corporation, received by one who has advanced the money with which they were taken up, under an agreement that they were to be delivered to him uncanceled, as security for the advances, as against the corporation, are valid securities in the hands of the holder; and a mortgage upon the corporate property, given to pay the bonds, may be enforced for his benefit. *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y. 311.

But as between him and bondholders who received the amount of their coupons in ignorance of the transaction, and supposing their coupons to have been paid, the latter have the prior equity; and if, upon

foreclosure and sale of the mortgaged property, the sum realized is insufficient to pay the face of the bonds, the holder of the coupons is not entitled to share in the proceeds. *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y. 311.—FOLLOWED IN *South Covington & C. St. R. Co. v. Gest*, 34 Fed. Rep. 628.—*Cameron v. Tome*, 24 Am. & Eng. R. Cas. 203, 64 A. J. 507, 2 Atl. Rep. 837.

A railroad company made a contract for the construction of its road by which bonds to the amount of \$25,000 a mile were to be issued to the contractors, who were to procure the necessary money by the sale of the securities, and were to advance funds and buy up the coupons as they matured. Held, that the contractors were not entitled to priority over the bondholders for coupons purchased in terms of the contract. *Hollister v. Stewart*, 38 Am. & Eng. R. Cas. 599, 111 N. Y. 644, 19 N. E. Rep. 782.

Where a railroad company issued bonds, with coupons for interest attached, which were guaranteed by the state, and to secure the payment thereof gave to the state a statutory lien on all the franchises, rights, and property of the company; and the company afterwards failed to pay the coupons and became insolvent; and before the bonds became due the statutory lien or mortgage was foreclosed in an action by the state, and all the franchises, rights, and property of the company were sold—held, that the holders of the coupons past due at the time of the sale were not entitled to priority of payment over the owners of the principal debt, which was not then due, but that such proceeds were distributable, *pari passu*, between the holders of the coupons past due and the owners of the bonds. *State v. Spartanburg & U. R. Co.*, 8 So. Car. 129.

12. Interest on overdue coupons.*

—Interest is due on coupons from maturity. *Genca v. Woodruff*, 92 U. S. 502.—FOLLOWED IN *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314; *Walnut v. Wade*, 103 U. S. 683.—*Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. Rep. 803.—FOLLOWING *Humphreys v. Morton*, 100 Ill. 592; *Harper v. Ely*, 70 Ill. 581; *Drury v. Wolfe*, 134 Ill. 294; *United States Mortgage Co. v. Sperry*, 138 U. S. 313.—*Beattys v. Solon*, 45 N. Y. S. R. 899,

64 Hun 120, 19 N. Y. Supp. 37. *Gibert v. Washington City, V. M. & G. S. R. Co.*, 1 Am. & Eng. R. Cas. 473, 33 Gratt. (Va.) 586.

Where interest coupons are made so as to be negotiable promises to pay money, and to circulate independently of the bond, if not paid when due, interest should be allowed thereon for the delay of payment, though there be no express promise to pay interest on interest. *Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co.*, 26 How. Pr. (N. Y.) 225, 41 Barb. 9; affirming 23 How. Pr. 180.

In the case of bonds with interest coupons, the latter may be detached as they become due, and if not paid at maturity the holder may recover interest thereon. And so the guarantor of the prompt payment of the principal and interest of such bonds is liable for interest upon the separate coupons from the time the same are payable. *Philadelphia & R. R. Co. v. Knight*, 124 Pa. St. 58, 16 Atl. Rep. 492. *Williamsburgh Sav. Bank v. Solon*, 47 N. Y. S. R. 496, 20 N. Y. Supp. 27.

The coupons of railroad bonds are negotiable instruments, and may be sued on by the holder separate from the bonds, and interest from the date of demand and refusal of payment may be recovered. *Beaver County v. Armstrong*, 44 Pa. St. 63.—DISAPPROVING *Rose v. Bridgeport*, 17 Conn. 243. QUOTING *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575; *Com'rs of Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Craig v. Vicksburg*, 31 Miss. 216.—*Love v. Philadelphia & R. R. Co.*, 19 Phila. (Pa.) 304. *Whitaker v. Hartford, P. & F. R. Co.*, 8 R. I. 47.

A coupon payable on presentation and demand can bear interest only from the date of its maturity, and after payment has been demanded and unjustly refused. *Corcoran v. Chesapeake & O. Canal Co.*, 1 MacArthur (D. C.) 358.—REVIEWING *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 206; *Aurora City v. West*, 7 Wall. 105.

A coupon bond issued by an incorporated railroad company, redeemable on a day certain and at a bank named on the surrender of the bond, bears interest from its maturity, although no demand of payment or offer to surrender the bond be made at the bank or elsewhere. So coupons, payable at a certain time and place, bear interest from the

* Recovery of interest on overdue coupons, see note, 64 AM. DEC. 441.

time they fall due, without demand of payment. *Langston v. South Carolina R. Co.*, 2 So. Car. 248.

Where a railroad company has no funds at the place at which the coupons on their bonds are to be presented for payment, interest is payable on the coupons after maturity without presentation. *North Pa. R. Co. v. Adams*, 54 Pa. St. 94.—DISTINGUISHING *Emlen v. Lehigh C. & N. Co.*, 47 Pa. St. 76.

Where the law allows interest upon past-due interest coupons from municipal bonds issued in aid of a railroad, the right to such interest cannot be impaired by a subsequent act of the legislature. *Koshkonong v. Burton*, 7 Am. & Eng. R. Cas. 203, 104 U. S. 668.

Under laws of Illinois overdue coupons which from their form are negotiable instruments draw interest after maturity, if not paid, at the rate of six per cent. per annum. *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. Rep. 321.—FOLLOWED IN *Cairo v. Zane*, 149 U. S. 122.

Unless there be a provision to the contrary, past-due interest coupons of municipal railroad bonds bear interest according to the law of the state where issued. *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26; affirming 25 Fed. Rep. 395.

Municipal bonds issued in Illinois for railroad stock were made payable, principal and interest, in New York. *Held*, that interest coupons, after due, drew interest at the rate fixed by the laws of New York. *Pana v. Bowler*, 12 Am. & Eng. R. Cas. 563, 107 U. S. 529, 2 Sup. Ct. Rep. 704.

Interest upon unpaid coupons of mortgage bonds is not entitled to payment in priority to the principal of the mortgage itself. *Hollister v. Stewart*, 38 Am. & Eng. R. Cas. 599, 111 N. Y. 644, 19 N. E. Rep. 782.—DISTINGUISHING *Ketchum v. Duncan*, 96 U. S. 659.

Where past-due interest coupons of railroad mortgage bonds have been detached from the bonds, but are still in the hands of the owner thereof, and by the terms of the bonds the obligor has the option to redeem them, a tender, in exercise of the option, of payment of the bonds and accrued interest, on condition that said coupons and bonds be surrendered, is valid and will stop the running of interest after the date thereof. *Bailey v. Buchanan County*, 115 N. Y. 297, 22 N. E. Rep. 155, 26 N. Y. S. R. 128.

Such coupons, when detached from the bonds, are for many purposes to be considered as independent separate instruments until negotiated or used in some way, and while in the hands of the owner of the bonds they remain mere incidents thereof, and have no other or greater force or effect than the stipulation for the payment of interest contained in the bonds. *Bailey v. Buchanan County*, 115 N. Y. 297, 22 N. E. Rep. 155, 26 N. Y. S. R. 128.

The interest coupons of municipal bonds, issued for stock in a railroad, do not bear interest after due, there being no statute allowing such interest. *Pekin v. Reynolds*, 31 Ill. 529.—DISTINGUISHED IN *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 586.

13. Stolen coupons in innocent hands.—Coupons stolen after the day when they had become due and payable, though they afterwards come into the hands of a bona-fide holder for value, cannot be held by him against the rightful owner. *Arents v. Commonwealth*, 18 Gratt. (Va.) 750. Compare *Evertson v. National Bank*, 66 N. Y. 14.

II. ACTIONS ON COUPONS.

14. Right of action.—The holder of interest coupons from municipal bonds, issued for railroad stock, may maintain a suit to recover the interest without producing the bonds. *Kenosha v. Lamson*, 9 Wall. (U. S.) 477.

Where an act authorizing the issue of municipal bonds provides that they "shall be transferable only on the books of the city," a holder of the coupons for interest cannot recover thereon unless the bonds have been transferred to him as provided by the act. *Oelrich v. Pittsburgh*, 1 Pittsb. (Pa.) 522.

A provision in a railroad mortgage that, upon default in the payment of the coupons for ninety days, the principal of the bonds shall become due and payable at the option of the mortgage trustee, but that a majority of the bondholders may waive the right to consider the principal due, does not affect the right to collect interest on the coupons; and a waiver of the bondholders as to considering the principal due is not a waiver of the interest. *Lyon v. New York, S. & W. R. Co.*, 14 Daly (N. Y.) 489, 15 N. Y. S. R. 348; affirming 13 N. Y. S. R. 732.

A railway mortgage provided that the trustee may execute the power of entry and sale of the mortgaged property in case of

default, and forbade the bondholders from taking proceedings at law or in equity to foreclose or to procure a sale of the property independently of the trustee. *Held*, that this provision only applied to such proceedings as the trustee might take, and not to actions at law to collect interest due on coupons, which action the trustee could not bring. *Lyon v. New York, S. & W. R. Co.*, 14 *Daly* (N. Y.) 489, 15 *N. Y. S. R.* 348; *affirming* 13 *N. Y. S. R.* 732.

By a statute of New York a county judge was authorized, on a petition by a specified number of taxpayers, to ascertain, by judicial inquiry, whether the majority of the taxpayers of a town, in number and in taxable property, desired the town to issue its bonds in aid of a railroad company; and, if he ascertained such to be the case, he was authorized to appoint three commissioners to execute and issue bonds in behalf of the town and invest them in the stock or bonds of the company. On a petition and proofs the county judge adjudged that the bonds should be issued by the town, and appointed commissioners to do so. Opposing taxpayers obtained a writ of *certiorari* for the review by the supreme court of the state of the decision of the county judge. After the writ had been issued, and the commissioners and the company had had notice of it, they executed the bonds and delivered them to the company. The supreme court reversed the judgment. The bonds had interest coupons, and B. subsequently brought suit against the town on some of the coupons. It did not appear how he acquired title to the coupons, or whether he ever owned the bonds to which the coupons belonged, although it appeared that he had the coupons in his possession before they fell due. *Held*, that he was not entitled to recover. The issue of the *certiorari* suspended the operation of the judgment, and the company acquired no title to the bonds which they could enforce as against the town. *Bailey v. Lansing*, 13 *Blatchf.* (U. S.) 424.

15. Jurisdiction.—In a suit to recover coupons on railroad bonds issued by a county court, the question whether the amount sued on is sufficient to bring it within jurisdiction of the circuit court is to be determined by the aggregate amount of the coupons. *Smith v. Clark County*, 54 *Mo.* 58.

16. Who may sue.—A holder of coupons from municipal-aid bonds may recover thereon without showing that he is the owner of the bonds. *Thomson v. Lee County*, 3 *Wall.* (U. S.) 327.—FOLLOWED IN *Walnut v. Wade*, 103 U. S. 683.

A person can recover on coupons on the bonds of a town issued in aid of a railroad although his sole purpose in buying them was to bring suit on them in the U. S. circuit court. *Foote v. Hancock*, 15 *Blatchf.* (U. S.) 343.

Where a coupon is negotiable by delivery without indorsement, a holder may demand payment in his own name without any indorsement. *Johnson v. Stark County*, 24 *Ill.* 75.—APPROVED IN *Roberts v. Bolles*, 101 U. S. 119.

Where coupons are payable to holder or bearer, the right of the owner thereof to sue in a federal court does not depend upon the citizenship of any former holder, as he is not an "assignee" within the meaning of the act of congress of March 3, 1875, ch. 137, providing that no circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court if no assignment had been made. *Thompson v. Perrine*, 12 *Am. & Eng. R. Cas.* 577, 106 U. S. 589, 1 *Sup. Ct. Rep.* 564. *Cooper v. Thompson*, 13 *Blatchf.* (U. S.) 434.

The holder of overdue interest coupons and interest warrants, whether attached to or severed from bonds issued by a railroad corporation payable to bearer, may maintain an action thereon against the corporation, and may recover interest on the amount of said coupons and warrants from the time they became due and payable. *Philadelphia & R. R. Co. v. Smith*, 29 *Am. & Eng. R. Cas.* 400, 105 *Pa. St.* 195.—FOLLOWED IN *Philadelphia & R. R. Co. v. Fidelity I., T. & S. D. Co.*, 29 *Am. & Eng. R. Cas.* 404, 105 *Pa. St.* 216.

Without some statutory provision, no action can be maintained in the name of an assignee, upon interest coupons, which contain no negotiable words, nor language from which it can be inferred that it was the design of the corporation issuing them to treat them as negotiable paper, or as creating an obligation distinct from, and independent of, the bonds to which they were severally attached when the bonds

were issued. *Jackson v. York & C. R. Co.*, 48 Me. 147.—DISAPPROVED IN *Evertson v. National Bank*, 66 N. Y. 14.

The negotiability of such coupons is a question of law, to be determined from the papers themselves, by fixed and well-settled rules; and proof of custom, as to the negotiability of them, is admissible. *Jackson v. York & C. R. Co.*, 48 Me. 147.

In this case the coupons read, "Coupon No. 1, Bond No. 60. On the first day of May, 1852, the Y. and C. R. R. Co. will pay nine dollars on this coupon in Portland." Signed by the treasurer of the company. *Jackson v. York & C. R. Co.*, 48 Me. 147.

The proper action was debt or covenant, and the coupon was not legally assignable, so that an action could be sustained in the name of the holder assignee. *Jackson v. York & C. R. Co.*, 48 Me. 147.

The holder, by purchase, of certain interest coupons, overdue, cannot, by reason of that interest alone, maintain an action in his own name, to enforce a trust, and the sale of property covered by a deed of trust, executed to secure a series of negotiable bonds, with such unnegotiable interest coupons attached. *Wright v. Ohio & M. R. Co.*, 1 Disney (Ohio) 465.

A city issued bonds, with coupons for interest. A railroad company indorsed upon the bonds a guaranty of prompt payment of principal and interest. *Held*, that the holder of a detached coupon might sue the guarantor in his own name; that he was not required to use the name of the holder of the bond. *Taylor v. Memphis & C. R. Co.*, 11 Lea (Tenn.) 186.

17. Who may be sued.—Sureties on a coupon bond are liable on a suit upon the coupons although the contract of suretyship is indorsed only on the bond itself. *Love v. Philadelphia & R. R. Co.*, 19 Phila. (Pa.) 304.—FOLLOWING *Commonwealth v. Canal Co.*, 45 Leg. Int. 237.

In order to maintain an action on the guaranty of county bonds it is not necessary for the holder to sue the county in the first instance or pursue it to insolvency; nor is any demand or notice required. *Evans v. Cleveland & P. R. Co.*, 5 Phila. (Pa.) 512.

18. Pleading.—It is not necessary to aver and prove, in a suit on coupons from municipal bonds issued to a railroad, that the coupons were presented for payment at the place where they are made payable.

Walnut v. Wade, 3 Am. & Eng. R. Cas. 36, 103 U. S. 683.

Such coupons bear interest if not paid at maturity, and when severed from the bonds are negotiable and pass by delivery. A failure to present when due will not defeat the interest, but a town may defeat a recovery of interest by showing that it had the money to pay the coupons when due. *Walnut v. Wade*, 3 Am. & Eng. R. Cas. 36, 103 U. S. 683.—FOLLOWING *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Aurora v. West*, 7 Wall. 82; *Thompson v. Lee County*, 3 Wall. 327; *Genoa v. Woodruff*, 92 U. S. 502.

In an action on interest coupons detached from the bonds of a railroad it is not error to allow the plaintiff, at the trial, to correct in his petition an erroneous numeration of a part of the coupons, where the dates and amounts remain the same. *Baltzer v. Kansas Pac. R. Co.*, 3 Mo. App. 574.

In a suit to recover interest upon coupon bonds an affidavit of defense is demandable if the plaintiff file a copy of the coupons, without a copy of the bonds from which they have been detached. *Wahn v. Huntingdon & B. T. R. Co.*, 16 Phila. (Pa.) 21.

In an action of debt on coupons from bonds issued by a county in payment of railroad stock, pleas that plaintiff is not the owner, holder, or bearer of the same, but that they are the property of a third person, and that the county never executed them, are good on general demurrer, though so poorly drawn that they might have been stricken from the record on motion, or been held bad on special demurrer. *Pendleton County v. Amy*, 13 Wall. (U. S.) 297, 4 Am. Ry. Rep. 109.

Defendant corporation was sought to be made liable upon certain interest coupons issued by another corporation, on the ground that it had consolidated with the corporation issuing the coupons. The only allegation in the complaint relating to such consolidation and liability was that under the laws of certain states named, "all the debts, liabilities, and duties of said consolidating companies and corporations, respectively, thereupon attached to defendant and became enforceable against it." *Held*, that this stated but a conclusion and was therefore demurrable. *Rio Grande Western R. Co. v. Rothschild*, 20 Civ. Pro. (N. Y.) 197, 37 N. Y. S. R. 44, 13 N. Y. Supp. 361.

A declaration alleged that defendants, by their bond or debenture, did bind themselves

to pay the bearer of said debenture \$1000, and interest thereon half-yearly at seven per cent. per annum on the 1st of March and September, at a named place, on presentation of the proper "coupons" therefor, and then annexed to said bond; that defendants delivered the bond to C. & Co., who thereby became the lawful holders of said bond and coupons; that after the making of said bond, the coupon for \$35, being the instalment of interest due September 1, 1873, was duly presented at said place, and was not paid, but was dishonored, and payment refused; and that said coupon and all claims in respect thereof have been assigned to plaintiff, who now sues for the recovery of the amount thereof. *Held*, bad, for that it did not appear what a "coupon" was, or that its assignment alone gave a right of action, the covenant to pay interest being contained in the bond. *McKenzie v. Montreal & C. of O. J. R. Co.*, 27 U. C. C. P. 224.

19. Defenses.—Where a municipality is sued upon interest coupons issued with bonds in payment of railroad stock, it cannot set up as a defense to a suit thereon, as against a *bona-fide* purchaser for value before maturity, that the company never constructed the road, or that the municipal officers issued the bonds in violation of certain conditions not required by statute, and of which plaintiff has no knowledge. *Brooklyn v. Aetna L. Ins. Co.*, 99 U. S. 362.

The coupons are not barred by the statute of limitations, but partake of the nature of the instrument of which they formed part. *Waln v. Huntingdon & B. T. R. Co.*, 16 Phila. (Pa.) 21.

A statute, authorizing township bonds in payment of stock in a railroad, provided that the amount of the bonds should be limited to a sum that would not require an amount of over one per cent. of the taxable property of the township to pay the interest. The election was held and the bonds regularly issued, and recited that they were issued in accordance with the act. *Held*, that it could not be set up in defense to a suit on coupons by a *bona-fide* holder that the bonds issued were for an amount greater than said rate of taxation would pay. *Marcy v. Oswego Tp.*, 92 U. S. 637.—FOLLOWED IN *Wilson v. Salamanca Tp.*, 99 U. S. 499; *Walnut v. Wade*, 103 U. S. 683; *Moultrie County v. Fairfield*, 105 U. S. 370;

Dallas County v. McKenzie, 110 U. S. 686; *Humboldt Tp. v. Long*, 92 U. S. 642.

The agent of the county and the presiding justice of the county court substituted engraved bonds, the signatures on the coupons of which were lithographed, for private bonds, the new bonds being of the same date and amount as the old, and the old being at the same time destroyed; there was no order of the county court for the substitution, but the county afterwards paid interest for two years, retained the certificate of stock, which was the consideration of the bonds, and entered of record other reasons than the substitution for ceasing to pay interest on the new bonds. *Held*, that the plea of *non est factum* was not sustainable as a defense to an action to recover interest on the new bonds. *McKee v. Vernon County*, 3 Dill. (U. S.) 210.

A street-railway company sold certain coupons through its president, under a warranty that they were unpaid. At the time the president was practically the owner of the road and controlled and dominated its directors. The coupons as a matter of fact had been paid, but the president procured the directors to pass a resolution subrogating him to the rights of the original holders, on the ground that he had advanced money to pay them out of his own private funds. *Held*, that the resolution of the directors was no defense to an action for breach of warranty. *South Covington & C. St. R. Co. v. Gest*, 34 Fed. Rep. 628; *affirmed in 36 Fed. Rep. 307*.

Neither is the fact that the president mixed the company's funds with his own a defense, in the absence of proof that moneys used in payment of the coupons were his individual funds. *South Covington & C. St. R. Co. v. Gest*, 34 Fed. Rep. 628; *affirmed in 36 Fed. Rep. 307*.

Mortgage bonds, with coupons attached representing semi-annual interest, were executed by a corporation, payable to bearer, the bonds stating upon their face that the payment of interest thereon was secured by a lease of the railroad of the maker to the defendant, at a rental equal to the interest, the defendant to pay the interest by paying the coupons; the statement being repeated on the back of the bond, with the additional statement, all under defendant's signature, that the rent will be applied by defendant directly to the payment of the interest. It was shown, in an action against defendant

on one of the coupons, that some of these coupons had been paid by defendant. *Held*, that the coupons were a part of the bonds; that the statement on the back of the bonds imports a promise to pay the coupons to bearer; that, the lease having been treated as valid, the question of its validity was immaterial; that defendant adopted the acts of its agents by acquiescence, and was estopped to urge as a defense to these coupons that the lease and indorsement were *ultra vires*. *Singer v. St. Louis, K. C. & N. R. Co.*, 6 Mo. App. 427.

By 34 Vict. c. 47, D, § 13, incorporating a railroad, they were empowered to issue bonds or debentures in such form and amount, and payable at such times and places, as the directors might appoint; and by 35 Vict. c. 12, § 2, O, the bonds or debentures of corporations made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, and such transfer shall vest the property thereof in the holder, to enable him to maintain an action in his own name. The company issued bonds, with coupons attached, for the payment of the interest half-yearly, payable to bearer, and delivered them to contractors for the building of the road. The coupons for the first instalment of interest not having been paid, plaintiff brought an action thereon, alleging an assignment to him, and that he was the lawful holder thereof. *Held*, that plaintiff held the coupons freed from any equities arising between the company and the contractors under an agreement creating a charge upon such instruments, and a plea setting up the forfeiture of such debentures under such agreement was held bad. *McKenzie v. Montreal & C. of O. J. R. Co.*, 29 U. C. C. P. 333.

20. Evidence.—An answer to a suit on coupons from county bonds issued for railroad stock denied *bona-fide* ownership of the coupons at maturity. *Held*, that proof of such ownership was both proper and necessary. *Ralls County v. Douglass*, 7 Am. & Eng. R. Cas. 212, 105 U. S. 728.

It appearing that bonds were issued in fraud of the rights of a town, the burden was upon the holder to show that he was the purchaser of the coupons in good faith and for value. *Bailey v. Lansing*, 13 Blatchf. (U. S.) 424.

Certain of the above-mentioned bonds, with their coupons, having come into the

hands of E. as a holder of them for value, before maturity, and then having passed to S.—*held*, that S. was entitled to recover in a suit on some of such coupons against the town. The reversal of the judgment of the county judge could not invalidate the title of a *bona-fide* purchaser. *Bailey v. Lansing*, 13 Blatchf. (U. S.) 424.

In an action of assumpsit against a county to recover upon interest coupons issued with its bonds in payment of railroad stock, the coupons are admissible in evidence under the common money counts, the same as bank bills would be, where they are negotiable and pass by delivery. *Sup'rs of Mercer County v. Hubbard*, 45 Ill. 139.—**DISTINGUISHING** *Marshall County v. Cook*, 38 Ill. 44.

21. Amount recoverable.—A coupon once detached and negotiated ceases to be a mere incident of the bond and becomes an independent claim, and its amount, with interest after demand of payment, is recoverable under a general count in debt. *National Exchange Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375.

A railroad company issued bonds for the payment, to bearer, of money with interest, with interest coupons in the usual form attached. Before the time fixed for the payment of the principal in the bonds they became due at once, under a condition contained in the mortgage securing the bonds. In an action upon interest coupons for a time subsequent to the bonds thus becoming due—*held*, that the holder of such coupons is entitled to recover the amount of them, the damages allowed by law for default in payment of the principal being at the same rate as the stipulated interest. *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314.—**FOLLOWED IN** *Patterson v. First Div. St. P. & P. R. Co.*, 25 Minn. 324, n.

22. Action on lost coupon.—The holder of lost railroad coupons, tendering indemnity, is entitled to recover, with interest from the date of demand. *Fitchett v. North Pa. R. Co.*, 5 Phila. (Pa.) 132.

23. Mandamus to compel payment.—In a mandamus to compel payment of a judgment against a county for the amount of interest coupons from bonds issued for railroad stock, the county cannot set up as a defense anything that relates to the validity of the coupons. *Ralls County Court v. United States*, 105 U. S. 733.

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I. GENERAL PRINCIPLES.

1. Implied covenants.—The deed between the plaintiffs and a railway company reciting that the company required 350,000 sleepers and that the plaintiffs were willing to supply them according to the terms of a specification and tender contained in a covenant by the plaintiffs that they would supply the sleepers within the time specified, etc., contained an implied covenant on the part of the company to take the whole of the 350,000 sleepers. *Great Northern R. Co. v. Harrison*, 12 C. B. 576, 16 Jur. 565, 22 L. J. C. P. 49.

If an acknowledgment by a railway company of a debt in a deed under seal is merely collateral to the purpose for which the deed was executed, a covenant to pay will not be implied. *Jackson v. North Eastern R. Co.*, L. R. 7 Ch. D. 573, 47 L. J. Ch. D. 303, 38 L. T. 664, 26 W. R. 513.

2. Dependent and independent covenants.—Covenants whereby the defendant agrees to purchase of the plaintiff, on or before the expiration of the term of five years, the property described, and that on the said payment by the said defendant the said plaintiff agrees to make to said company a good and sufficient deed, etc., are dependent covenants. *Powell v. Dayton, S. & G. R. R. Co.*, 14 Oreg. 356, 12 Pac. Rep. 665.

The covenant by a railway company with the defendant to take from him all the coke it required was not a condition precedent to the defendant's liability under a covenant to supply a certain amount, the two covenants being independent. *Eastern Counties R. Co. v. Philpston*, 16 C. B. 2, 24 L. J. C. P. 140.

3. What covenants run with the land, generally.*—An agreement by a railroad, for a valuable consideration, to make and maintain certain improvements on land is a covenant running with the land and not severed by a subsequent act of the legislature authorizing the company to sell its road and franchises. *Dorsey v. St. Louis, A. & T. H. R. Co.*, 58 Ill. 65.

Where the consideration for a conveyance of a strip of land for a right of way for a railroad is one dollar, and the deed contains a provision that "the water on the southeast side of the road to be made to run on the same side of the road instead of through the cattle-guards," such provision is a covenant running with the land. *Peden v. Chicago, R. I. & P. R. Co.*, 73 Iowa 328, 35 N. W. Rep. 424, 5 Am. St. Rep. 680.—**DISTINGUISHING** *Close v. Burlington, C. R. & N. R. Co.*, 64 Iowa 149.

Where a deed for a right of way to a railway company contains a covenant to furnish the grantor with an annual pass during his life, to which is annexed a condition that a failure to do so shall work a forfeiture of the land, a successor to the company takes subject to the condition. *Ruddick v. St. Louis, K. & N. W. R. Co.*, 116 Mo. 25, 22 S. W. Rep. 499.

* Grant to corporation. Covenants running with the land, see note, 2 L. R. A. 199.

Where the company has entered under the deed and built and operated the road, breach of the condition will not authorize an action for damages for the taking of the land for the roadway, and by reason thereof to his entire tract, but his remedy is either an action for damages against the original grantee for failure to furnish the pass or ejectment for forfeiture on condition broken. *Ruddick v. St. Louis, K. & N. W. R. Co.*, 116 Mo. 25, 22 S. W. Rep. 499.

The owner of a tract of land granted defendant company a right of way over it so long as the company should desire it, and in consideration defendant agreed in writing to build its track above the overflow of a certain river. The owner of the land having died, his widow occupied it as her homestead, and while thus held the land was overflowed, by reason of the failure of the defendant to build its track to the height required by the contract. *Held*: (1) that the covenant to build the track above the overflow of the river is a covenant which ran with the land; (2) that such covenant inures to the plaintiff's benefit as temporary owner of the land, and its breach gives her a cause of action. *St. Louis, I. M. & S. R. Co. v. O'Baugh*, 49 Ark. 418, 5 S. W. Rep. 711.—**REVIEWING** *Carr v. Lowry*, 27 Pa. St. 257; *Norfleet v. Cromwell*, 64 N. Car. 1; *Winfield v. Henning*, 21 N. J. Eq. 188.

4. — to maintain fences.*—A provision in a deed of land to a railroad company for a right of way, requiring the grantee to maintain a fence on each side of said right of way, and to put in and maintain a farm-crossing and cattle-guards, is a covenant running with the land. It is binding on the grantee and on a purchaser of the railroad under foreclosure of a mortgage executed before the land was conveyed. While equity will apply the mortgage to the after-acquired title, it can only affect such title as the grantee and mortgagor actually acquire. If the title comes to him, as in this case, burdened with covenants, the mortgagee, while availing himself of the security, must take the title as it is, with its burdens. *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77.—**FOLLOWING** *Midland R. Co. v. Fisher*, 125 Ind. 19.

* When covenants to build and maintain fences run with the land, see note, 38 AM. & ENG. R. CAS. 296.

A written agreement by a railroad company to keep up fences along its right of way runs with the land and is enforceable by and against subsequent grantees, where the deed shows an intention to charge the land, and contains provisions which, in their nature, adhere to the land and mutual promises connected with the grant as part of it. *Kentucky C. R. Co. v. Kenney*, 20 *Am. & Eng. R. Cas.* 458, 82 Ky. 154.

In conveying a right of way for a railroad a landowner covenanted for himself and heirs to erect and maintain a good and sufficient fence on each side of the right of way. Plaintiff hired pasture for a horse of the landowner adjoining the right of way, but by reason of defects in the fence the horse strayed upon the track and was killed. *Held*, that the covenant as to fencing was one running with the land, and was equally binding on plaintiff as on the owner himself, and would defeat a recovery. *Duffy v. New York & H. R. Co.*, 2 *Hill* (N. Y.) 496.

5. — to maintain depot or station.—A covenant by a railroad corporation, in consideration of a grant of the right of way through plaintiff's lands to erect a "flag-station" at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land and is binding on an assignee with notice. *Gilmer v. Mobile & M. R. Co.*, 79 *Ala.* 569.—REVIEWED IN *Kettle River R. Co. v. Eastern R. Co.*, 40 *Am. & Eng. R. Cas.* 449, 41 *Minn.* 461, 6 *L. R. A.* 111, 43 *N. W. Rep.* 469.—*Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422, 5 *So. Rep.* 138.

The covenantee in such written instrument is a creditor of the covenantor (railroad company), not from a breach of the covenants, but from the date of the instrument. *Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422, 5 *So. Rep.* 138.

A landowner conveyed a right of way through his lands in fee simple in consideration of \$25 and the building of the road, with a further provision in the deed that "it is hereby agreed and understood that a depot and station is to be located and given to said R. (grantor) on the land or strip above conveyed, to be permanently located for the benefit of said R. and his assigns, and to be used for the general pur-

poses of the railroad." *Held*, that this was a covenant running with the land, and was binding on any subsequent company that might lawfully become the purchaser of the road. *Georgia Southern R. Co. v. Reeves*, 11 *Am. & Eng. R. Cas.* 333, 64 *Ga.* 492.

6. — to maintain switch.—A right of way through land was granted to a railroad company, and as the consideration for such grant the company covenanted with the grantor, his heirs and assigns, to build and forever maintain a switch from the railroad to a mill on the land, for the use of such mill. *Held*, to be a covenant real and to run with the land. *Lydick v. Baltimore & O. R. Co.*, 11 *Am. & Eng. R. Cas.* 336, 17 *W. Va.* 427.

7. — to provide access to hotel property.—A strip of land was conveyed to a railroad company between its depot and a hotel with the express condition that the company, its successors, or assigns, should at all times maintain an opening from the premises conveyed to the hotel for the convenient access of passengers and baggage. *Held*, that this was a covenant running with the land, and a suit for specific performance would lie to prevent the erection of a fence without an opening so as to cut off access to the hotel. *Avery v. New York C. & H. R. R. Co.*, 31 *Am. & Eng. R. Cas.* 583, 106 *N. Y.* 142, 12 *N. E. Rep.* 619, 8 *N. Y. S. R.* 612, 7 *Cent. Rep.* 795; *further appeal* 121 *N. Y.* 31.

8. What covenants do not run with the land, generally.—Where there is an agreement between the vendor and vendee, not expressed in the deed, as to the use to be made of the land conveyed, such agreement cannot be enforced against a subsequent grantee. *Close v. Burlington, C. R. & N. R. Co.*, 17 *Am. & Eng. R. Cas.* 33, 64 *Iowa* 149, 19 *N. W. Rep.* 886.—DISTINGUISHING *Varner v. St. Louis & C. R. R. Co.*, 55 *Iowa* 677.

Where the county court was authorized by the voters of the county only to make a contract with a railroad company for the running its trains to a depot in the county, it has no authority to release that contract. *People ex rel. v. Louisville & N. R. Co.*, (Ill.) 25 *Am. & Eng. R. Cas.* 235, 5 *N. E. Rep.* 379.

Such contract, although binding on the company, is no lien on its property as against a purchaser without notice, and does not attach to the real estate of the

company so as to make it a covenant running with the land which would be binding on a succeeding purchaser of the railway. *People ex rel. v. Louisville & N. R. Co.*, (Ill.) 25 *Am. & Eng. R. Cas.* 235, 5 *N. E. Rep.* 379.

A company chartered for the purpose of mining, manufacturing, and railroading contracted with a landowner for certain lands adjoining a canal for the purpose of wharves and other improvements necessary for shipping on the canal, the company, among other things, covenanting on its part to make the terminus of its road on said lands its only terminus on the canal or its basins, and not to extend the terminus of its road any further than it then was. *Held*, that this covenant did not run with the land and the easements granted so as to bind subsequent purchasers of the corporation. *Lynn v. Mount Savage Iron Co.*, 34 *Md.* 603.—REVIEWING *Spencer's Case*, 3 *Coke* 16; *Hemingway v. Fernandes*, 13 *Sim.* 228; *Keppell v. Bailey*, 2 *M. & K.* 517.

Plaintiff conveyed in fee simple to a railroad for its roadbed a strip of land by a deed-poll, which contained the express condition subsequent "that the system of drainage shall remain the same as now, and ditches to remain of such a depth as to allow, as heretofore, the drainage of the land to the depth of five feet." This condition was violated by the grantees, and afterwards the railroad was purchased by a new company. *Held*, that the terms of the deed did not create a covenant running with the land, and there being no personal covenant by the present owners, they were not liable to plaintiff in damages for their mere failure to remove obstructions which had been placed in the ditches by the former company. *Hammond v. Port Royal & A. R. Co.*, 16 *So. Car.* 567.

9. — to maintain or discontinue fences.—A parol promise by a railroad company to maintain a board fence along its right of way is not a covenant running with the land so as to thereafter prevent the erection of a barbed-wire fence. *Gulfford v. New York C. & H. R. Co.*, 69 *Hun (N. Y.)* 593, 53 *N. Y. S. R.* 538.

A parol agreement for the removal and discontinuance of a fence on the line of a railroad, between the owner of adjoining land and the railroad company, does not run with the land, and cannot, therefore,

bind his grantee. *Wilder v. Maine C. R. Co.*, 65 *Me.* 332, 9 *Am. Ry. Rep.* 289.

A deed granting a right of way contained a stipulation that if any portion of the land adjoining should be inclosed and used for pasturage, then the company should construct a fence on each side of its right of way. *Held*, that this was not a covenant running with the land so as to enable persons holding under the grantor, but not named in the deed, to sue for a failure to erect such fence. *Gulf, C. & S. F. R. Co. v. Smith*, 72 *Tex.* 122, 9 *S. W. Rep.* 865, 2 *L. R. A.* 281.

10. — for exclusive transportation of market produce.—An agreement by a landowner that the products of his land shall be transported to market by a certain common carrier is not a covenant real and does not run with the land or bind any subsequent purchaser of the land. *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 *W. Va.* 600. *Kettle River R. Co. v. Eastern R. Co.*, 40 *Am. & Eng. R. Cas.* 449, 41 *Minn.* 461, 6 *L. R. A.* 111, 43 *N. W. Rep.* 469.—FOLLOWING *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 *W. Va.* 626.

A court of equity would not enforce the performance of such a covenant by a subsequent purchaser of the land, though he bought the land with full notice of the existence of such covenant. *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 *W. Va.* 600.—FOLLOWING *Kettle River R. Co. v. Eastern R. Co.*, 40 *Am. & Eng. R. Cas.* 449, 41 *Minn.* 461, 6 *L. R. A.* 111, 43 *N. W. Rep.* 469.

11. Covenants against encumbrances.—The right of way of a railroad across land conveyed is such an encumbrance as is a breach of the covenants against encumbrances. *Pilcher v. Atchison, T. & S. F. R. Co.*, 38 *Kan.* 516, 16 *Pac. Rep.* 945. *Burk v. Hill*, 48 *Ind.* 52.

A highway, or a railroad located and running over land, is an encumbrance, and to a greater or less degree obstructs and encumbers the free use and enjoyment of the land, and a person selling land thus encumbered, and covenanting that it is not, may be held to perform his covenant by its removal or respond in damages. *Kellogg v. Malin*, 50 *Mo.* 496.

And the grantor's liability is not discharged by the fact that the grantee, at the date of the deed, was aware of the exist-

ence of the encumbrance. *Kellogg v. Mallin*, 50 Mo. 496.

12. — of warranty.—The existence of a right of way for a railroad over land conveyed by warranty deed is a breach of the warranty, though known to the grantee at the time of the conveyance; and the grantor cannot complain at having the damages assessed at the purchase price per acre of the land so occupied, with interest. *Flynn v. White Breast, C. & M. Co.*, 72 Iowa 738, 32 N. W. Rep. 471.

13. What constitutes a breach of covenant.—A company owning a pier purchased certain lands from defendant in front of the pier, with a further covenant that a roadway thirty feet wide should forever be maintained from the land conveyed back through lands of defendant to a certain avenue. The roadway was opened, but defendant maintained various obstructions, such as sheds, posts, and booths, extending out several feet onto the way. Plaintiff also maintained a balcony overhanging the roadway. *Held*, that the obstructions maintained by defendant were a violation of the covenant, but plaintiff was not prevented from maintaining an action for a removal of the obstructions by maintaining the balcony. *Ocean P. & N. Co. v. Woolsey*, 22 N. Y. S. R. 72, 51 Hun 643.

14. — and what does not.—A covenant on the part of a railroad company to maintain an opening between its station grounds and an adjoining hotel, sufficient to enable persons to pass between the two is sufficiently complied with by maintaining a gate sufficient to enable persons to pass to and from the hotel without inconvenience; and it does not require the company to maintain such an opening as will enable passengers to have a full view of the hotel and its signboard. *Avery v. New York C. & H. R. R. Co.*, 121 N. Y. 31, 24 N. E. Rep. 20, 30 N. Y. S. R. 471; *reversing* 2 N. Y. Supp. 101, 17 N. Y. S. R. 417; *former appeal* 106 N. Y. 142.

A regulation of the company requiring persons passing from the hotel to the station to exhibit tickets at the gate, and prohibiting baggage other than such as was carried by hand to be taken in at that place, was not a breach of the covenant. *Avery v. New York C. & H. R. R. Co.*, 121 N. Y. 31, 24 N. E. Rep. 20, 30 N. Y. S. R. 471; *reversing* 2 N. Y. Supp. 101, 17 N. Y. S. R. 417; *former appeal* 106 N. Y. 142.

Where a railway company promoting in parliament a bill for the extension of its line which if made would go through the land of the plaintiff, covenanted with him "that in the event of the proposed bill passing in the then session of parliament, the company should, before entering upon any part of the plaintiff's lands, pay to him £4900 purchase money for any portion not exceeding 43 acres, which the company might, under the powers of their act, require and take for the purpose of their undertaking; and that, in addition to the purchase money, the company should pay to the plaintiff, before they should enter upon any part of the land, £7100 as landlord's compensation for the damage arising to his estate by severance in respect of the lands, not exceeding 43 acres, to be taken by them"—the company is not liable to pay either of these sums unless it enters upon some part of the land. *Gage v. Newmarket R. Co.*, 16 Jur. 1136, 21 L. J. Q. B. 398, 18 Q. B. 457.

Where there was no implied covenant on the part of the defendant company to make a cut in certain land deeded to it by the plaintiff and to divert a stream through such land, consequently there could be no breach of the expressed covenant contained in the deed to build a bridge for the use of the plaintiff, unless the cut was made and the stream diverted. *Rushleigh v. South Eastern R. Co.*, 10 C. B. 612.—COMMENTED ON IN *Knight v. Gravesend & M. W. Co.*, 27 L. J. Ex. 73.

II. ACTIONS UPON COVENANTS.

15. Right of action.—In taking a conveyance of a right of way from plaintiff's grantor, a railroad company covenanted that the water on a certain side of the road should be made to run on that side instead of through cattle-guards. While the grantor still owned the land a culvert was constructed so as to throw the water onto plaintiff's land. After plaintiff became the purchaser he sued the company for damages caused by flooding his lands. *Held*, that if the structure was permanent, the right of action arose for all of the damages which might ever occur as soon as it was constructed, and whether it was permanent was for the jury; and in the absence of an assignment of the damages to plaintiff he could not recover. *Peden v. Chicago, R. I.*

& *P. R. Co.*, 73 *Iowa* 328, 35 *N. W. Rep.* 424, 5 *Am. St. Rep.* 680.

16. Who may sue.—Where a ferry company granted certain rights or easements to a railroad over land, which were distinct property from the ferry franchise, in consideration of which the railroad company covenanted with the ferry company always to employ the latter to transport over the Mississippi river all property and persons which might be taken across the river, either way, by the railroad, so that the ferry company, its representatives and assigns, owners of the ferry, should have the profits of the transportation—*held*, that as the covenant was for the benefit of the owners of the ferry, and not for the owners of the land out of which the easement was granted, a separate and distinct property, the ferry company could not maintain an action at law against a party succeeding to the railroad company, for a breach of covenant. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 *Ill.* 83.

After a railroad was located over certain lands the owner conveyed a portion of them by deed containing covenants against encumbrances. Both the grantor and grantee filed petitions for the assessment of damages, but the grantee becoming insolvent his assignee assigned his claim to the company with full power to prosecute it to final judgment. Subsequently the grantor recovered a judgment for full damages for all land taken, and the company filed a bill to enjoin him from collecting such portion of the damages as related to the land conveyed. *Held*, that the claim that the grantee might have against the grantor for breach of his covenant against encumbrances did not pass by the assignment to the company, and therefore the bill could not be maintained. *New York & N. E. R. Co. v. Drury*, 10 *Am. & Eng. R. Cas.* 518, 133 *Mass.* 167.

In taking a deed for a right of way over land a railroad company covenanted to construct sufficient farm crossings. Plaintiffs afterward contracted to purchase the land, to receive a deed when it was fully paid for, but at the time of the trial it did not appear that they had received a deed or had fully paid the purchase money. *Held*, that an action to compel a construction of the farm crossings could not be maintained by plaintiffs, as they only had an equitable title to the land, without making their vendors

parties, whether the covenant ran with the land or not. *Haynes v. Buffalo, N. Y. & P. R. Co.*, 38 *Hun (N. Y.)* 17.

A company owning a main line and a branch sold the branch, the purchasers agreeing to assume a certain amount of the debts of the company, the conveyance containing a covenant that in default of payment by the purchasers the selling company should have the right to re-enter and foreclose. Subsequently the main line was mortgaged with "all the stock, railroad or other bonds, * * * causes of action, demands, and choses in action of whatever kind. The mortgage was foreclosed, and the purchasers filed a bill to enforce the covenant of foreclosure against the branch. *Held*, that the right to do so did not pass to such purchasers, where the notice of sale was not any more specific as to the property foreclosed than the mortgage, and where the bill did not state that the price bid was in any way affected by the right to foreclose as against the branch. *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.*, 20 *Wis.* 174.

17. Pleading.—In an action for breach of covenant of a railroad company to erect a flag-station at a point convenient to plaintiff's house, and to permit him to cultivate the other adjacent lands not needed by the company, which he had conveyed, it is not necessary that the complaint should aver that the stopping of trains at the station would not interfere with the running of the company's regular schedule, or that his cultivation of the land would not interfere with the wants and requirements of the road. Such facts are matters of defense. *Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422, 5 *So. Rep.* 138.—OVERRULED IN *Louisville & N. R. Co. v. Trammell*, 93 *Ala.* 350.

Plaintiffs leased certain lands from a railroad company and erected an elevator thereon, and sued to recover damages for a failure on the part of the company to deliver the amount of grain it had contracted to furnish. It appeared that the company had covenanted that the grain should be brought to the elevator in readiness to be received there. *Held*, that the complaint was defective in not averring that plaintiffs were ready to perform their part of the contract, and this must be averred according to its legal effect, and not in the words of the contract. *Chicago, M. & St. P. R. Co., v. Hoyt*, 44 *Ill. App.* 48.

Covenants are dependent and concurrent when the act of each party is to be done at the same time. In such case the party alleging a breach must aver a tender of performance on his part at the stipulated time. *Powell v. Dayton, S. & G. R. R. Co.*, 12 *Oreg.* 488, 8 *Pac. Rep.* 544.

The deed by which the defendant company demised to the plaintiff refreshment rooms at one of its stations, declaring it to be the intention of the company that all passenger trains should stop at such station for refreshment of passengers for about ten minutes, amounted to a covenant that so long as the company made the station the general place of stoppage for refreshment it would cause the trains to stop there for ten minutes; and a breach alleging that the company caused passenger trains to pass without stopping for about ten minutes was well assigned although it was not stated that any passenger wanted refreshment or had given notice thereof. *Rigby v. Great Western R. Co.*, 14 *M. & W.* 811, 15 *L. J. Ex.* 60; *s. c.* 10 *Jur.* 488.

18. Defenses—Evidence.—Defendant conveyed land to a railroad company in payment of stock, but before the deed was recorded he conveyed to a third party and the company lost the land. *Held*, when sued for a breach of covenant, that a parol license to the grantor to resell could not be set up as a defense. *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 *Ind.* 502.

Defendant conveyed land to a railroad company in payment of stock, but before the deed was recorded conveyed to a third party. When sued for a breach of covenant he sought to recoup by showing that the company failed to deliver him a certificate of stock. *Held*, that such defense was not good where there was no allegation that he could have sold the stock if the certificate had been delivered, or that he desired to sell it. *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 *Ind.* 502.

A railroad company sold a tract of land which it claimed under a land grant and gave a certificate of purchase which was assigned to plaintiff, who surrendered the certificate and took a warranty deed from the company. His title failed and he bought an outstanding homestead title, which was adjudged valid as against the company; and he thereupon sued the company for a breach of the covenant of warranty in its deed. *Held*, that plaintiff was not estopped

from asserting that his title procured by the homestead purchase was paramount to that conveyed by the company. *Kansas Pac. R. Co. v. Dunmeyer*, 5 *Am. & Eng. R. Cas.* 417, 24 *Kan.* 725.

Evidence of plaintiff's object in purchasing is inadmissible in a suit for damages on the covenant against encumbrances on account of the existence of a right of way. *Kellogg v. Malin*, 62 *Mo.* 429.

In a suit for breach of covenant against encumbrances by reason of a right of way by a railroad, evidence of the enhanced value of the land by reason of the railroad, or of privileges accorded by the railroad, is inadmissible. *Kellogg v. Malin*, 62 *Mo.* 429.

19. Amount recoverable—Damages.—Under a claim for damages resulting from breach of covenant against encumbrances, on account of a right of way for a railroad over the land, the real question as to the measure of damages is, in what proportion to the purchase price has the land been depreciated by reason of the right of way? The ordinary rule as to the measure of damages prevailing in such case between the landowner and the railroad company does not apply. *Kostendader v. Pierce*, 37 *Iowa* 645.

Land was conveyed to a railroad company in payment of stock, but before the deed was recorded the vendor conveyed to a third party and the company lost the land. *Held*, in an action for breach of covenant, that the measure of damages was the price paid for the land, but, being paid in stock, the amount was a matter of proof. *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 *Ind.* 502.

Plaintiff's grantor deeded to defendant a right of way through an eighty-acre tract of land. The deed provided that "the water on the southeast side of the road to be made to run on same side of road, instead of through cattle-guards." The grantor owned other adjoining lands, and afterwards conveyed one hundred and thirty-five acres of it, including twenty-nine acres of the eighty acres, to plaintiff. The covenant above named ran with the land. *Held*, that for a breach of it, causing the water to flow across the right of way upon plaintiff's land, if he was entitled to recover at all, his right to do so extended to the one hundred and thirty-five acres, and was not limited to the injury to the

twenty-nine acres. *Peden v. Chicago, R. I. & P. R. Co.*, 78 Iowa 131, 4 L. R. A. 401, 42 N. W. Rep. 625.

In an action for overflowing plaintiff's land witnesses were permitted to state how much more, if any, the land of plaintiff would have been worth between certain named dates if the water had not been made to run over it. The petition alleged that plaintiff sustained damages by reason of the overflow of his lands during the time named by the witnesses, and specified certain injuries, all in the nature of damages to real estate. *Held*, that the testimony was neither incompetent nor immaterial, and that its admission was not erroneous on the ground that it adopted a wrong measure of damages. *Peden v. Chicago, R. I. & P. R. Co.*, 78 Iowa 131, 4 L. R. A. 401, 42 N. W. Rep. 625.

COVERTURE.

Disability of, see LIMITATIONS OF ACTIONS, 60.

See also HUSBAND AND WIFE.

COVINGTON.

Decisions particularly applicable to, see MUNICIPAL CORPORATIONS, 30.

COW-CATCHER.

See PILOT.

CREDIBILITY.

Of employes as witnesses, see WITNESSES, 20, 30.

— witnesses, generally, see WITNESSES, 20-43.

— question for the jury, see ANIMALS, INJURIES TO, 554; WITNESSES, 28.

— review of, on appeal, see APPEAL, ETC., 120.

CREDITORS.

Claims of, when prior to mortgages, see MORTGAGES, 101, 104.

Competency of, as witnesses, see WITNESSES, 12.

Delaying shipment to permit attachment by, see CARRIAGE OF MERCHANDISE, 100.

Liability of stockholders to, see STOCKHOLDERS, II.

— to, upon dissolution, see DISSOLUTION, 30.

Limitation of actions against stockholders by, see LIMITATIONS OF ACTIONS, 21, 43.

Of bankrupt corporations, rights of, see BANKRUPTCY, 0, 11.

— landowner, right of, to land damages, see EMINENT DOMAIN, 443.

— old company, rights of, as respects consolidated company, see CONSOLIDATION, 41-44.

Position of bondholder as respects, see BONDS, 34.

Purchaser in foreclosure, when trustee for, see MORTGAGES, 204.

Right of, to compel sale of superfluous land, in England, see EMINENT DOMAIN, 1123.

Rights of, on insolvency of corporation, see INSOLVENCY, 4, 6.

— — reorganization, see REORGANIZATION, 10.

— — sale of railroads, see SALES OF RAILROADS, 15.

— — secured, see EASTERN R. CO., 4.

CREDITORS' BILL.

Pleading and proof, see PLEADING, 105.

1. Nature, form, and object of the bill.—Certain parties sued for themselves and others, the holders of guaranteed stock of a railroad company, the said company and others, the holders of the common stock of said company, to enforce contracts between plaintiffs and the company in respect to plaintiffs' participation in certain dividends of the company. *Held*: (1) that the suit was a creditors' bill in form, nature, and object; (2) that it should have been referred to a commissioner to ascertain, state, and report who were the holders of guaranteed stock, and in what shares and what obligations and money dividends were coming to them; (3) and counsel fees against the guaranty stockholders should have been allowed. *Gordon v. Richmond, F. & P. R. Co.*, 81 Va. 621.

2. What property may be reached, generally.—A judgment creditor of a company may, by bill in equity, compel its directors to account with the company, to the end that the funds belonging to the company misappropriated by them may be subjected to the satisfaction of his debts. *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

An execution creditor of a company, with a return of *nulla bona*, may subject to the satisfaction of his demand money paid to a director of the company for dividends illegally declared, and which might be recovered back by the company as paid through mistake. *Gatz v. Redd*, 4 B. Mon. (Ky.) 178.—FOLLOWED IN *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556.

The property of a consolidated railroad company in the hands of a purchaser, other than an innocent one, is liable to the claims given priority by the 3d proviso of § 3 of the Act of 1877, where it was sold upon foreclosure of a mortgage made by said company subject to provisions of said act; and it may be subjected to such claims by creditors' bill filed by one, on behalf of himself and all other creditors of the preferred class, against the insolvent company and the purchaser of its mortgaged property. *Frazier v. East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 358, 88 *Tenn.* 138, 12 *S. W. Rep.* 537.

A judgment creditor of a corporation who files a bill to obtain satisfaction of his debt out of the property and effects of the corporation, after the return of an execution at law unsatisfied, must proceed according to the provisions of the article of the revised statutes relative to proceedings against corporations in equity. And he does not obtain a preference in payment; but the whole property and effects of the corporation must be sequestered for the benefit of all of its creditors ratably, except as to preferences created by the laws of the United States, or where liens upon the real estate of the corporation have been obtained by judgment or decree. *Morgan v. New York & A. R. Co.*, 10 *Paige (N. Y.)* 290.—APPLIED IN *Sherwood v. Buffalo & N. Y. C. R. Co.*, 12 *How. Pr. (N. Y.)* 136. FOLLOWED IN *Hinds v. Canandaigua & N. F. R. Co.*, 10 *How. Pr. (N. Y.)* 487.

3. Unpaid subscriptions.—Where the return of an execution at law unsatisfied is the ground of proceeding against a corporation, according to section 36, N. Y. Rev. St., and the effects of the corporation are not sufficient to pay the debts, the creditor must resort to equity to recover the unpaid subscriptions to the capital stock. *Mann v. Pents*, 3 *N. Y.* 415; *reversing 2 Sandf. Ch.* 257.

But in such a case each shareholder is liable only in due proportion with the others, and the bill should be filed by the creditor in behalf of all the creditors against the corporation, and all the shareholders who have not paid up their subscriptions, so that an account may be taken of the debts and assets of the corporation, of the amount of capital not paid in, and the sum due from each shareholder. *Mann v. Pents*, 3 *N. Y.* 415; *reversing 2 Sandf. Ch.* 257.

Where a railroad company assigns unpaid subscriptions to its stock to its president, in trust for certain definite purposes which have been fulfilled, and, the company being insolvent, one of its judgment creditors brings an action, under Ohio Code, § 458, to subject the amount due on such unpaid subscriptions to the payment of his judgment, as to the amount due on such subscriptions, after the fulfilment of the trust and the payment of all costs and expenses of its administration, the trustee is not entitled to retain from such fund the amount of indebtedness of the company to him for his salary as president thereof, the plaintiff, by his action, having established a specific lien on the fund as against less diligent creditors, and being entitled in equity to a preference over them in its distribution. *Dunbar v. Harrison*, 18 *Ohio St.* 24.

Where a bill is filed by a judgment creditor in a United States circuit court in one state against a corporation created by the laws of another state, asking the appointment of a receiver, and, among other things, that he be empowered to collect unpaid subscriptions to the corporation stock sufficient to pay the judgment, the fact that the company has no property in the district where the suit is brought is no defense, nor objection to the jurisdiction of the court. *Winans v. McKean R. & N. Co.*, 6 *Blatchf. (U. S.)* 215.

4. Jurisdiction.—Where a party has obtained a judgment against a corporation in a state court and is unable to collect it on account of the insolvency of the corporation, he may file a bill in a federal court to compel payment by those who are owing the corporation, if the citizenship of the parties be such as to confer jurisdiction under the judiciary act. *Putnam v. New Albany*, 4 *Biss. (U. S.)* 365.

A United States circuit court cannot entertain jurisdiction of a suit in equity to subject the property of an insolvent railway company to the payment of a simple contract debt, which is not secured by a lien or mortgage, and has not been reduced to a judgment at law; and this is so even where a state statute authorizes any three creditors of an insolvent corporation to bring such suit. *Atlanta & F. R. Co. v. Western R. Co.*, 50 *Fed. Rep.* 790, 2 *U. S. App.* 227, 1 *C. C. A.* 676.—APPLYING *Scott v. Neely*, 140 *U. S.* 106, 11 *Sup. Ct. Rep.* 712. DISTINGUISHING *Graham v. La Crosse &*

M. R. Co., 102 U. S. 148; *Mellen v. Moline M. Iron Works*, 131 U. S. 353, 9 Sup. Ct. Rep. 781. FOLLOWING *Terry v. Anderson*, 95 U. S. 628.

Complainants contracted to build part of a railroad in Kansas, and were to receive in payment certain municipal bonds that had been voted the road. The work was completed, but one county refused to deliver the bonds that it had voted. The railroad company was insolvent. Complainants then filed a bill, in the nature of a creditors' bill, in the United States circuit court, praying that the company be decreed to assign its claim to the bonds to complainants, and that the county be required to issue them. *Held*, that the court had equity jurisdiction of such a proceeding, unaffected by the state law abolishing the distinction between law and equity; but to maintain the bill the amount and validity of the claim must first be fixed by a judgment at law. *Smith v. Ft. Scott, H. & W. R. Co.*, 99 U. S. 398.

5. When bill will not lie—Mandamus proper remedy.—A judgment creditor of a railroad on a petition in the nature of a creditors' bill is not entitled to a decree directing the railroad to assign to him a claim against a county for a subscription to stock, and also directing the county to issue its bonds to the creditor instead of to the railroad. If the county improperly refused to issue the bonds the railroad could only compel it to do so by mandamus, and a creditor could have no better remedy. *Smith v. Com'rs of Bourbon County*, 127 U. S. 105, 8 Sup. Ct. Rep. 1043.

6. How far creditor must exhaust remedy at law.—A creditor at large of a corporation, whose remedy at law has not been exhausted, cannot maintain an action in equity for the appointment of a receiver, etc. *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. Rep. 21.

A party who has not reduced his claim to a judgment is not entitled to be made a party to an equitable proceeding against a corporation, nor entitled to relief; and this is so regardless of the amount of his claim. *People v. Erie R. Co.*, 56 How. Pr. (N. Y.) 122.—DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

A private corporation is a trustee of its property for the payment of its creditors, and afterwards for the benefit of its stockholders. During its existence and operation its general creditors have no liens

which will entitle them to sue it in a court of equity, but its property can be subjected to the payment of its debts by action at law. *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139.

Where a railroad company has a claim against a county for bonds upon a subscription to its capital stock, a creditor of the company, who is a stranger to the county, and has no legal or equitable assignment of the claim of the railroad company, cannot maintain an action against the county to recover the bonds in payment of a claim against the company, prior to judgment, although he joins the company as a defendant. *Smith v. Com'rs of Bourbon County*, 29 Am. & Eng. Corp. Cas. 180, 43 Kan. 619, 23 Pac. Rep. 642.—DISTINGUISHING *Seaton v. Hixon*, 35 Kan. 663.

7. Parties.—It should be within the power of creditors of an insolvent corporation, or their representatives pursuing the trust fund, to bring all parties necessary to a full adjustment of their rights before the same court in one suit. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. Rep. 1015.

In an equitable proceeding by a judgment creditor against a foreign corporation to have debts due the corporation applied to the payment of the judgment, the corporation debtors are necessary parties, and process must be served on them. They cannot be made defendants merely by naming them as such. *Monroe v. Galveston, H. & H. R. Co.*, 19 Abb. Pr. (N. Y.) 90.

The administrator of a deceased stockholder, domiciled and receiving his letters in another county, may properly be made a co-defendant in the bill, when duly served under § 1, Act of April 6, 1859, P. L. 387; and as it is not a question of distribution, but of the fixing of a liability, he may be joined in the final decree entered. *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 23 All. Rep. 53.

Where a mortgaged railroad is sold for more than enough to pay the mortgage debts, and unsecured creditors of the company bring a suit in equity to subject the balance of the fund to payment of their claims, it is not necessary to make the stockholders and bondholders parties. The railroad company and the purchasers are the only necessary defendants. *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

A creditor of a corporation may maintain his bill against any member who is a director of the corporation, who holds funds in his hands belonging to the company (of capital stock), without bringing all the members of the company before the court. *Gratz v. Redd, 4 B. Mon. (Ky.) 178.*

8. Pleading—Amendment.—Where a bill is filed by judgment creditors of a corporation seeking to make its directors account for funds, and charging embezzlement by the directors and appropriation of money by them for the purpose of bribery and corruption, the fact that such charges, if true, involve criminal liability is no ground of demurrer; nor is a failure to make parties all of the directors who were charged with such offenses a ground of demurrer. *Shea v. Knoxville & K. R. Co., 6 Baxt. (Tenn.) 277.*

Where a bill is filed by judgment creditors of a railroad corporation to compel an accounting for funds misappropriated, an allegation that the officers of the company have in divers ways squandered, embezzled, and misappropriated funds of the company is sufficiently specific to require an answer. *Shea v. Knoxville & K. R. Co., 6 Baxt. (Tenn.) 277.*

Where a creditors' bill was filed against a railroad company and a decree had, adjudicating the dignity and priority of the various claims before the court, and directing the sale of the road, a creditor who was a party to such decree cannot subsequently, but before the distribution of the proceeds of such sale, by an amendment to the original bill set up a preferred claim held by him as collateral security for the indebtedness passed upon by such decree. *Clews v. Brunswick & A. R. Co., 50 Ga. 522.*

9. Questions raised.—The corporate existence of a corporation *de facto* cannot be inquired into collaterally. Much less can such a corporation, or a stockholder therein, set up a defect of incorporation against creditors who have contracted with it on the faith of its lawful corporate existence. *Hamilton v. Clarion, M. & P. R. Co., 144 Pa. St. 34, 23 Atl. Rep. 53.*

10. Decree—Priority.—A decree ascertaining the demands of the plaintiffs in the bill, the amounts unpaid upon the subscriptions of the stockholders defendant, and adjudging that the latter paid said demands to the extent of their unpaid subscriptions, with a provision to secure

3 D. R. D.—23.

contribution among themselves in due proportion, is not erroneous. *Hamilton v. Clarion, M. & P. R. Co., 144 Pa. St. 34, 23 Atl. Rep. 53.*

Section 23 of the Railway Companies Act 1867 does not give to creditors of a railway company, in respect to mortgages, bonds, or debenture stock any lien or charge which they did not possess before the act, so as to entitle them to payment in priority out of the proceeds of surplus lands of the company, which have been sold on the application of the judgment creditors of the company. *In re Hull, B. & W. R. J. R. Co., 40 Ch. D. 119.*—REVIEWING Gardner v. London, C. & D. R. Co., L. R. 2 Ch. 201.

11. Cross-bill.—The original bill being filed by a judgment creditor of an insolvent railroad company, which had conveyed all its property to trustees for the benefit of the holders of certain mortgage bonds, the validity of which was assailed and denied by the complainant, a cross-bill between the several bondholders, claiming and asserting antagonistic interests under the deed of trust, is proper and necessary to adjust and settle their conflicting liens and priorities. *Morton v. New Orleans & S. R. Co., 79 Ala. 590.*

12. Proceedings in the nature of a creditors' bill.—Under the Wis. Act of 1860, ch. 303, a judgment creditor, after execution returned unsatisfied, may proceed against the judgment debtor, and any other person or corporation, to compel a discovery of the property of the debtor due to or held in trust for him, and to enjoin the transfer thereof, and to obtain satisfaction of the judgment out of the same; and such proceeding will lie against a domestic corporation, unless enjoined by some other creditor under Rev. St. ch. 148, § 37. *Pierce v. Milwaukee Constr. Co., 38 Wis. 253.*—FOLLOWING *Ballston Spa Bank v. Marine Bank, 18 Wis. 490.*—FOLLOWED IN *Everdell v. Sheboygan & F. du L. R. Co., 41 Wis. 395.*

CRIMINAL ACTS.

Of agents, liability of corporations for, see AGENCY, 90.

CRIMINAL LAW.

Carrying dangerous explosives on trains, see CARRIAGE OF MERCHANDISE, 108.

Criminal liability for killing stock, see ANIMALS, INJURIES TO, 11.

Criminal prosecution for causing death, see
DEATH, ETC., 441-451.

Illegal transportation of liquor by agent of
express company, see INTOXICATING
LIQUORS, 5.

Privilege as to self-crimination, see WIT-
NESSES, 86, 87.

Punishment for failure to pay fare, see TICK-
ETS AND FARES, 143-149.

Sufficiency of indictment under long and
short haul section, see INTERSTATE COM-
MERCE, 128.

Traveling with intent not to pay fare, see
also TICKETS AND FARES, 147.

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I. GENERAL PRINCIPLES.

**1. Criminal responsibility, gen-
erally.***—At common law a corporation
may be indicted for a misfeasance. *Queen*
v. Great N. of E. R. Co., 9 Q. B. 315, 10 Jur.
755, 16 L. J. M. C. 16. *Louisville & N. R.*
Co. v. State, 3 Head (Tenn.) 523. Contra,
see *Commonwealth v. Swift Run Gap Tp.*
Co., 2 Va. Cas. 362.—REVIEWED IN *State v.*
Baltimore & O. R. Co., 15 W. Va. 362.

A corporation may be indicted for a mis-
feasance, or the doing of an act unlawful in
itself and injurious to the rights of others,
as by maintaining a nuisance, as well as for
non-feasance or an omission to perform a
legal duty or obligation. *Commonwealth v.*
Prop'rs of New Bedford Bridge, 2 Gray
(Mass.) 339.—QUOTED IN *Owsley v. Mont-*
gomery & W. P. R. Co., 37 Ala. 560; *State*
v. Baltimore & O. R. Co., 15 W. Va. 362.—
State v. Morris & E. R. Co., 23 N. J. L.
360.—FOLLOWING *Queen v. Great N. of*
E. R. Co., 9 Q. B. 315.—QUOTED IN *State*
v. Baltimore & O. R. Co., 15 W. Va. 362.
—*Texas & St. L. R. Co. v. State*, 20 Am.
& Eng. R. Cas. 626, 41 Ark. 488.

Corporations cannot be indicted for
offenses which derive their criminality from
evil intentions, or which consist in a viola-
tion of the social duties which appertain to
men and subjects. They cannot be guilty
of treason, felony, perjury, or offenses
against persons; but beyond this they are
not exempt from the consequences of their

*Criminal liability of railway servants, see
note, 38 AM. & ENG. R. CAS. 266.

When railway officials not criminally liable for
agreement for payment of rebates, see 45 AM.
& ENG. R. CAS. 245, *abstr.*

unlawful or wrongful acts. *Commonwealth*
v. Prop'rs of New Bedford Bridge, 2 Gray
(Mass.) 339.

A corporation cannot be prosecuted in
Indiana for a misfeasance, the word "per-
son" in § 797, 2 Gav. & H. 335, which ex-
tends such word to bodies corporate, not
applying to the criminal code. *State v.*
Ohio & M. R. Co., 23 Ind. 362.—REVIEWED
IN *Lackland v. North Mo. R. Co.*, 31 Mo.
180.

Where a corporation is in the hands of a
receiver, who has full possession of its
property and entire charge of its affairs,
such corporation cannot be prosecuted for
crimes or misdemeanors committed by the
agents or servants of the receiver. *State v.*
Wabash R. Co., 35 Am. & Eng. R. Cas. 1,
115 Ind. 466, 15 West. Rep. 449, 17 N. E.
Rep. 909, 1 L. R. A. 179.

The failure of a railroad company to give
bond for the faithful application of the
money arising from a county subscription
to aid in building its road does not render
it liable to indictment; and even if it were
liable its lessee could not be made liable for
its wrong. *Commonwealth v. Chesapeake &*
O. R. Co., 91 Ky. 118.

An indictment under the Act 1874-75,
ch. clix. (changing the gauge of railroads),
against the Richmond and Danville railroad
company, cannot be sustained, because that
act impairs the obligation of the contract
between the state and the defendant rail-
road company, as assignee of the North
Carolina railroad company. *State v. Rich-*
mond & D. R. Co., 73 N. Car. 527.

The taking unconditionally and gratui-
tously of a voter to the poll by a railway
company or an individual, whatever his oc-
cupation may be, or giving a voter a free
pass over a railway, or by boat, or other
conveyance, if unaccompanied by any con-
ditions or stipulations that shall affect the
voter's action in reference to the vote to be
given, is not prohibited by 39 Vict. c. 9
(D). *Genereux v. Cuthbert*, 9 Can. Sup. Ct.
102.

**2. Rewards for detection of crimi-
nals.**—(1) *Power to offer rewards.*—An of-
fer of a general standing reward for the de-
tection of persons obstructing the track of
a railroad is not an *ultra vires* act of the
company. *Central R. & B. Co. v. Cheatham*,
37 Am. & Eng. R. Cas. 282, 85 Ala. 292, 7
Am. St. Rep. 48, 4 So. Rep. 828.

A railroad company having an implied

power to offer a general reward for the detection of persons obstructing its road, such authority is incident to the business and duties of the superintendent, and consequently is within the scope of his agency. *Central R. & B. Co. v. Cheatham*, 37 Am. & Eng. R. Cas. 282, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. Rep. 828.

(2) *Construction of offer*.—What covered. —The offer contained in a hand-bill being general, "for the arrest, with proof to convict, of any person or persons for maliciously obstructing the tracks of this company," it applies equally to both past and future offenses. *Central R. & B. Co. v. Cheatham*, 37 Am. & Eng. R. Cas. 282, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. Rep. 828.

A proclamation by one interested, to pay a designated sum for the arrest of two persons who had stolen or embezzled money, constitutes, when acted on by one who makes the arrest of both persons, a contract which may be enforced; but it is single in its nature, and no right of action exists to recover any portion of the reward for the arrest of but one of the parties, when the failure to arrest the other is not caused by the fraud or fault of the person offering the reward. *Blain v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. Rep. 679.

A reward offered by a railroad company for the arrest and conviction "of any person who has injured persons or property by throwing stones or other missiles at the trains," does not cover a case where an employé or passenger becomes involved in a personal difficulty with a stranger, and such missile is thrown at him during, and as a part of, a personal contest. *Chicago & A. R. Co. v. Sebring*, 19 Ill. App. 222.

(3) *Who entitled to claim the reward*.—Where a railway company offers a reward for the arrest and conviction of a person committing certain offenses against the property of the company, without any distinction as to who may participate in its benefits, an employé of the company is included, and may claim the reward. *Chicago & A. R. Co. v. Sebring*, 16 Ill. App. 181.

The mere fact that appellee is an employé of appellant does not conclude him from claiming the offered reward. *Chicago & A. R. Co. v. Sebring*, 19 Ill. App. 222.

Deputy sheriffs detailed to protect railroad property during a railroad strike are not entitled to a reward offered by the company for the arrest and conviction of

persons interfering with the railroad property. *St. Louis, I. M. & S. R. Co. v. Grafton*, 51 Ark. 504, 11 S. W. Rep. 702.—FOLLOWED IN *Sullivan v. Utah & N. R. Co.*, 11 Mont. 236.

A police officer cannot recover a private reward offered by a railroad company for the arrest of an offender when it is his duty as such officer to make such arrest; and this, too, it would seem, whether the law provided any special compensation for such service or not. *Thornton v. Missouri Pac. R. Co.*, 42 Mo. App. 58.

The defendant offered a reward for the apprehension and conviction of a party or parties firing into one of its trains in Kansas. Plaintiff informed the governor of Kansas that one of the parties was in the Missouri penitentiary. The governor turned over the information to defendant's agents, who secured the arrest and conviction of the suspected party, simply using plaintiff as a witness, who took no risk or responsibility for the arrest or conviction. Held, that plaintiff was not entitled to recover the reward. *Lovejoy v. Atchison, T. & S. F. R. Co.*, 53 Mo. App. 386.

(4) *Proof of authority to make the offer*.—When a proclamation offering a reward for the stealing or embezzling of money from an express company was alleged in a suit against it to have been made by the company, acting through designated parties as its officers, the authority cannot be questioned by the defendant, except on a plea of *non est factum*, filed as required by statute. *Blain v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. Rep. 679.

In such a suit the declarations of a third party who assumed to act for the company are not admissible in evidence against it for the purpose of showing that the defendant agreed to pay the reward, in the absence of evidence showing his authority to make them, when there is no proper plea setting up such authority, and this though they were made by the superintendent of the company. *Blain v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. Rep. 679.

A circular was issued offering a reward for the detection of persons obstructing a track of a certain railroad company. The circular was signed "A. B., Supt.," but at the head of it was prefixed the name of the company and not of the superintendent individually. For the purpose of showing that the superintendent in publishing said

hand-bill, his signature being printed, acted in his official capacity, it is permissible for the plaintiff, suing to recover the reward, to prove that, having written and sent a letter by mail to the superintendent, he received by mail a few days afterwards a copy of the printed hand-bill in an envelope which purported to come from the office of the superintendent and to be on official business, the address being in the handwriting of his secretary. *Central R. & B. Co. v. Cheatham*, 37 Am. & Eng. R. Cas. 282, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. Rep. 828.

As tending to show that the officers of the railroad corporation had knowledge of the superintendent's act in offering the reward and ratified it by failing to repudiate it, the plaintiff may prove that the printed hand-bill was posted at various public places along the line of the railroad by an employé who was under the control of the superintendent, and remained posted for several months and until after the performance by plaintiff of the services for which he claimed the reward. *Central R. & B. Co. v. Cheatham*, 37 Am. & Eng. R. Cas. 282, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. Rep. 828.

(5) *Effect of dismissal of prosecution.*—Rewards offered for the apprehension and conviction of criminals are required to be paid, although there was no conviction, the conviction having been prevented by a dismissal of the indictments at the instance and request of attorneys employed to prosecute by the company which offered the rewards. Several criminals for whose arrest and conviction rewards were offered by a railroad company were apprehended and indicted. Two of them confessed their guilt. The indictments against those two were dismissed in order to use them as witnesses against the others, the attorneys employed by the company to assist in the prosecution indorsing and urging the dismissal. *Held*, the counsel employed by the company to aid in the prosecution were for the time being representatives of the commonwealth, and were bound to labor honestly and earnestly for the conviction of the guilty, and also to act in accordance with their convictions as to the propriety and policy of prosecuting or dismissing the indictments. In advising and procuring the dismissal of the indictments the employed attorneys of the company acted within the

scope of their authority and in the discharge of a duty devolved upon them by the very nature of their employment, and they therefore acted for the company, which, through them, prevented the conviction of the two guilty parties, and the company became liable to their captors for the reward offered for their apprehension and conviction. *Louisville & N. R. Co. v. Goodnight*, 10 Bush (Ky.) 552.

3. Employment of convicts.—A court of equity has the power to enjoin a railroad company from receiving and the principal keeper from delivering convicts, and, upon final decree, to require the railroad company to deliver up the convicts in its possession should the railroad company fail to establish its right to receive any more, and should it be determined that the railroad company has had the service of two hundred and fifty for three years. *Georgia Penitentiary Co. v. Nelms*, 71 Ga. 301.

The injunction heretofore granted in this case must be so modified as to enjoin the principal keeper (Nelms) from delivering and the railroad company from receiving any more convicts until its right to receive more shall have been established by law. *Georgia Penitentiary Co. v. Nelms*, 71 Ga. 301.

Complainants must enter into bond, with security, conditioned to pay the railroad company any damages which it may sustain on account of the service of convicts which may hereafter be turned over to complainants, in the event that the railroad company shall establish the fact that it was entitled to the service of such convicts. *Georgia Penitentiary Co. v. Nelms*, 71 Ga. 301.

Under the act of 1876 persons leasing convicts are called corporations, in the manner and for the purpose specified in the statute. The state has the right to create an agency to aid it in enforcement of the criminal law by having the convicts confined, guarded, and worked at hard labor in terms of the sentences of the court; and the state having in this manner, for its own benefit, contracted with such persons, could not take advantage of the fact that they are called corporations, and the railroad company claiming rights subordinate to the rights of the state can take no advantage of the same. *Georgia Penitentiary Co. v. Nelms*, 71 Ga. 301.

II. PROCEDURE.

4. Jurisdiction.—The engineer of a railroad locomotive was criminally prosecuted in New Haven county for so negligently managing his engine as to cause the death of A. The injury was in Litchfield county and the death in New Haven county. *Held*, that the superior court in New Haven county had no jurisdiction of the offense. *State v. Meehan*, 62 Conn. 126.

In order to give jurisdiction under 2 N. Y. Rev. St. 727, § 44, as amended in 1860, ch. 431, of an offense committed on a canal boat, it is necessary to allege in the indictment that the boat passed through some part of the county in which the indictment is found, on that trip or voyage, and that the offense was committed on board the boat; and both of these facts must be supported by the proof. So an indictment alleging both facts is not supported by evidence showing that the boat on that trip passed through the county where the indictment was found, but where there is no evidence that the offense was committed on the boat. *Larkin v. People*, 61 Barb. (N. Y.) 226.

5. Process—Summons.—A summons is the only process to be issued to a corporation to appear and answer an indictment. *Boston, C. & M. R. Co. v. State*, 32 N. H. 215.

The proper mode of bringing into court a railroad corporation charged with a criminal offense is by service of a copy of the summons upon one of its officers or agents. *State v. Western N. C. R. Co.*, 22 Am. & Eng. R. Cas. 58, 89 N. Car. 584.

6. Indictment.*—In an indictment for offenses charged against the property of a corporation ownership is not to be laid or proved in the stockholders, but in the corporation itself; and it matters not whether the shares of stock are held by individuals or another corporation. *Johnson v. State*, 98 Ala. 57, 14 So. Rep. 627.

When an indictment under Ala. Code of 1876, § 4239, does not aver the ownership of the road, but designates it as a railroad in use for the transportation of passengers or merchandise, known as the "Alabama Great Southern Railroad," proof of ownership is not necessary; but the averments of the in-

dictment are satisfied by evidence that it was known as the "Alabama Great Southern Railroad," and was in use for the transportation of passengers or merchandise. *Clifton v. State*, 73 Ala. 473.

An indictment to recover a penalty imposed by statute need not negative the existence of circumstances which, under a proviso contained in the statute, would exonerate the defendant from liability. *Commonwealth v. Fitchburg R. Co.*, 10 Allen (Mass.) 189.—DISTINGUISHED IN *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354.

Judgment may be rendered against a corporation upon an indictment, upon default of appearance after due notice to appear. *Boston, C. & M. R. Co. v. State*, 32 N. H. 215.

An indictment of a railroad corporation under N. H. Gen. Laws, ch. 163, § 2, for not affording reasonable transportation facilities need not allege that the acts were unlawful, nor that the merchandise was the property of the person trying to transport it. *State v. Concord R. Co.*, 59 N. H. 85.

An indictment against a railroad company for not keeping up a ferry must set forth how the company became subjected to the duty of keeping up the ferry. *State v. Wilmington & M. R. Co.*, *Bush*, (N. Car.) 234.

Where an indictment framed under chapter 38, Acts of 1869-70, failed to aver that the accused was the president of a railroad company in which the state had an interest, and also failed to aver that he had received the state bonds under some act of the legislature or ordinance of the convention, passed since May, A. D. 1865—*held*, that such an indictment was fatally defective and should be quashed. *State v. Sloan*, 67 N. Car. 357, 2 Am. Ry. Rep. 236.

A plea of not guilty to an indictment against a corporation is an admission of its corporate existence. *State v. Western N. C. R. Co.*, 95 N. Car. 602.

When the charge in an indictment, stripped of technical language, is that the defendants used steam-engines and caused them to pass over their road, which engines emitted sparks and thereby set fire to the adjoining houses and herbage, and there is no allegation of any negligence or want of care or skill on the part of defendants—*held*,

* Indictments against railroad companies, see note, 8 AM. & ENG. R. CAS. 304.

that the language of the indictment cannot be extended by inference or implication, and it cannot be intended that due skill, care, and diligence were not exercised by the defendants in the selection and construction of their engines, or that there was any negligence or want of care in their use. *Morris & E. R. Co. v. State*, 36 N. J. L. 553, 12 Am. Ry. Rep. 470.

7. Evidence.—On a trial in a criminal case the existence of a railway corporation may be proved by general reputation. A *de facto* existence of a corporation is all that is necessary to be shown. *State v. Thompson*, 23 Kan. 338.—QUOTING *People v. Frank*, 28 Cal. 507.

An allegation in an indictment, on Mass. St. 1874, ch. 372, § 115, that a drawbridge over a navigable stream was duly erected and legally maintained by a certain railroad corporation is sustained by evidence that the corporation was authorized by its charter to build a bridge across the stream, and had built and maintained it for fifteen or twenty years. *Commonwealth v. Chase*, 127 Mass. 7.

Where there are two counts in an indictment and the evidence does not fully sustain one of them, and yet the case is submitted to the jury and a general verdict rendered, this constitutes ground for reversal for *non constat*, but that the jury convicted partly or wholly on the count not sustained by the evidence. *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. Cas. 297, 133 Mass. 383.—EXPLAINING *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372.

8. View of locus in quo.—The prisoner was tried without a jury by a county court, exercising jurisdiction under the "Speedy Trials Act," upon an indictment for feloniously displacing a railway switch. After hearing the evidence and the addresses of counsel, the judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present. The prisoner was found guilty. *Held*, that there was no authority for the judge taking a "view" of the place, and his so doing was unwarranted; and even if he had been warranted in taking the view, the manner of his taking it, without the presence of the prisoner or of any one on his behalf, was unwarranted. *Reg. v. Petrie*, 20 Ont. 317.

III. PARTICULAR OFFENSES.

9. Assaults.*—A trespasser on a train is not justified in shooting a servant of the railroad company who attempts to put him off, when he can with safety get off and avoid the shooting. *People v. Douglass*, 87 Cal. 281, 25 Pac. Rep. 417.

Where the assault was committed upon the brakeman of a railroad company in his efforts to get defendant off the train, and there is evidence tending to show that the defendant was not a passenger on the train, but a trespasser thereon, it is a question of fact for the jury whether the defendant was a trespasser or a passenger. *People v. Douglass*, 87 Cal. 281, 25 Pac. Rep. 417.

Shooting at a brakeman is cognizable by the general criminal law, and is not within the provision of the Mich. General Railway Law, Acts 1873, art. 4, § 12, which punishes acts wilfully endangering the lives of railway employes or travelers. *People v. Dunkel*, 39 Mich. 255.

If an innkeeper who has frequently entered a railroad depot and annoyed passengers by soliciting them to go to his inn receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with the *bona-fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery. *Commonwealth v. Power*, 7 Metc. (Mass.) 596.

A street-car conductor who forcibly ejects a passenger from a car under the honest belief that he has not paid his fare is not liable in a criminal prosecution for assault and battery. *State v. McDonald*, 7 Mo. App. 510.

On the indictment of a conductor for assault and battery in expelling a passenger from a car, if the evidence shows that a battery was committed, and the jury render a

* Civil remedy for assaults, see ASSAULT.

verdict of guilty of an assault only, the court will be justified in the exercise of a sound discretion in setting the verdict aside. *State v. Ross*, 26 N. J. L. 224.

Where several confederates act in pursuance of a common plan in the commission of an offense, all are held to be present where the offense is committed, and all are principals. So where three persons conspire together to assault and rob the driver of an express wagon, one who builds a signal fire on a mountain at a considerable distance away from the other two, and in another county, to give the two warning that the wagon is coming, is equally guilty with them. *State v. Hamilton*, 13 Nev. 386.

10. Burglary.—(1) *What constitutes the offense.*—In order to constitute burglary in breaking into a car with intent to steal, it is not necessary that the doors of the car should be locked or fastened in some secure way. The carelessness of the owner in securing and guarding his property affords no excuse to the commission of a burglary or larceny. *Lyons v. People*, 68 Ill. 271.

Defendant secreted himself in a box which he procured to be placed by the agents of an express company in an express car. His intention was to rob the car. Held, that this was a constructive breaking. *Nicholls v. State*, 68 Wis. 416, 32 N. W. Rep. 543.

(2) *What premises are subject to.*—A railroad depot is a building, within the meaning of Rev. St. 1889, § 3256, cl. 2, defining burglary in the second degree. *State v. Edwards*, 109 Mo. 315, 19 S. W. Rep. 91.

A railroad depot is a warehouse, within the meaning of Vt. Gen. St. ch. 113, § 7, so that the breaking and entering of the same in the night-time, with intent to steal, is burglary. *State v. Bishop*, 51 Vt. 287.

A railway station platform is a place of public resort so as to authorize the conviction of a person frequenting it with intent to commit a felony. *Ex parte Davis*, 2 H. & N. 149, 26 L. J. M. C. 178.

The passenger room of a railroad station, having within it a separate inclosed room where the books are kept and tickets sold, is not an office, within Rev. St. ch. 126, relating to burglary. *Commonwealth v. White*, 6 Cush. (Mass.) 181.

(3) *Indictment, generality*—Time of offense.—In an indictment for burglary in breaking and entering a railroad car (Code, 4344), it is not sufficient to aver that the

goods in the car were therein kept "for transportation;" the averment should be that they were kept for transportation as freight. *Graves v. State*, 63 Ala. 134.

Under a statute which made it a criminal offense to break into any car in the night-time with intent to commit the crime of larceny, the indictment charged the defendant in the words of the statute, and then added that defendant stole bacon out of this car, the property of F. Held, that the indictment charged only the offense of car-breaking, and the added words did not charge the separate crime of larceny, and might be treated as surplusage; there was no error, therefore, in refusing to require these added words to be stricken from the indictment. *State v. Crawford*, 38 So. Car. 330, 17 S. E. Rep. 36.

Under the Ill. act of Feb. 19, 1859, an indictment for breaking and entering a freight car in the night-time with intent to commit larceny therefrom is sufficient when the offense is charged in the language of the statute, without using the word "burglariously." *Lyons v. People*, 68 Ill. 271.

An information charging the breaking and entering of a freight car, but not stating whether it was in the daytime or night-time, is held sufficient, under Rev. St. § 4410, as charging a breaking and entering in the daytime. *Nicholls v. State*, 68 Wis. 416, 32 N. W. Rep. 543.

(4) *Describing the locus in quo.*—On trial upon an indictment found under Ala. Code, § 3787, which charged that the car was "upon or connected with a railroad in this state," it is not necessary to prove that the car was actually standing on the track. *Johnson v. State*, 98 Ala. 57, 13 So. Rep. 503.

One who enters a room of a house with burglarious intent, enters the house with such intent; and where the room was known as a ticket-office, it is properly described as "a building, to wit, the ticket-office." *People v. Young*, 65 Cal. 225, 3 Pac. Rep. 813.

An information charging the breaking and entering of a "freight and express car of the American express company," sufficiently charges the offense to have been committed in a "railroad freight car," within the meaning of Rev. St. § 4410. *Nicholls v. State*, 68 Wis. 416, 32 N. W. Rep. 543.

(5) *Averment of ownership.*—Under section 4344 of the Code of 1876, declaring that the breaking and entry into a railroad

car, in which goods, merchandise, or other valuable things are kept for use, deposit, or transportation as freight, with the intent to steal, or to commit a felony, is burglary, it is essential that the indictment should allege the ownership of the car. *Johnson v. State*, 73 Ala. 483.

Where at the time of the breaking and entry the car was the property of one railroad company, the ownership is properly laid in that company, although another railroad company may have had the possession and use of it. *Johnson v. State*, 73 Ala. 483.

Under such an information, proof of the exclusive possession, occupancy, and control of the car by the company is sufficient proof of ownership. *Nicholls v. State*, 68 Wis. 416, 32 N. W. Rep. 543.

Testimony was given that a car, which defendant was charged with burglariously entering, was upon the track of the C. P. R. Co., attached to its train and in its possession, occupancy, and control. Held, that its ownership was properly laid in that company, although the legal title was in another. *State v. Parker*, 16 Nev. 79.

(6) *Averment and proof of incorporation.*—Where an indictment for burglary charges that the offense was committed by a burglarious entrance into the office of a railroad company, therein designated, it is not necessary to also aver that such company was a corporation, partnership or stock company. In such case corporate existence will be implied. *Norton v. State*, 74 Ind. 337. *State v. Shields*, 89 Mo. 259, 1 S. W. Rep. 336.

It is not error in such case to permit a witness to state that such railroad company was a corporation; it is sufficient to prove that such company was known and acting as a corporation. *Norton v. State*, 74 Ind. 337.

If it be alleged that a burglary was committed in the car of a railroad company, the corporate character of the company is sufficiently shown by proof that it was, at the time of the burglary, a corporation *de facto*. *Burke v. State*, 34 Ohio St. 79, 21 Am. Ky. Rep. 77.

Where the ownership of goods stolen from a railroad car is laid in a railroad company averred to be a corporation, the fact of incorporation must be shown; and when that is derived from a statute of which the court does not take judicial knowledge, the

statute must be produced. *Johnson v. State*, 73 Ala. 483.

Where the charge is burglary by breaking into the car of a railroad company, designated by its corporate name, but the indictment contains no averment that the company was incorporated, the accused cannot avail himself of the defect, if defect it be, in view of the code of criminal procedure. (66 Ohio L. 301, § 90; 74 Ohio L. 334.) *Burke v. State*, 34 Ohio St. 79, 21 Am. Ky. Rep. 77.—FOLLOWED IN *Hamilton v. State*, 34 Ohio St. 82.

(7) *Conviction and punishment.*—Where an indictment in one count charges a burglary and in another a larceny, at the same time, in a car which was broken and entered, and defendant is found guilty generally, and a punishment imposed which is by law authorized to be inflicted for the offense charged in either count, the verdict must be sustained. *Lyons v. People*, 68 Ill. 271.

11. Burning or destroying bridges.—An indictment charging the wilful and malicious burning of a bridge owned by a corporation is sufficient in its description of the owner when it gives the corporate name of the owner and states in substance that the company named is a corporation doing business in the state. In such cases it is not necessary to allege in the indictment that such corporation was "duly organized or incorporated under the laws of any state or territory." *Duncan v. State*, 52 Am. & Eng. R. Cas. 646, 29 Fla. 439, 10 So. Rep. 815.

In the trial under such an indictment the corporate existence of such alleged owner is sufficiently proven if it be shown that it was a corporation in existence *de facto* and *de facto* in the exercise of corporate functions and franchises, whether it was a corporation *de jure* or not. *Duncan v. State*, 52 Am. & Eng. R. Cas. 646, 29 Fla. 439, 10 So. Rep. 815.

The proof of the ownership by such corporation is sufficient if it shows that such bridge forms part of the roadbed of the corporation named, and is in the actual use of such corporation in the passage of its trains. *Duncan v. State*, 52 Am. & Eng. R. Cas. 646, 29 Fla. 439, 10 So. Rep. 815.

Those structures forming part of railway beds by which they span streams, chasms, ditches, etc.—held, to be "bridges," the wilful and malicious burning of which is prohibited by section 4, page 358, McClellan's

Digest. *Duncan v. State*, 52 Am. & Eng. R. Cas. 646, 29 Fla. 439, 10 So. Rep. 815.

The defendants were guilty of no offense in tearing down a portion of the railroad bridge over Neuse river below Kingston, when by so doing they were removing obstructions to the free navigation of that river. *State v. Parrott*, 71 N. Car. 311.—FOLLOWED IN *State v. Harper*, 71 N. Car. 314.

12. Conspiracy.*—(1) *Jurisdiction*.—In cases of combinations and conspiracies the fields of operations may embrace several states, as the necessities of the conspirators require. Yet the state in which all or any of them reside, and in which the conspiracy originated or was conducted, has ample jurisdiction. *Bloomer v. State*, 48 Md. 521.

(2) *Liability for act of co-conspirator*.—Where a party of men combine with intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the rest of the party, and does acts which the others do not themselves perform, all are responsible for what the one does. But to make the law applicable there should be a concert of action—an agreement to do some unlawful thing. *United States v. Kane*, 25 Am. & Eng. R. Cas. 608, 23 Fed. Rep. 748.

(3) *Conspiracy to steal and fill up blank passes*.—Where parties are indicted for a conspiracy to steal blank passes and to fill them up and use them on a certain railroad, it is competent to establish a fraudulent intent by proving possession of passes of the same kind and description over another road, which were stolen at the same time and from the same person. *Bloomer v. State*, 48 Md. 521.

Where the alteration of the passes is one of the fraudulent acts charged in the indictment, it is competent for the state to prove the facts charged in any order it may choose; but before the defendants can be held responsible it is necessary for the state to show that they conspired and agreed together to make the improper use of the passes, and that it was done by conspiracy. *Bloomer v. State*, 48 Md. 521.

The fact that one conspirator has been indicted, tried, and acquitted in another

state for stealing and using railroad passes does not deprive an adjoining state of jurisdiction over the same offense committed within its borders as to another conspirator. *Bloomer v. State*, 48 Md. 521.

The evidence showed that the pass in blank had been sold by B., one of the defendants, to W., in Philadelphia. Subsequently another person, G., at the request of W., in Camden, N. J., filled in the pass with the name "H. M. B. and one." In a short time G. visited Baltimore, where defendant inquired about the pass he had sold W., and expressed a wish to buy it back again. *Held*, that the fact that the sale and filling in of the pass occurred out of the state could not affect their admissibility as evidence of a conspiracy in Maryland, the operations in Philadelphia not being offered to prove an offense *per se*, but as circumstances tending to show a privity between the defendants and W. in the business of buying and selling and filling in blank passes. *Bloomer v. State*, 48 Md. 521.

(4) — *to prevent conductor from operating train*.—Under Tex. Pen. Code, art. 279, making the meeting of three or more persons with intent to aid each other by violence, or in any other manner, either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof, an unlawful assembly, it is an offense for two or more persons to meet and co-operate in preventing a conductor of a railway train from operating the same. *McGehee v. State*, (Tex. App.) 5 S. W. Rep. 222.

(5) — *to violate provisions of Interstate Commerce Act*.—Where it is alleged, in an indictment under U. S. Rev. St. § 5440, for a conspiracy to violate the Interstate Commerce Law, that certain lumber merchants and their agents and an agent of a railroad company conspired to falsely and fraudulently ship a quantity of lumber at less than the actual weight, the jury, in order to convict, must find that all the parties conspired together to commit the offense against the United States, and also that the one charged with committing the overt act—namely, the agent of the railroad company—by false billing and weighing, did knowingly and wilfully commit such overt acts, in furtherance of the common design of which his act was a part. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

Where several shipments were all made

* Criminal and civil liability for conspiracies known as "boycotts," see note, 59 AM. REP. 720. See also *BOYCOTTING; STRIKES*.

in pursuance of the common agreement, and the acts were continuous, although charges were made in four counts of the indictment, there was but one offense of conspiracy; and although there may have been many different sets of overt acts done in furtherance of this conspiracy, the proof of at least one overt act by at least one of the conspirators is sufficient to make out a conspiracy. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

Although the parties charged with conspiracy were acting as *de facto* corporations engaged in interstate commerce, they were indictable under the statute; and the fact that the lumber was delivered to the carriers in Kansas, for shipment in Kansas, was immaterial as fixing the jurisdiction of the court, the material inquiry being as to whether the overt act was done, and the conspiracy entered into, in the jurisdiction of this court, and whether or not, as a matter of fact, the lumber was shipped through this jurisdiction, or from the state of Kansas to some other state, and that it passed into this jurisdiction and was weighed there, because the court within whose jurisdiction the overt act was committed has jurisdiction over all the conspirators, wherever they may reside. *United States v. Howell*, (Mo.) 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

If a freight rate had been established, and was known to the persons in charge of the railroad as a fixed rate of a uniform character, undertaking to treat all shippers alike, it was not necessary that it should be published by posting the schedules, as required by the Interstate Commerce Act; and parties as shippers, or as agents of common carriers, who combined to evade that rate, or secure a discrimination against people generally, should be held liable for conspiracy under the statute. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

Where it was alleged in the indictment that a certain person, acting for the railroad companies, in weighing and reporting weights of freight, was the agent of the companies so as to make them guilty of the act, it was immaterial for the purposes of the indictment whether he was generally employed for that purpose or not. If he was employed for the purpose of making these particular weights, where there was an under-billing and underweighing and an attempt to secure a discrimination, the

fact of such employment would be sufficient under the allegation. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

Where the indictment charged that certain persons were acting as agents of the shippers in conspiring to evade the Interstate Commerce Act, it was only necessary, in order to meet the allegations of the indictment, to prove that either the shipper or the consignee of the lumber knew about the acts of such persons, permitted them to go on, and either directly or indirectly received benefits from the transaction. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

The formation of a conspiracy is a case, above all others, in which circumstantial evidence may be received in proving the crime. The jury may take into consideration any overt act, if apparently done in pursuance of the design, to show who was connected with the combination. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

While the testimony of conspirators is to be received with caution and weighed with care, it is not necessary to corroborate such testimony in every detail, but corroboration in some material fact is sufficient. *United States v. Howell*, 55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21.

13. Criminal negligence.—An officer having control of a train of cars, who fails to perform a duty enjoined by statute, may be indicted; and any person who suffers any injury which would not have resulted had the statutory duty been performed, has a right of action. *Mobile & M. R. Co. v. Blakey*, 59 Ala. 471.

An indictment under the Maine statute against a railroad to recover damages for negligently killing a person, is so far of the nature of a civil proceeding that it may be discontinued, by leave of court, by a *nolle prosequi* entered at the trial on motion of the prosecutor, though the company oppose it and insist upon a verdict. *State v. Maine C. R. Co.*, 21 Am. & Eng. R. Cas. 216, 77 Me. 244.

Where a railroad is indicted under the Maine statute to recover damages for negligently killing a person at a crossing, the burden of proof is on the state to affirmatively show that the defendant was guilty of negligence causing the accident, and that the deceased was in the exercise of due

care. *State v. Maine C. R. Co.*, 77 Me. 538, 1 Atl. Rep. 673.

At the trial of an indictment against a railroad company, under a statute imposing a penalty for negligence in certain cases, the court should not take the case from the jury, on the defendant's motion, where there is more than a mere scintilla of evidence of negligence. *Commonwealth v. Fitchburg R. Co.*, 10 Allen (Mass.) 189.—QUOTING *Toomey v. London, B. & S. C. R. Co.*, 3 C. B. N. S. 146.

A printed indorsement on a season ticket, disclaiming liability for any personal injury to the holder, is no defense to an indictment of the corporation under a penal statute for gross negligence. *Commonwealth v. Vermont & M. R. Co.*, 108 Mass. 7, 7 Am. Rep. 394.

The term "criminal negligence," as used in Comp. St. § 3, art. 1, ch. 72, means gross negligence, such as amounts to reckless disregard of one's own safety and a wilful indifference to the consequences liable to follow. *Chicago, B. & Q. R. Co. v. Landauer*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.

The distinction between negligence and gross negligence, carelessness and gross carelessness, is to a great extent merely verbal. But indictments and declarations founded on special statutes should follow the form of such statutes, and should use the same words, and in the same sense that the statute uses them. *State v. Manchester & L. R. Co.*, 52 N. H. 528.

In an indictment against a railroad it is not necessary to state by what particular acts of negligence or carelessness, or by what special unfitness of servants, the accident occurred. *State v. Manchester & L. R. Co.*, 52 N. H. 528.

14. Cruelty to animals.—Where a street-car conductor and driver are indicted for cruelly overloading horses, under N. Y. Act of 1867, ch. 375, entitled "An act for the more effectual prevention of cruelty to animals," they cannot defend on the ground that they were in the employ of the company at the time and acting under its orders. *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y.) 374.

Nor is it any defense to say that they did not intend to violate the law. The offense is committed by overloading a car beyond the ability of the horses attached to it to draw, and the intention is assumed directly

from the act itself. *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y.) 374.

The conductor is equally guilty with the driver, and perhaps more so, from the fact that the driver is usually under the orders of the conductor. *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y.) 374.

In the absence of a statute limiting the number of passengers that may be carried, the question whether the car was overloaded is for the jury. *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y.) 374.

The summary jurisdiction of the justices to convict a person under 32 & 33 Vict. c. 70, § 64, for failure to make any request that cattle consigned by him for carriage should be supplied with water, sustained. *Johnson v. Colam, L. R.* 10 Q. B. 544, 44 L. J. M. C. 185, 23 W. R. 697, 32 L. T. 725.

15. Destruction of fence.—A statute making it criminal to displace, remove, or destroy "a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure appertaining to or connected with a railway"—held, not applicable to structures not constituting any part of the railroad proper, such as a fence. *State v. Walsh*, 42 Am. & Eng. R. Cas. 623, 43 Minn. 444, 45 N. W. Rep. 721.

16. Disobedience of rules.—Under Pa. act of March 22, 1869, any refusal or neglect on the part of a person in the employ of a railroad company to obey the rules and regulations of such company is punishable. *Commonwealth v. Griffin*, 7 Phila. (Pa.) 679.

17. Embezzlement.—(1) *What constitutes the offense.*—The treasurer of a railroad corporation is an "officer, agent, clerk, or servant of an incorporated company," within Mass. Rev. St. ch. 126, § 29, relating to embezzlements by such persons. *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173.

Where the property alleged to have been embezzled by a clerk of a railroad is grain stored in bulk, for various consignees, in a warehouse of the railroad company, and the defendant, by virtue of his said employment, has it within his power and authority, through the medium of grain orders issued by him to the order of consignees of grain, which orders are bought and sold, and pass from hand to hand in market, to transfer title to such grain, and then clandestinely issue grain orders upon the company, causes them to be sold for his own benefit in the

market and appropriates the proceeds of the sale to his own use, he has such care of the grain as is contemplated by the Ohio act of 1864; and the act of embezzling the grain named in such orders is complete. *Calkins v. State*, 18 Ohio St. 366.

An assistant of a railroad agent had been held out to the public by the agent as authorized to collect bills, and by reason of the trust imposed in him by the company was enabled to collect money belonging to the company. It appeared that he did not have authority to collect all bills due the company. *Held*, that he was intrusted with money which he collected, within the meaning of Nev. Comp. Laws, § 2380, providing that if any clerk, apprentice, or servant, or other person, whether bound or hired, to whom any money or goods or chattels or other property shall be intrusted shall withdraw himself from his master or employer and go away with intent to steal the same, he shall be deemed guilty of embezzlement. *Ex parte Ricord*, 11 Nev. 287.

(2) *What does not amount to embezzlement.*—Where a railroad employé contracts to lease certain property belonging to the company at the regular price charged for such property, the fact that he sells the lease to a third party at a premium does not make him guilty of embezzlement in retaining the premium. He is entitled to such premium as his own. *Panama R. Co. v. Johnson*, 44 N. Y. S. R. 382, 63 Hun 629, 17 N. Y. Supp. 777.

A shipper gave a carrier a check on account of the freight, payable to a third person, it being so made out at the request of the carrier to enable him to pay some contract obligation between him and such third person. The freights were never carried through, but the check was delivered to such third person. *Held*, that the shipper must have intended that the check was to be delivered to such third person and that the carrier was not indictable for embezzlement under 2 N. Y. Rev. St. 679, § 62, as amended by Laws of 1862, ch. 729. *Larkin v. People*, 61 Barb. (N. Y.) 226.

(3) *Indictment.*—That the company from which the alleged embezzlement was made was called "railroad company" in the indictment and instructions, while its corporate name was "railway company," is immaterial. *State v. Goode*, 68 Iowa 593, 27 N. W. Rep. 772.

To sustain an indictment under Minn.

Gen. St. ch. 95, § 24, it must appear that the goods intrusted to the defendant for delivery were so intrusted to be carried for hire. An allegation simply that they were intrusted with him by the owner for the purpose of sending and delivering the same to another is insufficient. *State v. Mims*, 26 Minn. 191, 2 N. W. Rep. 492.

To maintain an indictment under the provisions of Minn. Gen. St. ch. 95, § 23, as amended by Laws 1876, ch. 55 (Gen. St. 1878 ch. 95, § 33), for an embezzlement of money, received by defendant from the owner, for the purpose of being sent and delivered to another, when the wrongful act complained of consists in "the use and disposal of such money by defendant to his own use and benefit," it must be alleged that such use and disposition were without the consent of such owner. *State v. Mims*, 26 Minn. 191, 2 N. W. Rep. 492.

In an indictment founded on section 37 of the Mo. "act to authorize the formation of railroad associations and to regulate the same" (R. C. 1855, p. 430), it is not necessary to allege a neglect or refusal on the part of defendant to pay over on demand the moneys, etc., alleged to have been converted. *State v. Porter*, 26 Mo. 201.

To constitute embezzlement under Tex. Penal Code, art. 771, as amended in 1876, it is necessary (1) that the defendant occupied a fiduciary relation as specified; (2) that the money or property belonged to his principal; (3) that it came to the possession of the defendant by virtue of such fiduciary relation. So an indictment against an express agent, charging him with embezzling a certain amount of money belonging to a bank, is fatally defective if it fails to allege any fiduciary relation between the bank and the defendant, or that the express company has any property therein. *Griffin v. State*, 4 Tex. App. 390.

(4) *Evidence.*—The suppression of way-bills is competent evidence, in a trial for embezzlement, from which the jury may infer an attempt to defraud; but where the accused is a person of high character and it appears that other persons had access to the money embezzled, and he alleges that the way-bills were held back for the purpose of discovering the thief, his statement should be accepted as true. *State v. Baldwin*, 70 Iowa 180, 30 N. W. Rep. 476.

In the case of an indictment against a ticket agent for embezzling funds belonging

to a railroad company it is competent for the prosecution to show the course of business pursued by the defendant and required by the rules of the company, by introducing in evidence duplicate blank returns used by the ticket agents of the company. The prosecution is not bound in such case to resort to the blank returns actually filled up and transmitted by the defendant as ticket agent to the treasurer of the company. *State v. Porter*, 26 Mo. 201.

Where a party is indicted for embezzlement, and the indictment charges him with having been a clerk of an incorporated railroad company therein named, and with having fraudulently embezzled and converted to his own use the property of such corporation, then under his care by virtue of his employment as such clerk, the corporate existence of the company is sufficiently established by proving that it assumed to be, and notoriously exercised the franchises of, a railroad corporation. *Calkins v. State*, 18 Ohio St. 366.

An indictment for embezzlement laid the ownership of the money in an express company. The proof showed that the money was not the property of the express company, but belonged to bankers who had bailed it to the express company for transportation to a distant point. *Held*, that the express company had a qualified property as bailees, on which this kind of felony might be committed, and that the proof sustained the allegation of ownership in the company. *Riley v. State*, 32 Tex. 763.

Evidence that the agent of an express company was in charge of money to be carried, and reports it stolen, but gives no reasonable account of the theft, is sufficient to raise a presumption that he has appropriated the money, and if not sufficiently rebutted will justify the jury in finding him guilty of embezzlement. If in attempting to rebut the presumption he gives an incredible account of the matter, it only strengthens the presumption. *Riley v. State*, 32 Tex. 763.

(5) *Good character as a defense*.—Where an employé accused of embezzlement of funds which came into his hands as station master is a man of high character, and the evidence shows that other persons had access to the money-drawer by permission of the company, a judgment of conviction will be reversed. *State v. Baldwin*, 70 Iowa 180, 30 N. W. Rep. 476.

18. Failure to erect fences, signposts, etc..—Where a railroad corporation wilfully omitted to obey an order of a county judge directing it to operate gates at a certain street crossing, as provided by N. Y. Laws 1884, ch. 439, § 3, an indictment for a misdemeanor under § 154 of the penal code is properly sustainable. *People v. Long Island R. Co.*, 134 N. Y. 506, 31 N. E. Rep. 873, 47 N. Y. S. R. 648; *affirming* 58 Hun 412, 34 N. Y. S. R. 715, 12 N. Y. Supp. 41.

In an indictment against a railroad company for an unlawful and wilful neglect to erect and maintain fences on the sides of the road, it is necessary to aver that it was the duty of the corporation to erect and maintain such fences. *People v. New York C. R. Co.*, 5 Park Cr. (N. Y.) 195.—FOLLOWING *Kane v. People*, 3 Wend. (N. Y.) 363.

To prevent railroad accidents, among other things it is required by § 1166 of the Tenn. Code that the overseers of every public road crossed by a railroad shall place at each crossing a sign marked, "Look out for the cars when you hear a whistle or bell," and the county court shall appropriate money to defray the expenses of said signs. And when a public county road passes through a town, and is used in common by the public and the inhabitants of the town both as a public road and a street of the town, the corporation is regarded as the "overseer" of such road within the limits of the town, and, as such, must perform the duties enjoined by law upon the overseers of public roads. The corporation is subject to a criminal prosecution on failure to do so. *State v. London*, 3 Head (Tenn.) 263.—DOUBTED IN *Louisville & N. Turnpike Co. v. State*, 3 Heisk. (Tenn.) 129.

19. Failure to give statutory signals.—The provisions of Mass. St. 1874, ch. 272, § 164, rendering a railroad company liable to indictment where any person is injured in consequence of the failure of the company to ring a bell or sound a whistle on approaching a crossing, applies equally where the injury results in death and where it does not. *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. Cas. 297, 133 Mass. 383.

An action against a railroad corporation for a violation of the statute in failing to ring the bell or sound the whistle of its locomotive when crossing a public road is

of a criminal nature, and an appeal from a justice, in such a case, lies, in St. Louis, to the court of criminal correction. *State ex rel. v. Missouri Pac. R. Co.*, 10 Mo. App. 588.

An indictment is defective which alleges neglect on the part of a railway company "to ring the bell and sound the whistle" at the crossing of a public road, as required by section 5478 of Mansfield's Digest; the indictment should have alleged a neglect to perform either act, and not a neglect to perform both acts. *State v. Kansas City, S. & M. R. Co.*, 54 Ark. 546, 16 S. W. Rep. 567. *St. Louis, I. M. & S. R. Co. v. State*, (Ark.) 22 S. W. Rep. 918.

Where a statute makes it the duty of a railroad company to ring a bell or blow a whistle when a train is approaching a crossing, an indictment for a failure to do so is not bad by charging a failure to blow a whistle and ring a bell, but makes it necessary, in order to convict, to prove that both signals were omitted. *State v. Vermont C. R. Co.*, 28 Vt. 583.

An information against a railroad company for neglecting to ring a bell or to blow a whistle at a public crossing is sufficient, as to the existence of the corporation, which describes it by name and "existing under and by virtue of the laws of this state, duly organized and doing business." *State v. Vermont C. R. Co.*, 28 Vt. 583.

20. Failure to keep ticket office open.—It is a good defense to an indictment of a ticket agent at a railroad station, under the new Tennessee Code, § 2359, for failing to keep open his office for one hour before the departure of a particular passenger train, that the railroad company, with notice to the public, had by its rules dispensed with the sale and purchase of tickets for that train, and required the passengers to pay the regular ticket fare on the train. *Brady v. State*, 15 Lea (Tenn.) 628.

21. Failure to repair bridge or highway.—For the want of proper repair of its bridges and their abutments, so constructed by a railroad company as to be a part of the highway which the town is bound to maintain, it is liable to an indictment. *State v. Gorham*, 37 Me. 451.

A railroad company is not indictable for a failure to repair a bridge across its track, under Miss. Code of 1880, § 2871, which provides that if a person shall obstruct a

highway in any manner whatever and shall not remove the obstruction immediately, he should be liable to indictment and fine. The indictment for failure to repair a bridge should be under § 1053. *Vicksburg & M. R. Co. v. State*, 64 Miss. 5, 8 So. Rep. 128.

Neglect to keep a bridge in repair across a cut made by a railroad company, where its road crosses a public highway, so that travel is obstructed upon the highway, is a breach of duty to the public for which the owners or operators of the railroad are indictable. *New York & G. L. R. Co. v. State*, 32 Am. & Eng. R. Cas. 186, 50 N. J. L. 303, 11 Cent. Rep. 555, 13 All. Rep. 1.

Under the New York Act of 1850, ch. 140, § 24, a railroad company may be indicted for failing to properly keep its bridges and approaches thereto in repair. *People v. New York C. & H. R. R. Co.*, 74 N. Y. 302; modifying 12 Hun 195.

If a corporation fails to repair a bridge when that duty is imposed upon it, it is guilty of a misdemeanor. *Reg. v. Birmingham & G. R. Co.*, 3 Railw. Cas. 148, 2 G. & D. 236, 9 C. & P. 478, 6 Jur. 804.

An indictment is maintainable against a railway company in its corporate name for failure to repair a bridge. *Reg. v. Birmingham & G. R. Co.*, 3 Railw. Cas. 148, 2 G. & D. 236, 9 C. & P. 478, 6 Jur. 804.

A railway company indicted for failure to repair a bridge may appear in the court of queen's bench by attorney, but not if indicted at the assizes or sessions. *Reg. v. Birmingham & G. R. Co.*, 3 Railw. Cas. 148, 2 G. & D. 236, 9 C. & P. 478, 6 Jur. 804. See s. c., 3 Q. B. 223, 1 G. & D. 457, 5 Jur. 40.

If a railway company lays its track upon the highway it becomes bound to the public that the highway shall be put in as good repair as it was before; and for a failure to do this it may be indicted. *Gear v. Chicago, C. & D. R. Co.*, 43 Iowa 83.

The lessees of a railroad are liable to indictment for failing to reconstruct a public road taken by the lessors in constructing the railroad, under the Pa. act of March 27, 1852, providing that where any portion of a turnpike or public road is taken by a railroad the company shall forthwith reconstruct the same. *Commonwealth v. Pennsylvania R. Co.*, 117 Pa. St. 637, 10 Cent. Rep. 632, 12 All. Rep. 38, 20 W. N. C. 448.

FOLLOWING Pittsburgh, V. & C. R. Co. v. Commonwealth, 101 Pa. St. 192.

Where a highway is laid out along the side of a railroad, and, in places, is in part upon the land of the company, the town, being a party to the adjudication and order of the county court establishing the road and making and opening the highway, is bound by the adjudication, which cannot be set aside in a collateral proceeding such as an indictment against the town for neglecting to open the highway. *State v. Vernon*, 25 *Vt.* 244.

The adjudication of the county court being thus conclusive upon the town, they could not repudiate, in this collateral manner, the effect of that adjudication by attempting to stand upon the rights of the railroad company. *State v. Vernon*, 25 *Vt.* 244.

22. Failure to stop at stations.—The Texas act of 1866, which, under penalties upon conductors, requires that a stoppage of five minutes at every way station be made by every train of passenger cars, is constitutional. *Davidson v. State*, 4 *Tex. App.* 545.

The gist of the offense created by the Texas act of 1866, "to regulate the time that railroad passenger cars shall stop at way stations," is not the stoppage of such a train less than five minutes, but the passing of a wayside station without stopping at least five minutes thereat; and an indictment against the conductor, charging that he "did then and there wilfully and unlawfully stop a train of passenger cars less than five minutes" at a certain wayside station, fails to charge any offense. *Davis v. State*, 6 *Tex. App.* 166.

Indictments based on said act of 1866 must aver that the defendant, whether a "conductor or other person," was in charge of the train. *Davis v. State*, 6 *Tex. App.* 166.

23. False pretenses.—A demand of a railroad company for baggage by the attorney of a passenger, based on his checks, is within the scope of his authority and binding on his client; and a variance in the name of the place to which the baggage was checked, contained in the attorney's letter of demand, does not render it inadmissible as evidence on the trial of an indictment for attempting to obtain money of the company for loss of the baggage. *White v. State*, 86 *Ala.* 69, 5 *So. Rep.* 674.

The defendant being indicted for attempting to obtain money from a railroad com-

pany, as compensation for the loss of two trunks for which he had baggage checks, and which he claimed were never delivered to him, it is competent for the prosecution to prove that his wife, with whom he was traveling on the railroad, was present when the trunks were delivered on the platform at their destination, that they were opened by her, and articles of clothing taken out, which were afterwards worn by her under circumstances which might justify the inference that her possession was known to him. *White v. State*, 86 *Ala.* 69, 5 *So. Rep.* 674.

A count in an indictment, under the statute *Vt. Rev. Laws*, § 4160, is bad for argumentativeness in which it is alleged that the respondent, as treasurer of a railroad company, did sign, with intent that the same should be issued and used, a certain false certificate of the ownership of 1000 shares of its capital stock, falsely certifying that one Mead was then and there owner of 1000 shares, which he did not own or have standing in his name, and was not entitled to any share of. *State v. Haven*, 59 *Vt.* 399, 9 *Atl. Rep.* 841.

A count is bad for duplicity in which it is alleged that the respondent signed a certain false certificate of stock with the intent that it be issued and used, and that he caused it to be issued and used; as two offenses are charged. *State v. Haven*, 59 *Vt.* 399, 9 *Atl. Rep.* 841.

An indictment is bad for repugnancy in which it is alleged that the respondent caused to be issued to M. a false and fraudulent certificate of the ownership of 1000 shares of stock; that it was then and there signed in blank, and was and is of the following tenor, setting it out; as a blank certificate cannot certify nor purport ownership nor have a tenor. *State v. Haven*, 59 *Vt.* 399, 9 *Atl. Rep.* 841.

The offense of obtaining a chattel by false pretenses is committed by the obtaining of a railway ticket by a false pretense from a servant of the company, so as to enable the holder to travel thereon. *Reg. v. Roulton*, 3 *New Sess. Cas.* 705, 2 *C. & K.* 917, 1 *Den. C. C.* 508, *T. & M.* 201, 13 *Jur.* 1034, 19 *L. J. M. C.* 67, 3 *Cox C. C.* 576.—DISTINGUISHED IN *Reg. v. Kilham*, 11 *Cox C. C.* 561, 39 *L. J. M. C.* 109, 22 *L. T.* 625, 18 *W. R.* 957.

A farmer sending milk by railway cannot be convicted, under § 99 of the Railway

Clauses Act 1845, of the offense of signing a false consignment note, where the note in question was signed by his daughter, who stated that there was a less amount of milk than was actually sent, although the farmer had told his people not to fill up the full quantity in the note; there being no evidence, however, that he knew of the note in question. *Frith v. Simpson*, 48 J. P. 150.

24. Forgery.*—The fraudulent counterfeiting of a railroad ticket is forgery by the common law. *Commonwealth v. Ray*, 3 Gray (Mass.) 441.

In an indictment for forging a railroad ticket, expressed on its face to be "good for this day only," a description of the ticket as signifying to the holder that it must be used continuously and without stopping at intermediate stations after once entering the cars is a fatal variance. *Commonwealth v. Ray*, 3 Gray (Mass.) 441.

The register of shareholders, kept under 8 & 9 Vict. c. 16, § 9, is sufficient evidence to prove that the individual is a shareholder on the trial of an indictment for forging a transfer of shares. *Rex v. Nash*, 2 Den. C. C. 448, 16 Jur. 553, 21 L. J. M. C. 147.

25. Gambling on train.—A conviction under 5 Geo. IV. c. 83, § 4, prohibiting gaming in open and public places, alleging that the party "did unlawfully play in a certain open and public place, to wit, in a third-class carriage used on the London, Brighton, and South Coast Railway, with an instrument of gaming at a pretended game of chance" is bad. *In re Freestone*, 1 H. & N. 93, 2 Jur. N. S. 525, 25 L. J. M. C. 121.

26. Killing stock.†—The North Carolina Code, §§ 2327-30, making killing of live stock by railroads in certain counties a crime, and subjecting the president and other officers of roads to indictment for a refusal to pay for or arbitrate claims for stock killed, is unconstitutional. *State v. Divine*, 31 Am. & Eng. R. Cas. 574, 98 N. Car. 778, 4 S. E. Rep. 477.—QUOTING San Mateo County v. Southern Pac. R. Co., 8 Am. & Eng. R. Cas. 10, 13 Fed. Rep. 145.

Section 5545 Mansf. Dig., punishing rail-

road employes for burning, mutilating, hauling off, or burying stock killed by trains, is not unconstitutional. *Bannon v. State*, 49 Ark. 167, 4 S. W. Rep. 655.

27. Larceny.—(1) *What taking is larceny, generally.*—If a servant of a railroad corporation having custody of passenger tickets that had once been sold and taken up fraudulently abstracts them and sells them for his own use, it will be larceny of such tickets. *Eaton v. Farmer*, 46 N. H. 200.

Where a carrier has in his possession a lot of pig iron, the separation of a part thereof from the remainder and a conversion of it to his own use, without the assent of the owner, is larceny and not embezzlement. *Nichols v. People*, 17 N. Y. 114.

The fact that a person is in the employ of a railroad company as brakeman on a freight train does not imply such control or possession of the goods being transported on such train that he may not be convicted of the larceny thereof. *Manson v. State*, 24 Ohio St. 590.

A passenger on a railway train, when the train was in motion, threw from a car a bale of cotton belonging to another. Held, that a conviction of the passenger for theft of the cotton was proper where the facts and circumstances connected with the act justified the conclusion that the accused threw it from the train with a view of converting it to his own use. *Price v. State*, 41 Tex. 215.

On the trial of an indictment for stealing two street-cars, the evidence showed that the defendant entered into a contract with the street-car company, claiming to represent a construction and equipment company, to change the track from a horse to an electric road and for the purchase of the cars, delivery not to be made until the cars were paid for. Subsequently, through false pretense, defendant was permitted to remove the two cars for the purpose of changing them to electric cars, but instead sold them and appropriated the proceeds to his own use. Held, that the evidence warranted a conviction. *People v. Laurence*, 70 Hun (N. Y.) 80, 53 N. Y. S. R. 536, 23 N. Y. Supp. 1095.

(2) *Who deemed a principal offender.*—If one with knowledge that the commission of a crime has been determined on gets away and keeps away from the spot for the purpose of facilitating the commission of it, he

* Criminal liability for forging railway tickets and passes, see note, 55 AM. REP. 649.

† Validity of statutes imposing criminal liability upon officers for negligent killing of stock, see note, 31 AM. & ENG. R. CAS. 579.

is a principal, although he is not present or near enough to give assistance physically and mentally to his confederates. So held, where defendant and four others combined to steal certain bales of cotton from a railroad company, but where he was not present at the time. *State v. Poynier*, 36 La. Ann. 572.

(3) *Larceny by finder of lost property.*—Where a bale of cotton had been compressed for shipment and was found on a railroad track where there was no crossing, this, unexplained, would tend to show that it must have fallen from the train and that the finder could easily ascertain who had the special property in it. *Rountree v. State*, 58 Ala. 381.

(4) *Larceny in moving car—Jurisdiction.*—Where one enters a moving car in one county with intent to commit a larceny in such car, and with the same intent continues in the car until it passes into another county and there commits the intended larceny, there is in law a fresh entry in the latter county and the offense is indictable therein under the statute. *Powell v. State*, 9 Am. & Eng. R. Cas. 156, 52 Wis. 217, 9 N. W. Rep. 17.

(5) *Subject of larceny—Railway tickets and passes.**—An indictment may be sustained under § 77 of Ill. Crim. Code, for the larceny or embezzlement of a coupon or other railroad ticket or pass, without averring or proving its value. *McDaniels v. People*, 118 Ill. 301, 8 N. E. Rep. 687.

Minn. Gen. St. 1878, ch. 95, § 26, was framed to meet, *inter alia*, the case of an appropriation of tickets which had been sold by a railway company to a passenger and taken up by a conductor, so as to again become the property of the company by which they were issued, but which, instead of being returned to the proper depository, were otherwise disposed of by the conductor or some other person with larcenous intent. *State v. Brin*, 30 Minn. 522, 16 N. W. Rep. 406.

A passage ticket, completed and ready to be issued, is the proper subject of larceny, under Pen. Code Minn. § 423. But railway passes intended for employes, prepared and left in blank save as respects the printed *fac simile* signature of the general manager, and which have not been countersigned by

the officer, without whose signature they are of no avail, are not within the statute. *State v. Mugang*, 51 Minn. 556, 53 N. W. Rep. 874.

A railroad ticket unstamped and undated, and in a railroad office, is not the subject of larceny. *State v. Hill*, 1 Houst. (Del. Cr.) 421.

(6) *Indictment or information, generally.*—In an indictment for the larceny of warehouse receipts alleged to have been issued by a railroad company named in the indictment, a want of any allegations showing that the company had legal authority, under its charter, to issue the same is not a fatal defect. It is enough, in this regard, if the facts stated show a liability against the company in respect to the receipts in favor of any lawful holder of the same, which it would be estopped from denying by setting up a want of authority. *State v. Loomis*, 27 Minn. 521, 8 N. W. Rep. 758.

It is not necessary to allege, in an indictment for stealing from a railroad car, or to prove at the trial, the value of the goods stolen, under Mo. Rev. St. 1879, making stealing from such car grand larceny, irrespective of the value of the property stolen. *State v. Sharp*, 106 Mo. 106, 17 S. W. Rep. 225.

A conviction on a charge of theft from the train of a railroad company will not be disturbed on account of the failure of the state to allege and prove the proper name of the company, when that defense was not made on the trial, and could only be ascertained on appeal by reference to the private act of the legislature constituting the company. *Price v. State*, 41 Tex. 215.—CRITICISED IN *White v. State*, 24 Tex. App. 231.

(7) *Averment of ownership.*—Information or indictment for theft of the property of a corporation must not only describe the corporation by its correct corporate name, but should allege that it was a corporation. Allegation that the "Mo. P. R. Co." was the owner of the stolen property will not suffice. *White v. State*, 24 Tex. App. 231, 5 S. W. Rep. 857.—CRITICISING *Price v. State*, 41 Tex. 215.

If cotton is delivered to a railroad company for transportation, such company is thereby vested with special property in it, and, in an indictment for its larceny, it would be sufficient to lay the property in such company. *Rountree v. State*, 58 Ala. 381.

An indictment for breaking and entering

* Railroad tickets as the subject of larceny, see note, 27 AM. & ENG. R. CAS. 76.

a railroad car with intent to steal, and after entering stealing therefrom, must allege the ownership of the car; and such allegation is not included in an averment that the car was on a certain named railway in the county. *Cooper v. State*, 89 Ga. 222, 15 S. E. Rep. 291.

An indictment for larceny charged that the property stolen was the property of the "American Merchants' Union express company." In the absence of an averment that such company was a corporation—*held*, that the ownership of the property was defectively stated. If the company was not incorporated, the ownership should be laid in the individual members. *Wallace v. People*, 63 Ill. 451.

In an indictment for the larceny of certain meat belonging to a railroad company, the property was laid in a depot agent of the company, who had possession and control of it for the company for the use of its hands. *Held*, that the indictment was defective; the property should have been laid in the railroad company, the agent in such case not being a bailee. *State v. Jenkins*, 78 N. Car. 478.

An indictment for stealing goods from a car charged the ownership of the goods to be in the consignees. The evidence showed that they had purchased the goods by order. *Held*, that by delivery to the carrier the title to the goods passed to the consignees, and the ownership was therefore properly alleged and was sustained by the evidence. *Walker v. State*, 9 Tex. App. 38.

(8) *Evidence, generally*.—In a prosecution for larceny, the property in the goods was alleged to be in a railroad company. *Held*, that proof of the *de facto* existence of the corporation was sufficient. *Smith v. State*, 28 Ind. 321.

Where a person is indicted for breaking and entering a railroad car, with intent to steal, and for the larceny of goods contained therein, and is acquitted of the breaking and entering and convicted of the larceny only, the judgment of the court will not be reversed because of the admission, against objection of the defendant, of evidence for the sole purpose of proving the breaking and entering, whether such evidence was properly admitted or not. *Manson v. State*, 24 Ohio St. 590.

Testimony that defendants broke into a tool-house of a railroad company, took out a hand-car, propelled themselves for twelve

miles on the track, and left it at the side of the track—*held*, insufficient to warrant a conviction of larceny, for want of evidence showing an intent to deprive the company of its property. *State v. Ryan*, 12 Nev. 401.

(9) *Proof of value*.—Section 3789 of Ala. Code makes the stealing "of any personal property of any value from a railroad car" grand larceny; but an indictment therefor should be supported by some evidence of value. *Lucas v. State*, 96 Ala. 51, 11 So. Rep. 216.

The indictment charged the defendant with the theft in Dallas county, Texas, of a "coupon railroad ticket," entitling the holder to one first class passage from Caldwell to New York city, the said ticket being the property of the Gulf, C. & S. F. R. Co., and of the value of \$57. The state's witness, Cade, testified that the value of the ticket, as representing and good for the fare over the said line from Caldwell to New York, was \$57, and that as representing the fare from Dallas to New York, deducting the fare from Caldwell to Dallas, it was \$52. The state's witness, Hirsch, testified that the ticket as representing the price of a first-class fare from Dallas to New York, was worth in Dallas the sum of \$55; to all of which testimony the defense objected that the market value of the said ticket in Dallas was the one question at issue. *Held*, that in view of Hirsch's further testimony that he paid the defendant \$25 for the ticket, the admission of the evidence, if erroneous, constituted immaterial and harmless error. *Cunningham v. State*, 27 Tex. App. 479, 11 S. W. Rep. 485.

(10) *Variance*.—An indictment for stealing bank bills is not sustained by proof that the prisoner stole the orders of the Ohio railroad company. *Grimmond v. State*, 10 Ohio 510.

A variance between the allegation of an indictment for larceny from a railroad car and the proofs will be regarded as immaterial where the indictment charges that larceny was from a car on the track of the "Wabash" railroad and the proof is that it was from a car on the track of the "Wabash Western" railroad, where it also appears that there is but one railroad in the county where the venue is laid. *State v. Sharp*, 106 Mo. 106, 17 S. W. Rep. 225.

An indictment charging the larceny of a bale of cotton from a railroad car "in the possession and control of the Central R. R.

and Banking Co., a corporation duly chartered under the laws of Georgia and doing business under said corporate name," and the proof showing that the cotton was stolen from the car in question, that it was in possession of "The Central R. R. and Banking Co. of Georgia," and that this corporation was generally as well known by one name as the other, there was no substantial variance between the allegations and the proof as to the custody of the car. *Rogers v. State*, 90 Ga. 463, 16 S. E. Rep. 205.

(11) *Instructions to the jury*.—Where the proof shows that grain was stolen from the ground near a car and the value of grain is shown, it is proper to instruct the jury that if the grain was taken from the ground near the car it would be petit larceny only, though a statute makes stealing from a railroad car grand larceny, irrespective of the amount stolen. *State v. Sharp*, 106 Mo. 106, 17 S. W. Rep. 225.

A charge to the jury that if they believe that "a bale of cotton was dropped from the cars of the M. & E. R., and that defendants took and carried away said bale of cotton with intent to convert it to their own use, and not with the intent of returning to the true owner, they are guilty of larceny," is erroneous, because it ignores the question of felonious intent, without which there can be no larceny. *Rountree v. State*, 58 Ala. 381.

28. Malicious trespass.—Where the evidence shows that the trespass complained of consisted in the removal, by the employés of a railroad company, of a fence from real estate claimed by the company, to protect its rights, a charge of malicious trespass cannot be rightfully prosecuted, in the absence of any malicious intent. *Hughes v. State*, 103 Ind. 344, 2 N. E. Rep. 956.

Defendant, the servant of a railroad company, after being forbidden, went with his wagons and teams upon the lands of the prosecutor for the purpose of depositing materials necessary for the construction of the road. *Held*, that the fact that the railroad company had purchased from the prosecutor a right of way for one hundred feet on each side of its track did not give it a right to enter on the lands beyond the right of way, and was no evidence of a reasonable belief on the part of defendant that he had a right to make such entry. *State v. Fisher*, 109 N. Car. 817, 13 S. E. Rep. 878.

29. Manslaughter.—Where a railroad engineer, while engaged in operating the engine in his charge, carelessly and negligently runs the same into a passenger car standing upon the railroad track, thereby causing the destruction of the car and the death of a passenger therein, he is guilty of the offense of involuntary manslaughter, as defined by § 1908, Rev. St. 1881. *State v. Dorsey*, 118 Ind. 167, 20 N. E. Rep. 777.

Breaking and entering the ticket office of a railroad company in the daytime, with an intent to steal therein, but not actually stealing, is, under Rev. St. ch. 126, § 13, but a misdemeanor; and an arrest by an officer without a warrant for such an offense previously committed is illegal; and killing the officer by the person so arrested is not murder, but manslaughter. *Commonwealth v. Carey*, 12 Cush. (Mass.) 246.

Where a conductor is indicted for manslaughter in leaving a switch open, whereby an approaching train is wrecked and a person killed, and the indictment charges, among other things, that he knew the train was approaching, but failed to give a signal, the charge that he knew of the approach of the train is a material allegation, and must be proved as laid. *Commonwealth v. Hartwell*, 128 Mass. 415, 35 Am. Rep. 391.

Negligence by omission consists in the omission to perform an act with the performance of which the party is especially charged; and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of a railway track, nor the sounding of the danger signal, cannot be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolves. *Anderson v. State*, 38 Am. & Eng. R. Cas. 263, 27 Tex. App. 177, 11 S. W. Rep. 33.

30. Murder.—If a train of railroad cars is thrown from the track by obstructions wrongfully placed upon it, and a human being is killed, the person committing the act is guilty of murder in the first degree. *Presley v. State*, 59 Ala. 98.

Upon a trial of an indictment for murder, alleging the crime to have been committed by wilfully and maliciously changing a switch upon the track of a railroad, whereby

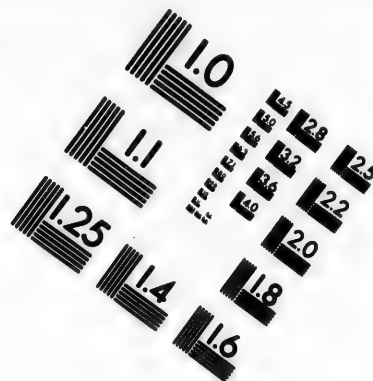
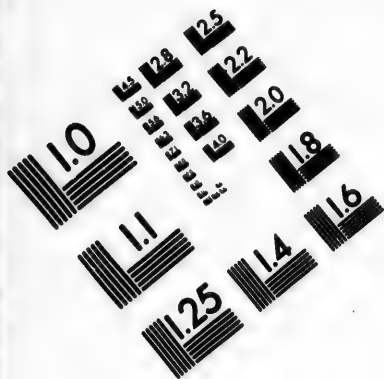
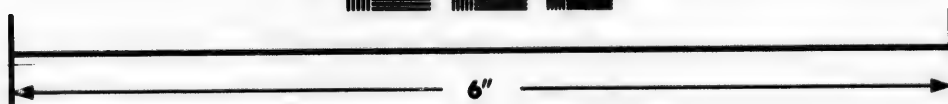
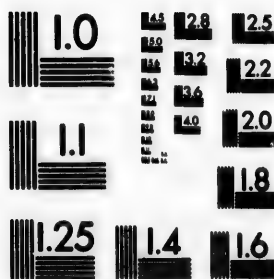


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a train of cars was wrecked, resulting in the death of a person thereon, it was admitted by counsel for the defense, among other things, that such death was the immediate result of such wreck, which was caused by some person or persons changing the switch. *Held*, that, upon such admission, it is erroneous for the court to instruct the jury that a crime had been committed, as the determination of that fact is the exclusive province of the jury. *Jackman v. State*, 71 Ind. 149.

31. Nuisance.—(1) *Jurisdiction*.—The common law courts have an undisputed jurisdiction over public nuisances by indictment, and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals. *Attorney-General v. New Jersey R. & T. Co.*, 3 N. J. Eq. 136. —QUOTED IN *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530.

(2) *Company, when indictable*.—Railroad corporations are liable to indictment for the acts of their officers and agents in erecting and maintaining a common nuisance. *State v. Vermont C. R. Co.*, 27 Vt. 103. —APPROVING *Queen v. Great N. of E. R. Co.*, 9 Q. B. 315, 58 E. C. L. 314. DISAPPROVING *State v. Great Works, M. & M. Co.*, 20 Me. 41. —FOLLOWED IN *State v. Troy & B. R. Co.*, 57 Vt. 144.

A railroad corporation, constructing its road across a highway without lawful authority, is liable to indictment for a nuisance. *Commonwealth v. Vermont & M. R. Corp.*, 4 Gray (Mass.) 22.

An incorporated railroad company is indictable for a nuisance in erecting and continuing a building, and placing and leaving its cars in the public highway. *State v. Morris & E. R. Co.*, 23 N. J. L. 360.

Where selectmen, besides requiring other alterations to be made by a railroad corporation in a way over which their railroad passed, pursuant to Mass. Rev. St. ch. 39, § 67, order a draw to be made in the railroad for the accommodation of public travel on the way, the railroad corporation, building their road without such a draw, so as to obstruct public travel, is liable to an indictment for a nuisance. *Commonwealth v. Nashua & L. R. Corp.*, 2 Gray (Mass.) 54.

A street-railway company is bound to

keep its entire roadbed, to the ends of its ties and its crossings, in repair, so as not to obstruct travel across its road or longitudinally upon it; and this duty is a continuing one whether the charter so expressly requires or not. *Memphis, P. P. & B. R. Co. v. State*, 38 Am. & Eng. R. Cas. 429, 87 Tenn. 746, 11 S. W. Rep. 946. —NOT FOLLOWING *Missouri, K. & T. R. Co. v. Long*, 6 Am. & Eng. R. Cas. 254, 27 Kan. 684. OVERRULING *Chesapeake, O. & S. W. R. Co. v. State*, 16 Lea (Tenn.) 300. QUOTING *Louisville & N. R. Co. v. State*, 3 Head (Tenn.) 524. REVIEWING *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 87 Tenn. 712.

A street-railway company failing to so repair, and thereby obstructing travel, is indictable for maintaining a nuisance, and, upon failure to abate the nuisance, the obstructions may be removed by order of the court. *Memphis, P. P. & B. R. Co. v. State*, 38 Am. & Eng. R. Cas. 429, 87 Tenn. 746, 11 S. W. Rep. 946.

The charge in an indictment that defendant company unlawfully obstructed a public road at a point where the railroad track crossed it, by leaving a hand-car thereon and by hanging buckets and clothing thereon, by reason of which, from the location of the car, the horses of people in passing upon the road were frightened, the lives of the persons endangered, and the road obstructed, shows everything necessary to constitute a nuisance. *Cincinnati R. Co. v. Commonwealth*, 80 Ky. 137.

A charter to construct a railroad does not necessarily imply that steam-power shall be the agent employed in propelling the cars upon it. The company, however, have the right to use that, or any other power, in carrying on their operations, but are responsible to the community for any abuse of such right; and they may be indicted for a nuisance whenever the evil complained of assumes that character. *State v. Tupper, Dudley (So. Car.)* 135.

Where a company in taking its railway across a highway had lowered the highway at the point of intersection, so as to make it inconvenient and dangerous, especially for loaded teams to descend upon and ascend from the railway track in passing along the highway across it, and the danger was much increased by the circumstance that the railway came upon the highway from a deep cutting, which made it impos-

* Indictment of railroad companies for public nuisances, see note, 14 AM. & ENG. R. CAS. 152.

sible to observe the approach of trains at a distance, or in time to take warning before crossing the track of the railway, it is guilty of a nuisance, and may be indicted and the nuisance abated by order of court. *Reg. v. Grand Trunk R. Co.*, 17 U. C. Q. B. 165.

(3) — *when not indictable.*—The legislature may authorize building a railroad on a public road, and a railroad company occupying a portion of a public road not exceeding the extent allowed by law, and obstructing public travel on such portion, is not guilty of nuisance. *Danville, H. & W. R. Co. v. Commonwealth*, 73 Pa. St. 29.

Upon the trial of an indictment against a certain corporation for alleged nuisance in constructing a bridge over its road for a highway, of less width than the highway, it appeared that the highway, when defendant's road was constructed, was owned by a turnpike company which, by its charter (ch. 121, Laws of 1800), was required, where a bridge was necessary, to build it not less than sixteen feet wide. Defendant, prior to 1850, constructed its road across the highway below its surface, and built a bridge for the highway about sixteen feet wide; this was replaced by a new one in 1852 or 1853 about nineteen and one half feet wide; both were approved by the turnpike company. In 1879, after the rights of said company in the highway had been extinguished, defendant built the bridge in question, which was twenty-four feet wide, with the roadway twenty-two and one half feet in width, corresponding substantially with the width of the beaten track of the highway. The court charged that if the bridge obstructed or hindered the enjoyment of the public in the highway, it was a nuisance, and defendant was guilty under the indictment; that the question was whether the bridge was so constructed "as not to impair the usefulness of the road and to interfere with the enjoyment or safety of the public." *Held, error.* *People v. New York, N. H. & H. R. Co.*, 10 Am. & Eng. R. Cas. 230, 89 N. Y. 266.

(4) *Indictment and proof.*—The word "unlawfully" is not indispensable in an indictment against a railroad corporation for erecting a nuisance. The words "wrongfully and injuriously" are sufficient. *State v. Vermont C. R. Co.*, 27 Vt. 103.

A mere allegation in an indictment that certain facts charged are to the common nuisance of all the citizens of the state will

not make it a good indictment for a common nuisance unless the facts charged be of such a nature as may justify that conclusion as one of law as well as of fact. *Morris & E. R. Co. v. State*, 36 N. J. L. 553.

A railroad company being indicted for maintaining a nuisance in unlawfully obstructing the street by means of its track, in the absence of any averment in the indictment, or in an offer of proof, that the structure of the track, or its position, interfered in point of fact with public travel in any respect, the mere location of it did not constitute a nuisance, and the offer is inadmissible. *Commonwealth v. Wilkes-Barre & K. S. R. Co.*, 127 Pa. St. 278, 17 Atl. Rep. 996.

An indictment against a railroad company for erecting and maintaining a nuisance upon a public road described the venue as "in Cecil county," and the locality of the alleged nuisance at the time of taking the inquisition as "at the county aforesaid," and especially set out in each count the nature of the nuisance, that "it was a common nuisance." No other county was named in the indictment. *Held*, that no presumption could arise that the offense was committed in any other county, and that the indictment possessed the essential attribute of certainty to a reasonable extent and was good on demurrer. *Philadelphia, W. & B. R. Co. v. State*, 20 Md. 157.—APPLIED IN *Northern C. R. Co. v. Mayor, etc.*, of Baltimore, 21 Md. 93.

32. Obstructing highways.*—(1) *Liability of company to prosecution.*—A railroad corporation may be indicted for obstructing a highway. *State v. Troy & B. R. Co.*, 57 Vt. 144.—FOLLOWING *State v. Vermont C. R. Co.*, 27 Vt. 103.—*State v. Louisville & N. R. Co.*, 50 Am. & Eng. R. Cas. 161, 91 Tenn. 445, 19 S. W. Rep. 229.—FOLLOWING *Louisville & N. R. Co. v. State*, 3 Head (Tenn.) 523.

Railroad companies may be indicted and fined for obstructing a public highway contrary to the powers granted in their charters. *Louisville & N. R. Co. v. State*, 3 Head

* Indictments for obstruction of highways, see notes, 17 AM. & ENG. R. CAS. 172; 19 *Id.* 433.

Indicting railroad companies for obstructing or failing to repair highways, see 32 AM. & ENG. R. CAS. 199, *abstr.*; 50 *Id.* 162, *abstr.*; 56 *Id.* 646, *abstr.*

Liability of company for obstructing highway crossings, see note, 18 L. R. A. 154.

(Tenn.) 523.—FOLLOWED IN *State v. Louisville & N. R. Co.*, 50 Am. & Eng. R. Cas. 161, 91 Tenn. 445, 19 S. W. Rep. 229. QUOTED IN *Memphis, P. P. & B. R. Co. v. State*, 38 Am. & Eng. R. Cas. 429, 87 Tenn. 746, 11 S. W. Rep. 946.

A railroad laid out over and along a highway in such a manner as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance. *Commonwealth v. Old Colony & F. R. R. Co.*, 14 Gray (Mass.) 93.

A railway company which obstructs a public road, without making a new one equally convenient, as required by statute, is indictable at common law for creating a nuisance. *Reg. v. Scott*, 2 G. & D. 729, 3 Q. B. 543, 3 Railw. Cas. 187, 6 Jur. 1084.

A railway cannot be indicted for obstructing a highway which through a defective proceeding has not been legally opened. *Reg. v. Great Western R. Co.*, 32 U. C. Q. B. 506.

The act of March 18, 1887, providing for the recovery by civil proceeding of a penalty against railroad companies for failing to construct or keep in repair railway crossings, does not repeal section 1865 of Mansfield's Digest, which makes it a misdemeanor, punishable by indictment, for any person to obstruct a highway by felling a tree across the same, or placing any other obstruction thereon. And under the latter statute a railway corporation may be indicted for building an embankment across a public highway and failing to keep the same in good condition and repair. *St. Louis, A. & T. R. Co. v. State*, 52 Ark. 51, 11 S. W. Rep. 1035.

Commissioners of highways in Illinois cannot grant away an exclusive use of a highway; therefore a railroad company is liable to a prosecution in taking exclusive possession of a highway, though it be under an agreement with such commissioners. *Rice v. Chicago, B. & N. R. Co.*, 30 Ill. App. 481.

Under Ind. Rev. St. 1881, §§ 1897, 1964, a railroad company may be prosecuted criminally for obstructing a public road; and the fact that it may be compelled by mandamus to remove the obstruction is no defense. *State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298, 22 N. E. Rep. 307.

By virtue of Rev. St. ch. 131, § 13, an indictment will lie to recover the forfeiture provided for in Rev. St. ch. 51, § 40, for

"unreasonably and negligently obstructing by engines, tenders, and cars," "any way." *State v. Grand Trunk R. Co.*, 59 Me. 189.

A railroad constructed over a highway in such a manner as to obstruct public travel is liable to indictment as a nuisance, notwithstanding the Act of 1849, ch. 222, § 4, conferring on county commissioners "the original jurisdiction of all questions touching obstructions to turnpikes, highways, or town ways, caused by the construction or operation of railroads." *Commonwealth v. Nashua & L. R. Corp.*, 2 Gray (Mass.) 54.

An indictment for obstructing the highway is the proper remedy where a railroad company is guilty of a substantial non-compliance with the statutory duty to make and maintain proper approaches to its bridges where the track crosses a public highway. *People v. New York C. & H. R. R. Co.*, 74 N. Y. 302; modifying 12 Hun 195.

The fact that the act of assembly incorporating a turnpike company gives it a specific remedy for an injury to its rights does not impair the separate right of the commonwealth to indict a railroad for obstructing the same. *Northern C. R. Co. v. Commonwealth*, 5 Am. & Eng. R. Cas. 318, 90 Pa. St. 300.

(2) *Liability of lessee of road.*—When a railroad corporation, without law or right, so obstructs a highway by building the roadbed within its limits, that it could be indicted for creating a nuisance, the lessee of such railroad company, from lapse of time, or acquiescence on the part of the town, gains no right to encroach further upon the highway, as the exigencies of the business may require, for the purpose of widening, repairing, and straightening its track; and there is no presumption that the company in taking a part took the whole of the highway, when all the evidence tended to prove that the original obstruction was without authority of law. *State v. Troy & B. R. Co.*, 57 Vt. 144.

And if lessee, in repairing its track, suffer stone and gravel to run into the highway and remain there an unreasonable time, so as to impede travel, it would be an indictable nuisance. *State v. Troy & B. R. Co.*, 57 Vt. 144.

(3) *What obstructions are indictable.*—A railroad company may construct its railway across any established road or way wherever it may be necessary to cross or intersect it, but it must so construct it that

it will not impede the passage or transportation of persons or property over said road or way. If it so construct its railway as to be a serious inconvenience and dangerous obstruction to travel along the road or way, it may be indicted therefor. *Northern C. R. Co. v. Commonwealth*, 5 Am. & Eng. R. Cas. 318, 90 Pa. St. 300.

A railroad company is liable criminally for an obstruction of a highway, if it permits its engines, cars, etc., to remain thereon an unnecessarily long period. *State v. Western N. C. R. Co.*, 95 N. Car. 602.

The statute to prevent the obstruction of highways changes the common law by requiring that the obstruction should be wilful to render it indictable. The word "wilful" in such statutes implies legal malice, evil intent, or the absence of reasonable ground for the accused to believe that the act charged was lawful. *Savannah, F. & W. R. Co. v. State*, 32 Am. & Eng. R. Cas. 182, 23 Fla. 579, 3 So. Rep. 204.

Where a railway company takes and occupies a part of a county road without having condemned it, yet with the consent of the county court duly given, but on the condition that the company shall restore the county road to its former state, or to such state as will not unnecessarily impair its usefulness, and fails to comply with the condition, the railway company may be proceeded against by indictment for maintaining a nuisance, and fined for obstructing and injuring the county road. *State v. Ohio River R. Co.*, 56 Am. & Eng. R. Cas. 641, 38 W. Va. 242, 18 S. E. Rep. 582.

The plaintiff in error was indicted for crossing a dirt road and obstructing it, and its charter required that in such cases it should make the crossing "as convenient as may be." This does not mean that the new road must be as convenient and easy of passage and as safe as the old road, but that the new road should be so constructed as to answer the purposes of the traveling public, and be made as easy and convenient as the nature of the ground will permit, having due regard to the rights of the public, and at the same time not requiring unreasonable outlays of money by the company. *Nashville & D. R. Co. v. State*, 1 Exst. (Tenn.) 55.

(4) *What indictments are sufficient.*—All that is necessary to constitute a good indictment for obstructing a public highway is to allege such facts as meet the require-

ments of the statute defining the offense. *State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298, 22 N. E. Rep. 307.

To constitute the offense of obstructing a public highway it is not necessary, under the statute, that there be a criminal intent, and the indictment need aver none, nor need it aver that the acts were done in bad faith. *State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298, 22 N. E. Rep. 307.

In an indictment for obstructing a public road it is not necessary to allege that the wrongful act was "knowingly and wilfully done." It will be sufficient to allege that the act was done unlawfully or without lawful authority. And if it allege that the act was done "knowingly and wilfully," these words "knowingly and wilfully" will be treated as surplusage. *State v. Chesapeake & O. R. Co.*, 19 Am. & Eng. R. Cas. 429, 24 W. Va. 809.—NOT FOLLOWED IN *State v. Monongahela River R. Co.*, 37 W. Va. 108.

An indictment for obstructing a public highway need not allege the condition of the highway before the obstruction complained of. *State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298, 22 N. E. Rep. 307.

If the railroad be improperly and negligently constructed, an indictment therefor should in terms charge the fact. *State v. Davenport & St. P. R. Co.*, 47 Iowa 507.

An indictment against a railway corporation which alleges that the defendant on, etc., in, etc., "did unlawfully," etc., "obstruct a public road in the city of Camden, Arkansas, where said railroad crosses the road leading from the city of Camden to Bradley's Ferry, known as the Bradley Ferry road, by building an embankment across said road and failing to keep the same in good condition," etc., charge a misdemeanor under section 1865, Mansfield's Digest, and sufficiently describes the road obstructed. *St. Louis, A. & T. R. Co. v. State*, 52 Ark. 51, 11 S. W. Rep. 1035.

The statutes of Florida, prescribing the powers and duties of railroad companies as to highways, do not affect the rules of pleading controlling indictments for obstructing a highway, further than to require that the act charged to be such obstruction shall appear to be an act which is not authorized by such statutes. *Palatka & I. R. R. Co. v. State*, 32 Am. & Eng. R. Cas. 191, 23 Fla. 546, 11 Am. St. Rep. 395, 3 So. Rep. 158.

The allegation in an indictment that the road described was and is "a common highway in Putnam county, made and laid out for the people of this state to go, return, and pass at their free pleasure and will, on foot, on horseback, and in vehicles," is equivalent to an allegation that the road was and is an "established highway," under the statute punishing the obstruction of any public road or established highway, and providing for the removal of the obstruction. *Palatka & I. R. R. Co. v. State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

Where an indictment against a railroad company shows a complete obstruction of the highway against travel, so as to prevent the people from traveling the same, it is good in law. No such privilege is given by the statutes to railroad companies. *Palatka & I. R. R. Co. v. State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

An indictment against a railroad company for constructing its road across or upon a highway at a point outside of the authorized route of the railroad should affirmatively show that the railroad is outside of such route. *Palatka & I. R. R. Co. v. State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

(5) *What indictments are insufficient.*—An indictment which charges that a highway has been "unnecessarily and unreasonably obstructed," omitting to charge that it was wilfully done, is insufficient. *Savannah, F. & W. R. Co. v. State*, 32 *Am. & Eng. R. Cas.* 182, 23 *Fla.* 579, 3 *So. Rep.* 204.

An allegation that the defendants "did unlawfully and injuriously lay, place, and put down, and cause to be laid, placed, and put down three certain tracks with iron rails in, upon, across, and over said highway," is not sufficient. *State v. Portland, S. & P. R. Co.*, 58 *Me.* 46.

An indictment founded on Rev. St. ch. 51, § 13, is fatally defective unless it allege substantially that the railroad crosses the highway in a manner not determined it writing by the county commissioners. *State v. Portland, S. & P. R. Co.*, 58 *Me.* 46.

An indictment cannot be aided by intentment, nor omissions therein supplied by construction; and where the acts charged may, under certain circumstances, be lawful, and these circumstances are not negatived, the indictment is insufficient, even

though it be alleged that the acts charged were wilfully and unlawfully done. So held, where the indictment charged defendant with the obstruction of a highway, without alleging that the acts charged were not done in the construction of a railway; or, if so, that it did not put the highway in repair within the time required by statute. Code, § 1262. *State v. Chicago, B. & P. R. Co.*, 17 *Am. & Eng. R. Cas.* 170, 63 *Iowa* 508, 19 *N. W. Rep.* 299.

(6) *Matters of defense, generally.*—The fact that a corporation may be compelled by it in a public highway is not a defense to a prosecution for maintaining such obstruction. *State v. Baltimore, O. & C. R. Co.*, 120 *Ind.* 298, 22 *N. E. Rep.* 307.

The obstructing of a street with cars by a railroad company is not excused by the fact that it is necessary for the carrying on of the company's business, though the obstruction be only occasional. *State v. Chicago, M. & St. P. R. Co.*, 77 *Iowa* 442, 4 *L. R. A.* 298, 42 *N. W. Rep.* 365.

The confirmation by statute of the illegal location of a railroad in a highway is no ground for arresting judgment on an indictment for a nuisance by such obstruction, on which the proprietors of the railroad have been convicted before the passage of the statute. *Commonwealth v. Old Colony & F. R. R. Co.*, 14 *Gray (Mass.)* 93.

Where a railroad company is indicted under Mass. St. of 1871, ch. 83, § 1, for occupying a highway with its cars for more than five minutes, it is no defense that the occupation was accidental and could not have been avoided; neither is it a defense to show that the company's employes were selected with the greatest care and specially instructed not to obstruct highways, and that the officers of the company had no knowledge of such obstruction. *Commonwealth v. New York, N. H. & H. R. Co.*, 112 *Mass.* 412.

It is no defense to an indictment against a railroad company for obstructing a highway with trains of cars that the rules of the company instructed its employes not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. *State v. Louisville & N. R. Co.*, 50 *Am. & Eng. R. Cas.* 161, 91 *Tenn.* 445, 19 *S. W. Rep.* 229.—FOLLOWING *Louisville & N. R. Co. v. State*, 3 *Hend (Tenn.)* 523.

(7) — *road in hands of receiver.*—Where

a corporation is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, such corporation cannot be prosecuted for the obstruction of a highway committed by the agents or servants of the receiver. *State v. Wabash R. Co.*, 35 *Am. & Eng. R. Cas.* 1, 115 *Ind.* 466, 15 *West. Rep.* 449, 17 *N. E. Rep.* 909, 1 *L. R. A.* 179.

An indictment cannot be sustained against a railroad company for a nuisance in the obstruction of a highway by the stoppage therein of the trains run upon the railroad while it is under the sole management of a receiver, over whose acts the company have no control. *State v. Vermont C. R. Co.*, 30 *Vt.* 108.

(8) *Evidence for the prosecution.*—The defendant having been indicted for obstructing a highway, to show its dangerous condition and the relation of the highway and the railroad evidence was admissible to prove that there were no cattle-guards at the crossings, and that water had been thrown from the side of an engine upon horses traveling in the highway. *State v. Troy & B. R. Co.*, 57 *Vt.* 144.

Under Iowa Code of 1851 the disqualification or inability of the county judge to act in a proceeding to establish a highway must have appeared upon the record, in order to enable the prosecuting attorney to act in his stead; and, where the record failed to show such disqualification or inability, it was not competent evidence to show that the highway was legally established. So held, where a railroad was indicted for obstructing a highway. *State v. Chicago, R. I. & P. R. Co.*, 50 *Iowa* 692.

(9) *Evidence in defense.*—The Chesapeake & Ohio R. Co. was indicted for obstructing a public road; and the obstruction was shown to have been caused by raising the track of the railway at the point where it was crossed by the public road. It was competent and material evidence on behalf of the defendant to show that at the time said road was obstructed the said railroad at that point was in the possession of and was run by another railroad company. *State v. Chesapeake & O. R. Co.*, 19 *Am. & Eng. R. Cas.* 429, 24 *W. Va.* 809.

Two indictments were found at the same time against appellant for a nuisance alleged to have been committed by obstructing a public road with its cars. The time at which the offense was charged to have

been committed was the same in both indictments. Appellant, having been acquitted under one indictment, pleaded acquittal upon the trial of the other. Held, that as the state has the right in such a case to show that the defendant had committed the offense charged at any time within a year prior to the indictment, a conviction or an acquittal under one indictment does not *ipso facto* bar another indictment found at the same time for the same character of offense. The first trial is a bar to the further prosecution for only such offenses as were proved or attempted to be proved; and whether the same acts were proved or attempted to be proved upon the first trial is a question of fact. Therefore, as the defendant in this case offered testimony tending to show that upon the first trial the commonwealth in the examination of its witnesses embraced the entire year, the issue thus presented should have been submitted to the jury, as this testimony, if true, showed the attempt to prove the obstruction at the time named by the witnesses in this case. *Chesapeake & O. R. Co. v. Commonwealth*, 88 *Ky.* 368, 11 *S. W. Rep.* 87.

(10) *Instructions to the jury.*—It is a proper instruction to be given to a jury on an indictment against a railroad company for obstructing a highway with their cars while discharging and receiving freight and passengers, that the right of the public in the highway for the purpose of travel is paramount to the right and convenience of the company for any other purpose than that of transit. *State v. Morris & E. R. Co.*, 25 *N. J. L.* 437.

On the trial of an indictment against a railway company for unlawful interference with highways in diverting a road to a greater angle than that which it originally had, in order to carry such road under its track, it is proper for the judge to charge that if the public sustained inconvenience by the alteration the jury should find for the crown; but that if the work was done in a mode in which an expert engineer would do it, having reasonable regard to the interests both of the company and the public, the company had a right to make such diversion. *Reg. v. Sharpe*, 3 *Railw. Cas.* 33.

On the trial of an indictment against the Chesapeake & Ohio R. Co. for obstructing a public road in a certain county it became and was material to ascertain whether there

was any other than the defendants' railroad within the said county; it was error in the circuit court to state in the presence of the jury that all the witnesses proved that there was but one railroad in the said county and that was the railroad of the defendants. *State v. Chesapeake & O. R. Co.*, 19 *Am. & Eng. R. Cas.* 429, 24 *W. Va.* 809.

(11) *The proper judgment.*—Where a railroad company is indicted for wilfully obstructing a highway, and the obstruction is one whose illegality is attributable to the manner in which the railroad has been constructed upon the highway, and, upon conviction, the judgment is so framed as to require an absolute removal of the constituent elements of the roadbed from the highway, and not to permit the railroad company to abate the nuisance or "remove the obstruction" by grading the highway to the surface of the railroad track, or by carrying the highway under or over the railroad, or by changing the line of the highway, or by carrying the railroad along and upon the highway on the surface of the latter, or in such other manner as not to obstruct it or to prevent its use by the public, according as one or the other of these courses may, under the circumstances of the case, be proper, it is erroneous and should be set aside and the cause remanded for a reformation of the judgment. *Palatka & I. R. R. Co. v. State*, 32 *Am. & Eng. R. Cas.* 191, 23 *Fla.* 546, 11 *Am. St. Rep.* 395, 3 *So. Rep.* 158.

33. Obstructing navigation.—Indictment is the proper remedy to abate the public nuisance created by the obstruction of a navigable stream by a railroad bridge. *South Carolina R. Co. v. Moore*, 28 *Ga.* 398.

Where the charter of a railroad corporation authorizes the erection of a bridge across navigable rivers, "provided said bridge shall be so constructed as not to prevent the navigating said waters," an indictment against the corporation for erecting a bridge across a navigable river named, which does not directly allege that the bridge prevents the navigating the waters of the river, is not good. *State v. Portland & K. R. Co.*, 57 *Me.* 402.—**QUOTING** *Mississippi & M. R. Co. v. Ward*, 2 *Black (U. S.)* 494.

An indictment drawn under *Rev. St. ch. 17, § 1*, alleging that the corporation did "unlawfully and injuriously obstruct and impede, without legal authority, the passage

of said navigable river * * * by erecting a bridge over said river, which bridge is so constructed as to prevent the navigating said river, * * * by means whereof the passage of said river and common highway hath been obstructed and impeded," etc., is not sufficient. *State v. Portland & K. R. Co.*, 57 *Me.* 402.

Where the direct injury alleged is to the navigation of a stream to which plaintiff is entitled only in common with the whole public, the remedy is by indictment and not by a civil action; and this rule is not changed by the fact that plaintiff maintains a wharf and is the only person navigating the stream above the obstruction. *Blackwell v. Old Colony R. Co.*, 122 *Mass.* 1.

Where the defendants were indicted for obstructing a navigable river by the erection of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shown only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with the navigation—*held*, that the jury were rightly directed that on this evidence the only verdict which could be rendered was not guilty. *Queen v. Port Perry & P. W. R. Co.*, 38 *U. C. Q. B.* 431.

34. Obstructing private ways.—A provision of *Mass. Pub. St. ch. 112, § 169*, making a railroad company criminally liable for occupying any "highway, town-way, or street" with its cars for more than five minutes, does not include a private way. *Commonwealth v. Boston, B. & G. R. Co.*, 135 *Mass.* 550.

A count at common law for obstructing a private way may be joined with a count under a statute which forbids an action against a railroad corporation, until after sixty days' notice has been given of the obstruction. *Lamphier v. Worcester & N. R. Co.*, 33 *N. H.* 495.

35. Obstructing railway tracks.—(1) *Alabama.*—The Code of 1876, § 4239, declaring that "any person who wantonly or maliciously injures any railroad in this state, which is in use for the transportation of passengers or merchandise, or places any obstruction or impediment thereon, or salts stock thereon, must, on conviction, be fined not less than one hundred nor more than one thousand dollars, and, at the discretion of the court, may also be imprisoned in the county jail, or sentenced to hard labor for

not more than six months, or may be imprisoned in the penitentiary for not more than ten years," does not create or declare an offense of different, distinct degrees, but three several offenses, all of the same nature, of the same grade, and subject to like punishment. *Clifton v. State*, 73 Ala. 473.

Where a party is indicted for placing an obstruction upon a railroad track, and the criminal act and the defendant's connection with it are clearly proved, the absence of a motive or a special intent to injure is immaterial, as the law infers an intent from the quality of the act. *Clifton v. State*, 73 Ala. 473.

On a prosecution for placing an obstruction on a railroad track (Code, § 4100), the evidence showing that the defendant was seen, at twelve o'clock at night, walking down the track with a crowbar on his shoulder, and that a broken crowbar was found at the place the next morning, it is permissible for the prosecution to adduce evidence identifying it as one which had been kept and used at the depot for some time, and which had been missing from that place since the evening of the preceding day; and a witness who had often seen or used it may express his opinion or belief as to its identity in such terms as will indicate whether his statement is made confidently or doubtfully, as, "I am satisfied it is the same crowbar," or "I would say it is the same, but do not know that it is;" and if he hesitates to express his opinion, the court may instruct him "that he could determine whether it was the same on the same principle that he determined whether his hat or knife was his own." *Mitchell v. State*, 94 Ala. 68, 10 So. Rep. 518.

A railroad shovel found under the defendant's house after his arrest being identified as one which had been hidden, three or four months before the obstruction of the railroad track, in the grass near that spot, and which could not be found there on the day after the track was obstructed, the court may permit it to be produced and exhibited to the jury. *Mitchell v. State*, 94 Ala. 68, 10 So. Rep. 518.

(2) *California*.—The provisions of Penal Code, § 587, providing for the punishment of persons obstructing a railroad track, and of § 664, providing for the punishment of persons attempting to obstruct such tracks, apply to a street-car track where the cars are

propelled by a cable. *People v. Stiles*, 75 Cal. 570, 17 Pac. Rep. 693.

(3) *Indiana*.—The Act of June 10, 1852, § 29, prescribing the penalty for wilfully and maliciously placing any obstruction upon a railroad track, and for changing any switch, is not repealed by the Act of June 14, 1852, § 66, providing for the punishment of persons who shall obstruct any public highway, railroad, tow-path, canal, turnpike, plank, or coal road, or injure any bridge, toll-gate, etc. The latter act is not repugnant to the former, neither does it cover all of its provisions. Therefore an indictment will lie under the former act. *Coghill v. State*, 37 Ind. 111.

Under an indictment for maliciously placing pieces of timber upon a railroad track, it is not necessary that the proof should correspond with the allegation as to the number of pieces placed upon the track. One piece calculated to obstruct passing trains is sufficient to constitute the offense. *Allison v. State*, 42 Ind. 354.

On trial of an indictment for placing obstructions on a railway track, an instruction that, "if the proof shows conclusively that the defendant placed the timbers upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the presumption is that the act was wilfully and maliciously done," it was held, was erroneous. *Allison v. State*, 42 Ind. 354.

An indictment for obstructing a railroad track under Ind. Rev. St. 1881, § 1960, if it follow the language of the statute, need not allege that the obstruction was such as would endanger the passage of trains, or throw the engine or cars from the track. *Riley v. State*, 95 Ind. 446.

(4) *Iowa*.—Under section 3979 of the code it is not necessary to allege in the indictment or prove upon the trial that the obstruction wilfully or maliciously placed upon the track of a railway actually did obstruct or hinder its trains. *State v. Clemens*, 38 Iowa 257.

(5) *Massachusetts*.—In an indictment for wilfully obstructing the engine passing upon a railroad alleged to be built by the Boston and Worcester railroad company, it is a fatal variance if the true name is the Boston and Worcester railroad corporation. *Commonwealth v. Pope*, 12 Cush. (Mass.) 272.

The driver of a heavily loaded wagon on a highway, having one wheel in the track of

a horse railroad established by authority of the legislature, and moving at the usual rate of speed of such wagons, but at a slower rate than horse-railroad cars usually move, is bound to turn off from the track at the request of the conductor of a car owned by the proprietors of the railroad if there is room to do so, although it is usual and much easier to drive such wagons with one wheel upon the railroad track. And if, by not so turning off for several hundred feet, he obstructs the passage of the car at its usual rate of speed, he is liable to indictment under a statute prohibiting the wilful and malicious obstruction of the railroad, even if he did not enter upon the track with the intention of obstructing the cars, and continued thereon without intending to obstruct them, and merely for his own convenience. *Commonwealth v. Temple*, 14 Gray (Mass.) 69.

In an indictment for wilfully and maliciously obstructing a horse-railroad company in the use of its road, the actual enjoyment and use of the franchise by the company is sufficient to authorize the jury to find, in the absence of any proof to the contrary, that its location was lawful; and it is not necessary to prove that the defendant was requested to remove from the track, and refused to do so, if the jury are satisfied, from other evidence, that his obstructing the cars was wilful and malicious. *Commonwealth v. Hicks*, 7 Allen (Mass.) 573.

In an indictment for wilfully and maliciously obstructing a street railway, the intention of the defendant is sufficiently alleged by charging, in the words of the statute, that his acts were "wilfully and maliciously" done. *Commonwealth v. Hicks*, 7 Allen (Mass.) 573.

A passenger who pulls a rope attached to a bell on the engine and causes the train to stop is not liable to indictment under Gen. St. §§ 63, 107, for obstructing a train and endangering the safety of passengers, regardless of what his motive may have been, though the safety of passengers may have been endangered by stopping the train. *Commonwealth v. Killian*, 109 Mass. 345.

(6) *Minnesota*.—If one wilfully places on a railroad track used by and on which engines and carriages conveying persons are likely to pass, any obstruction likely to produce disaster to such engines or carriages, and to endanger the safety of the persons conveyed thereon, he is guilty of the of-

fense described in section 63, ch. 94, Gen. St. 1878, though no engine or carriage be actually stopped or impeded by such obstruction. *State v. Kilty*, 9 Am. & Eng. R. Cas. 153, 28 Minn. 421, 10 N. W. Rep. 475.

(7) *Mississippi*.—So much of the charter of the Mississippi Central R. Co. as makes provision for the punishment of persons placing obstructions on the track of the road is a public law of the state; and being in relation to a subject which is made a matter of special provision by arts. 163 and 164, p. 600 of the Rev. Code, is superseded and repealed. (Arts. 2 and 3, Rev. Code, 43.) *McCarty v. State*, 37 Miss. 411.

An indictment which charges that the accused "wilfully and maliciously did place an obstruction on" a certain named "railroad, which obstruction was of such a nature as to endanger the lives of persons being carried on said road," is sufficient under art. 164, p. 600 of Rev. Code. *McCarty v. State*, 37 Miss. 411.

(8) *Nebraska*.—When the crime of maliciously placing obstructions upon a railroad track is fully established by competent testimony, the free and voluntary confession of the defendant may be proven for the purpose of connecting him with the offense. *Weinecke v. State*, 34 Neb. 14, 51 N. W. Rep. 307.

(9) *New Hampshire*.—Upon an indictment under the statute for maliciously placing obstructions upon the track of a railroad, evidence showing that the prisoner placed on the track other obstructions than those for which the indictment was found is competent, provided the acts are so connected that they may be regarded as being the continuation of the same transaction. *State v. Wentworth*, 37 N. H. 196.

In an indictment for placing obstructions on a railway track it is not necessary to allege the legal existence or organization of the corporation, or the ownership of the road, nor to prove the same, unless the averment be such as to be matter of essential description. *State v. Wentworth*, 37 N. H. 196.

Where the allegation was that the defendants "wilfully and maliciously did place upon the track or the railroad of the Boston and Maine railroad, in Somersworth, two iron rails," etc.—*held*, that the averment was not one of property, but a description of the railroad where the obstructions were placed, and that parol evidence that the road was

called and known by the name of the Boston and Maine railroad was sufficient. *State v. Wentworth*, 37 N. H. 196.

An indictment for maliciously placing obstructions on a railroad need not aver that the road was a corporation, or carrier, or a way or road used for travel. *State v. Wentworth*, 37 N. H. 196.

In an indictment upon the statute for maliciously placing obstructions upon a railroad, "whereby the life of any person may be endangered," it is not necessary that the names of the persons riding in the cars, whose lives are endangered, should be set forth. And where the indictment described the obstructions, accompanied by this averment, "whereby the lives of sundry persons, to wit, twenty persons, riding in said cars upon said railroad, were greatly endangered"—*held*, that the averment was sufficient. *State v. Wentworth*, 37 N. H. 196.

An indictment charged the obstruction of a railroad by wilfully and maliciously placing thereon two sleepers and a post. *Held*, that the statutory offense—Gen. St. ch. 263, § 16—was well charged. *State v. Beckman*, 57 N. H. 174.

The evidence tending to show that the placing of the obstructions was one continuous act—*held*, that it was properly charged, notwithstanding the obstructions were at considerable distances from each other. *State v. Beckman*, 57 N. H. 174.

It was not necessary to allege an intent to endanger life, the gist of the offense being the wilful and malicious placing of obstructions whereby life might be endangered. *State v. Beckman*, 57 N. H. 174.

It being found by the jury that the defendant wilfully and maliciously placed obstructions so that life was endangered—*held*, that it was no defense that the respondent in fact intended other mischief, and did not intend to endanger life. *State v. Beckman*, 57 N. H. 174.

(10) *New York*.—Under the Act of 1877, ch. 261, providing that any person who shall wilfully place an obstruction upon any railroad so as to endanger the safety of any train shall be liable to indictment, the party may be convicted without any purpose to wreck a train, as in this case, where defendant and others took an engine from a yard without permission, none of them being engineers, and ran it for a considerable distance each way on the track so as to endan-

ger trains. *People v. Adams*, 16 Hun (N. Y.) 549.

(11) *Tennessee*.—Placing obstructions on a railroad track, whereby a hand-car is thrown from the track and an employé of the railroad killed, is not a violation of sections 5387, 5388 of the (M. & V. Tenn.) code. The statute relates alone to cars and trains propelled by steam and drawn by locomotives. *Harris v. State*, 14 Lea (Tenn.) 485.

Where defendant placed obstructions on a railroad track for the purpose of getting a job or reward for notifying the railroad of the obstructions, and signaled the train and had it stopped before it struck the obstruction—*held*, he was guilty, under the statute (New Code, § 5387), of wilfully and maliciously placing obstructions on the railroad track. *Crawford v. State*, 15 Lea (Tenn.) 343, 54 Am. Rep. 423.

(12) *Texas*.—To warrant a conviction under art. 678, Rev. Pen. Code, for placing an obstruction on a railroad track, the evidence must show that the obstruction was such as might have endangered human life—which is the gist of the offense. This is not proved by evidence that the defendant placed across a railroad track a piece of iron bar which the witness was unable to remove with his foot, but did remove with his hands. *Bullion v. State*, 7 Tex. App. 462.

The state proved the obstruction to have been a piece of railroad iron, six or eight feet in length, put across the track, and that it was removed before any train passed. To show that human life might have been endangered thereby, the state could and should have proved whether it was on a level or an embankment, the main track or a switch, and the usual speed of trains thereat. *Bullion v. State*, 7 Tex. App. 462.

An indictment which charges that the defendant wilfully placed an obstruction upon a railroad track, "whereby the lives of persons were endangered," being substantially in the language of the statute defining the offense, is sufficient, although it does not specify the persons whose lives were endangered. *Barton v. State*, 43 Am. & Eng. R. Cas. 333, 28 Tex. App. 483, 13 S. W. Rep. 783.

On the trial of an indictment for obstructing a railroad track, testimony that another obstruction, in addition to the one charged in the indictment, was placed on

the track on the same night, and very soon after the first one, at a point some three quarters of a mile distant from the first obstruction, and that the defendant assisted in placing both obstructions upon the track, is admissible for the purpose of showing the motive or intent with which the first obstruction was made, and also for the purpose of developing the *res gestæ* of the first offense. *Barton v. State*, 43 *Am. & Eng. R. Cas.* 333, 28 *Tex. App.* 483, 13 *S. W. Rep.* 783.

(13) *England*.—An acquittal upon an indictment charging a person with a felony in obstructing a railway is no bar to a subsequent indictment upon the same facts for a misdemeanor, under the provisions of the statute. *Reg. v. Gilmore*, 15 *Cox C. C.* 85.

In order to render a person liable to the statutory penalty for obstructing the free passage of a railway, he must have intended to have committed the obstruction complained of. If a person's wagon accidentally becomes caught on a crossing, whereby a collision occurs, the owner is not liable to the penalty, although he may have been guilty of carelessness. *Batting v. Bristol & E. R. Co.*, 9 *W. R.* 271, 3 *L. T.* 665.

One who directs workmen to go on with their work in constructing a wall between his premises and the railway, in the course of which work stones and rubbish are placed on the road, obstructing the free passage of the same, is liable to conviction. *Roberts v. Preston*, 9 *C. B. N. S.* 208.

(14) *Canada*.—Where it appeared that a police constable gave the usual caution to the prisoner, who was arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him, "The truth will go better than a lie; if any one prompted you to it you had better tell about it," whereupon the prisoner said that he did the act charged against him—*held*, that the admission was not receivable in evidence, and a conviction grounded thereon was improper. *Reg. v. Romp*, 17 *Ont.* 567.

36. Obstructing streets in cities.—

(1) *General rules*.—On the trial of an indictment against several railways for obstructing public streets, where the only evidence produced against them is a map on which solid lines are marked streets, the dedication for the purpose of a highway is not established beyond a reasonable doubt, which is required in criminal cases. *State v. Du-*

buque & S. C. R. Co., (*Iowa*) 55 *N. W. Rep.* 727.

The remedy against an engineer or agent of a railroad for obstructing the crossings of a public street or road with their locomotives and cars is exclusively under the act of March 20, 1845; he is not liable to indictment at common law. *Commonwealth v. Caffp*, 48 *Pa. St.* 53.

The mere fact that a fence, erected by a railroad along the line of its right of way, is shown to inclose some ground within the lines of a plotted street that was once occupied by a pavement, the street having been opened and paved by the city up to the company's tracks, is not sufficient to sustain an indictment for obstructing the street, when no authority for paving across the company's line is shown. *Commonwealth v. Philadelphia & R. R. Co.*, 135 *Pa. St.* 256, 19 *Atl. Rep.* 1051.

A contract affixed to a grant of a right of way to a chartered street-railroad company through the streets of a city, which attempts to bind the company to certain stipulations as to mode and manner of constructing tracks, etc., etc., and which the company refuses to sign, cannot operate to prevent the company from laying its tracks, and it will not be liable to indictment for obstructing the streets as long as it keeps within reasonable bounds. *Fraser v. State*, 16 *Lea (Tenn.)* 671.

(2) *Illustrations*.—In a prosecution for obstructing a street, the court instructed the jury that it was not necessary that they should find that the defendant or its employés acted maliciously, in order to find defendant guilty, but that it was sufficient if the street was "wilfully" obstructed; and that to act wilfully means to act "intentionally or knowingly." *Held*, not objectionable when considered in connection with another portion of the charge, which expressly directed that to justify a conviction they must find that the obstruction complained of was "unreasonable." *State v. Chicago, M. & St. P. R. Co.*, 77 *Iowa* 442, 4 *L. R. A.* 298, 42 *N. W. Rep.* 365.

The G. T. R. Co. was indicted for nuisance, in obstructing a street in the town of Guelph, by occupying it with their road. It appeared that the municipality had passed a by-law allowing them to occupy the street with their railway, and ordering that for that purpose a portion of it should be closed altogether as a highway. *Held*, that such a

by-law was not within the 12 Vict. c. 81, § 192, and therefore that the notice there directed to be given was not required. The consent of the municipality might have been given, under 14 & 15 Vict. c. 51, § 12, by resolution as well as by by-law. *Reg. v. Grand Trunk R. Co.*, 15 U. C. Q. B. 121. —QUOTED IN *Pembroke Tp. v. Canada C. R. Co.*, 3 Ont. 503.

Defendant's act of incorporation required that "the rails of their railway shall be laid flush with the streets and highways, and the railway track shall conform to the grades of the same so as to offer the least possible impediment to the ordinary traffic of the said streets and highways." *Held*, that an omission to lay the rails flush with the street would be indictable, without showing that any unnecessary impediment was offered to the traffic. *Reg. v. Toronto St. R. Co.*, 24 U. C. Q. B. 454.

37. Obstructing the mails.—Boys twelve years old, who, at the time of a strike, obstruct the running of electric cars that have a contract for carrying the United States mails, are liable to indictment for obstructing the mails, under the United States Revised Statutes. *United States v. Thomas*, 55 Fed. Rep. 380.

Arresting a mail carrier on an indictment for murder is not obstructing the mails. *United States v. Kirby*, 7 Wal. (U. S.) 482. —REVIEWED IN *United States v. Kane*, 9 Sawy. (U. S.) 614.

The defendant and others, discharged railway laborers, to the number of one hundred and fifty, assembled at Pendleton, Oreg., and by threats of violence prevented the daily train of the Oregon R. and N. Co., including the mail-car with the United States mail therein, from proceeding to Portland, because the conductor would not permit them to ride thereon to Portland free of charge, on the ground that they had no money, and the company having "passed them up" ought to "pass them down;" and for the same reason and by the same means prevented the conductor from detaching said mail-car from said mail-train and sending it to Portland with the United States mail therein. *Held*, that whether the company was under any legal obligation to carry the defendant to Portland free of charge or not, he had no right to prevent the conductor from sending the mail-car on to Portland, as he did; and that the conduct of the defendant and his

associates being unlawful, and necessarily causing the passage of the mail to be obstructed, the law imputes to him an intention, whatever the primary purpose of his conduct was, to cause such obstruction, and therefore he is guilty of obstructing and retarding the passage of the mail, contrary to section 3995 of the Revised Statutes. *United States v. Kane*, 9 Sawy. (U. S.) 614. —REVIEWING *United States v. Kirby*, 7 Wall. (U. S.) 482.

38. Overworking employees.—The provisions of the act of 1892 (§§ 2 and 3, ch. 711, N. Y. Laws of 1892) providing "for a limit of hours of service on railroads," which declares what shall constitute a day's labor in certain employments upon railroads, and provides for payment to railroad employes for fractional parts of the statutory day, are not penal in their scope, but are applicable to an adjustment of the contractual relations of the parties, when the contract for hire of such an employe omits to prescribe the duration of a day's service. *People v. Phyfe*, 53 Am. & Eng. R. Cas. 30, 136 N. Y. 554, 32 N. E. Rep. 978, 49 N. Y. S. R. 680; reversing 20 N. Y. Supp. 461.

The clause of said act (§ 4) declaring a violation of its provisions to be a misdemeanor, applies only to the prohibition (§ 1) against permitting or requiring the employes charged with responsibility for the movement of trains, who have worked continuously for twenty-four hours, from going on duty again until after eight hours' rest. *People v. Phyfe*, 53 Am. & Eng. R. Cas. 30, 136 N. Y. 554, 32 N. E. Rep. 978, 49 N. Y. S. R. 680; reversing 20 N. Y. Supp. 461.

An indictment against the superintendent of a railroad, charging him with employing the complainant as a trainman at a fixed price per day, requiring him to work as and for his day's work fourteen and a half hours continuously, refusing to pay him for the extra time over the ten hours fixed by the act as a day's work, and discharging him on his refusal to accept the price per day agreed upon in full for his labor, does not charge an offense under the act. *People v. Phyfe*, 53 Am. & Eng. R. Cas. 30, 136 N. Y. 554, 32 N. E. Rep. 978, 49 N. Y. S. R. 680; reversing 20 N. Y. Supp. 461.

39. Refusal to work on highway.—A citizen of Birmingham, having been arrested, under an ordinance of said city, for a failure to perform certain work on the

streets, claimed that he was an employé of the A. G. S. R. Co. and, as such, was exempt from work on the streets, under an act of the legislature incorporating the N. E. & S. W. Ala. R. Co. (of which the A. G. S. R. Co. was claimed to be the successor), exempting the employés of said company from jury, military, and road duty; but the proof only showed that he was in the employment of the company at the time of his arrest. *Held*, that "if there be any force in the defendant's claim of exemption," to entitle him to its benefits, it was necessary that he should have been in the company's employment at the time he was required to perform the work on the streets, and that proof merely that he was in the company's employment when arrested was insufficient. *Hill v. Birmingham*, 73 Ala. 74.

The legislature of Alabama, in incorporating a railroad company, conferred upon it "all the rights, powers, and privileges" granted by the legislature of Tennessee, where the company was originally incorporated. The Tennessee act exempted the employés of the company from road duty, but this provision was held to be unconstitutional by the supreme court of Tennessee. *Held*: (1) that the employés of the company were not exempt from road duty in Alabama; (2) that the fact that, by a former decision, the Tennessee court had upheld the exemption could not prevent the subsequent decision declaring it unconstitutional. *Johnson v. State*, 53 Am. & Eng. R. Cas. 37, 91 Ala. 70, 9 So. Rep. 71.

Laborers employed in working upon the roadbed of a railroad company which was engaged in carrying freight, passengers, and mail were summoned to work upon the public highways, but failed to appear. On being prosecuted for such failure they interposed their daily and constant employment at that time as a justifiable excuse, which defense was, however, overruled by the trial justice and circuit judge. *Held*, that, there being no definition of what was a justifiable excuse in such cases, this court could not declare the ruling below to be error of law. *State v. Hatcock*, 18 Am. & Eng. R. Cas. 127, 20 So. Car. 419.

40. Resisting arrest.—At the trial of an indictment for an assault upon an officer while in the lawful execution of the duties of his office, there was evidence tending to show that the defendant, while in an intoxicated condition, entered a passenger car of

a railroad corporation standing upon a track at a station; that while in the car he engaged in a scuffle with another person in a similar condition; that he was requested by the conductor in charge of the car to leave the car, and, upon his refusal to comply, was ejected by the conductor and a brakeman, but immediately entered the car again and refused to leave at the request of the conductor; that thereupon an officer came into the car and found the defendant standing in the car, drunk and staggering about, and cursing and talking in a drunken manner; that the conductor requested the officer to eject him; that the officer told him to go out and he refused; that the officer then told him that if he did not go out he would arrest him; that the defendant again refused, and the officer arrested him; and that the defendant resisted and struck the officer. *Held*, that upon this evidence the jury might infer that the arrest was for being drunk, and that the defendant knew that it was for that cause. *Commonwealth v. Kennedy*, 18 Am. & Eng. R. Cas. 383, 136 Mass. 152.

At the trial of an indictment for an assault upon an officer while attempting to arrest the defendant, who, being intoxicated, was conducting himself in a disorderly manner in a passenger car of a railroad corporation, the officer testified that he was sent for to go into the car. On cross-examination he was asked whether he was employed by the railroad company to preserve order, or for any purpose; to which he replied that he was not regularly in its employ for any purpose. On redirect examination he was asked who requested him to go into the car. This question was objected to by the defendant, but the judge admitted it; and the witness stated that it was the station-master of the railroad. *Held*, that the defendant had no ground of exception. *Commonwealth v. Kennedy*, 18 Am. & Eng. R. Cas. 383, 136 Mass. 152.

41. Robbery.—An ordinary railroad is not a public highway within the meaning of N. C. Rev. Code, ch. 34, § 2, punishing with death robbery in or near a public highway. *State v. Johnson*, Phil. (N. Car.) 140.

In an indictment for robbery from a stage-coach of property belonging to Wells, Fargo & Co., the ownership of the property may be laid in the driver of the coach. *State v. Nelson*, 11 Nev. 334.

An indictment charging robbery in two

counts, the only difference being that in one the money is charged as being the property of Wells, Fargo & Co. and in the other it is laid in the messenger having at the time special custody thereof, is good. *State v. Chapman*, 6 Nev. 320.

Where several persons combined to rob Wells, Fargo & Co.'s express car, in Washoe county, and one named Chapman, in pursuance of the combination, went to San Francisco and telegraphed when a large amount of money would be on the car, and the others did the robbery—*held*, that Chapman was an accessory before the fact, and as such properly charged and convicted with the others as having committed the robbery in Washoe county. *State v. Chapman*, 6 Nev. 320.

42. Shooting or throwing missiles at cars.—Under Mass. Pub. St. ch. 112, § 206, the throwing of a missile at a car is an offense, whether the car is in use at the time or not. *Commonwealth v. Carroll*, 145 Mass. 403, 14 N. E. Rep. 618.

In a complaint for throwing a missile at a car, any defect in the description of the car, or defect in respect of the place where the car was at the time, is a defect in form which cannot be availed of for the first time in the superior court on appeal. *Commonwealth v. Carroll*, 145 Mass. 403, 14 N. E. Rep. 618.

On trial of an indictment under the N. Car. Act of 1877, ch. 4, for shooting at a railroad car, proof that the pistol discharged by defendant was loaded or that the car was struck, is not necessary to a conviction. If it be unloaded and this is relied on as a defense, the fact must be shown by the defendant. *State v. Hinson*, 82 N. Car. 597.

An indictment under N. Car. Act 1877, ch. 4, which fails to charge that the railroad car or locomotive at which a missile was thrown was in actual motion, or stopped for a temporary purpose, is defective. *State v. Boyd*, 9 Am. & Eng. R. Cas. 155, 86 N. Car. 634.

A charge at the trial of an indictment for shooting into a train is properly refused, which asks "that the jury must not convict upon the uncorroborated testimony of an impeached witness," since it assumes that the testimony of a witness is not corroborated, and that he is impeached—facts that should be left to the determination of the jury. *Gilyard v. State*, 98 Ala. 59, 13 So. Rep. 391.

3 D. R. D.—25.

43. Train wrecking.—The Georgia act of October 12, 1885, making it penal to wreck railroad trains, etc., applies to all railroads, whether duly chartered as such or not. *Hodge v. State*, 38 Am. & Eng. R. Cas. 520, 82 Ga. 643, 9 S. E. Rep. 676.

On the trial of an indictment for wrecking a train, it appeared that the wreck was caused by a slab of timber placed on the track. Two witnesses testified to the voluntary confessions by the defendant, who had been employed by the company and had been discharged. He had made threats. He lived near the place of the wreck and was seen near the place that morning. Defendant offered no testimony, but made a statement denying the confessions and threats or knowledge of the crime. *Held*, that the evidence was sufficient to sustain a verdict of guilty. *Hodge v. State*, 38 Am. & Eng. R. Cas. 520, 82 Ga. 643, 9 S. E. Rep. 676.

44. Traveling without paying fare.—A violation of section 9 of the Cal. act of April 1, 1878, providing for the punishment by a fine of any one who should fraudulently evade or attempt to evade the payment of his railroad fare, constitutes a public offense within the meaning of section 15 of the Penal Code, defining a public offense; and a constable has a right to charge the county for services rendered in arresting, transporting, and feeding prisoners charged with such offense. *Dyer v. County of Placer*, 90 Cal. 276, 27 Pac. Rep. 197.

The borough justices have jurisdiction over the offense of unlawfully and wilfully entering the carriage of a railway company for the purpose of traveling without previously having paid the fare contrary to a by-law of the company. *Reg. v. Frere*, 4 El. & Bl. 598, 1 Jur. N. S. 700, 24 L. J. M. C. 68.

A person who buys a ticket for a station beyond the station at which he leaves the train, although the fare to the nearer point is greater than the fare to the further, pays his fare, within the meaning of a by-law of the company providing that every passenger shall pay his fare previously to entering a carriage of the company, and that any passenger who enters a carriage without having paid his fare shall be subject to a penalty. *Reg. v. Frere*, 4 El. & Bl. 598, 1 Jur. N. S. 700, 24 L. J. M. C. 68.

Under §§ 237 and 238 of 6 & 7 Wm. IV.

c. 106, a justice has no authority to issue a warrant before conviction of a person charged with violating a by-law of a railway company in traveling without payment of fare; the authority to arrest in the first instance is confined to an officer of the railway company, and the duty thereby imposed upon the justice is forthwith, upon the offender being brought before him, to proceed to the determination of the case. *Gelen v. Hall*, 2 H. & N. 379.

Under 11 & 12 Vict. c. 43, § 16, a justice to whom a person is brought for an offense against a by-law of a railway company imposing a penalty for traveling without payment of fare is justified in committing such person to the house of correction, to be held to answer the charge before the justices at petty sessions. *Gelen v. Hall*, 2 H. & N. 379.

The offense, under section 103 of the Railway Clauses Consolidation Act 1845, of traveling in a railway carriage without having paid the fare, and with intent to avoid the payment of it, is a criminal offense, and the penalty recoverable under that section is not a "civil debt," within the terms of section 6 of the Summary Jurisdiction Act 1879; nor do the provisions of section 35 of that act apply in such a case. The magistrate may on conviction and non-payment issue a distress warrant under section 146 of the Railway Clauses Consolidation Act 1845, and if sufficient distress is not found, shall imprison the defendant, under section 147. *Queen v. Paget*, 8 Q. B. D. (C. A.) 151, 51 L. J. M. C. 9, 4 Ry. & C. T. Cas. xvii.

45. Unlawful intrusion or trespass.—Merely to walk upon the track of a railroad is not an unlawful intrusion in such sense as to be an indictable offense under §§ 4437, 4438 of the Ga. Code. *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.

One who enters upon the land of another under a *bona-fide* claim of right is guilty of no criminal offense. Therefore an employé of a railroad company, ordered to fell trees upon land adjacent to its track which had been conveyed by the owner for a right of way, is not indictable for a wilful trespass. *State v. Crosset*, 81 N. Car. 579.

The magistrates before whom a person is brought charged with trespassing on a railway may refuse to convict on the ground that the defendant was not a wilful trespasser if he went on the company's premises for the purpose of repairing a carriage

which was there by permission of the company, and which belonged to a third party, and which could not quit the yard without the needed repair. *Jones v. Taylor*, 1 El. & El. 20. But see *Foulger v. Steadman*, L. R. 8 Q. B. 65.

46. Unlawful sale of tickets.—Ind. Act of March 9, 1875, § 8 (1 Rev. St. 1876, p. 259), regulating the issuing and taking up of railroad tickets, exempts from the operation of its provisions all special tickets, whether they are half-fare or excursion tickets, or special in any other respect. A ticket having stamped upon its face the word "special" is *prima facie* exempt from the provisions of the act. *State v. Fry*, 6 Am. & Eng. R. Cas. 340, 81 Ind. 7.

Under N. Y. act of March 23, 1860, prohibiting the sale of passenger tickets except as therein provided, an indictment must state the station or port from which the passage under the ticket is to begin. *Enright v. People*, 31 How. Pr. (N. Y.) 383.

A statute making it a misdemeanor for any unauthorized person "to sell or deal in" tickets issued by a railroad company is not violated by the sale of a single railroad ticket by a person not a dealer in such tickets. Such statute relates to the practice or business of selling railroad tickets. *State v. Ray*, 52 Am. & Eng. R. Cas. 157, 109 N. Car. 736, 14 S. E. Rep. 83, 14 L. R. A. 529.

The Pa. Act of Assembly of May 6, 1863, and its amendment of April 10, 1872, which prohibits the sale of railroad tickets except by the agents of the companies, and makes a violation of the act a misdemeanor, is constitutional. State legislatures have the right to pass such an act. *Commonwealth v. Wilson*, (Pa.) 56 Am. & Eng. R. Cas. 230.

47. Unlawful speed.—The limitations upon the rate of speed of trains at highway crossings, under the Wis. General Railway Act of 1872, §§ 37, 43, are considered as limitations upon the company's franchises; and a violation of the statute is punishable by indictment. *Horn v. Chicago & N. W. R. Co.*, 38 Wis. 463.

48. Using vulgar and abusive language.—The track of a railroad company used to carry on its business as a common carrier is not a public highway, within the meaning of the statute against the use of vulgar and abusive language. To constitute such highway there must be a road dedicated to and kept up by the public, as dis-

tinguished from a private way. *Comer v. State*, 62 Ala. 320.

49. Violation of customs laws.—To authorize a conviction under a penal statute prescribing a punishment for "wilfully" removing an official seal from property which had been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted wilfully. *United States v. Three Railroad Cars*, 1 Abb. (U. S.) 196.

50. Violation of Sunday laws.—(1) *Constitutionality of Sunday laws.**—Statutes forbidding interstate freight trains to run on Sunday are, by their necessary operation, whatever their professed object, a regulation of or an obstruction to interstate commerce. *Norfolk & W. R. Co. v. Commonwealth*, 47 Am. & Eng. R. Cas. 1, 88 Va. 95, 13 S. E. Rep. 340.—DISAPPROVING *State v. Baltimore & O. R. Co.*, 24 W. Va. 783. QUOTING AND DISTINGUISHING *Cooley v. Port Wardens of Philadelphia*, 12 How. (U. S.) 299. QUOTING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557; *Leisy v. Hardin*, 135 U. S. 100; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114.

The provision of section 4578 of the Code of Georgia, making it a misdemeanor to run a freight train upon any railroad in the state on the Sabbath day, is a regulation of internal police and not a regulation of commerce. It is not in conflict with the constitution of the United States, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freight received on board before the trains entered this state, and consigned to points beyond its limits. *Hennington v. State*, 90 Ga. 396, 17 S. E. Rep. 1009.—APPROVING *State v. Baltimore & O. R. Co.*, 24 W. Va. 783. DISAPPROVING *Norfolk & W. R. Co. v. Commonwealth*, 88 Va. 95, 13 S. E. Rep. 340.

* Sunday laws applicable to railroads as regulations of interstate commerce, see note, 18 AM. & ENG. R. CAS. 481.

New York Penal Code, § 263, prohibiting all manner of servile labor on the first day of the week, except works of necessity or charity, is in conflict with the Constitution of the United States, art. 1, § 8, so far as it affects the interstate traffic of common carriers, and is therefore void; and such section cannot be upheld as a police regulation; but it is otherwise as to traffic that is confined entirely to one state. *Dinsmore v. New York Board of Police*, 12 Abb. N. Cas. (N. Y.) 436, 65 How. Pr. 72.

Virginia Code 1887, § 3891, relating to Sunday trains, is inconsistent with United States Const. art. 1, § 8, giving congress power to regulate interstate commerce, and void as to trains running between different states. *Norfolk & W. R. Co. v. Commonwealth*, 47 Am. & Eng. R. Cas. 1, 88 Va. 95, 13 S. E. Rep. 340.

A state statute prohibiting running of freight trains on Sunday is not unconstitutional as an attempt to regulate interstate commerce, though the company be indicted for running a train through the state, or from the state to other states, on Sunday. *State v. Baltimore & O. R. Co.*, 10 Am. & Eng. R. Cas. 466, 24 W. Va. 783.—QUOTING *Erie R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 284; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465.—APPROVED in *Hennington v. State*, 90 Ga. 396. DISAPPROVED in *Norfolk & W. R. Co. v. Commonwealth*, 88 Va. 95.

(2) *How they are to be construed.**—If the act of February 28, 1874 (Ga. Code, § 4578), is to be construed as allowing freight trains not carrying live stock to be run in any case after 8 o'clock on Sunday morning, such running is lawful only when the given train has been actually started on or before the previous Saturday night. A freight train not started on its schedule until 12.50 o'clock on Sunday morning cannot be lawfully run either before or after 8 o'clock of that day. *Jackson v. State*, 54 Am. & Eng. R. Cas. 325, 88 Ga. 787, 15 S. E. Rep. 905.

An express company under New York laws is not justified in transacting its ordinary business on Sunday, nor in receiving and delivering merchandise on that day in the same place, but it has a right to move its interstate business or perishable articles

* Construction of statutes on the observance of the Sabbath, see note, 5 AM. & ENG. R. CAS. 42.

on that day, and may enjoin the police of a city from interfering with such business. *Adams Exp. Co. v. Board of Police*, 65 How. Pr. (N. Y.) 72, 12 Abb. N. Cas. 436.

The running of cars on passenger railroads on Sunday by reason of the noise accompanying them, is a disturbance of the public peace of the Sabbath and the rights of worship and of rest; and the drivers of such cars may be arrested and held for a breach of peace. *Commonwealth v. Jeandell*, 2 Grant's Cas. (Pa.) 506.

Under §§ 16 and 17, ch. 149, W. Va. Code 1887, no indictment can be sustained against a railroad company for running trains on Sunday. There is no law to sustain such indictment. *State v. Norfolk & W. R. Co.*, 43 Am. & Eng. R. Cas. 330, 33 W. Va. 440, 10 S. E. Rep. 813. — OVERRULING on this point *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

(3) *Indictment*.—In an indictment against a railroad company for being found laboring at its trade and calling on a certain Sabbath day it is proper and necessary to allege that such labor was not in household work or other work of necessity or charity; but it is not necessary to allege that the defendant did not conscientiously believe that the seventh day of the week ought to be observed as a Sabbath, or that it did not refrain from all secular labor on that day, or that the labor was not done in the transportation of the mail, or of passengers or their baggage. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

(4) *Impaneling the jury*.—The jury for a trial of a company for Sabbath-breaking should be formed in the manner in which juries in civil suits are formed under our statute. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

(5) *Defenses, generally*.—If there was any legal excuse or justification for running the train on Sunday the burden of proving the same was on the accused. *Jackson v. State*, 54 Am. & Eng. R. Cas. 325, 88 Ga. 787, 15 S. E. Rep. 905.

On trial of an indictment under W. Va. Code, ch. 149, § 16, against a railroad for running freight trains on the Sabbath, if the defendant proves that by a general order it had directed its agent or employes not to ship anything except live stock and perishable freight on Sunday, the jury may nevertheless find the defendant guilty, if by

proof of the habitual running of freight trains about the time the offense was committed, or from other satisfactory evidence, the jury are satisfied that the running of such trains in violation of such general order met the assent of the corporation. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

On the trial of an indictment against such a railroad company for running its trains on Sunday in violation of the law it is not error to refuse to permit the following question to be propounded by the company to its dispatcher of trains: "Did the defendant run out any train from Piedmont east in the month of April, 1873, or about that time, except such as were necessary?" *State v. Baltimore & O. R. Co.*, 18 Am. & Eng. R. Cas. 466, 24 W. Va. 783.

(6) *Works of necessity*.*—The carrying of passengers and baggage on the Sabbath day is a work of necessity, and therefore not indictable under Ky. Gen. St., ch. 29, art. 17, § 10, prohibiting work or business on the Sabbath day, except ordinary household work or other work of necessity or charity. *Commonwealth v. Louisville & N. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475.—QUOTING *McGatrick v. Wason*, 4 Ohio St. 566; *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. S. Towboat Co.*, 23 How. (U. S.) 209.

The defendants were indicted for having been engaged at common labor on Sunday. The evidence showed that they were servants of a railroad company and were engaged on that day in taking up an old switch and putting in a new one, and that the work could not be accomplished in less time than eight hours; that the work could not have been done on any day of the week except Sunday without delaying four of the company's trains; that the track of the company was then in a very bad condition, and it was then engaged in taking up the old iron and replacing it with steel. *Held*, the work was one of necessity, within the meaning of the statute. *Yonoski v. State*, 5 Am. & Eng. R. Cas. 40, 79 Ind. 393.

(7) *Evidence—Time of offense*.—Where a railroad is indicted for running freight trains on the Sabbath, and it denies that it permitted its employes to do so, mere proof that part of a load of coal was transported

* Works of charity or necessity, see note, 6 AM. & ENG. R. CAS. 220.

on Sunday is not sufficient to prove the defendant's assent, without proof of habitual recurrence of the act. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

It is not necessary in a trial for Sabbath-breaking to prove by positive affirmative evidence that the cars run over the track of the defendant belonged to or were under the control of the defendant; this may be legitimately inferred from their being run over the railroad of the defendant. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

It is not necessary, to sustain an indictment for Sabbath-breaking, to prove that the acts charged were done on the particular day named in the indictment; it is sufficient to prove that the defendant labored in its trade on a Sabbath day within one year before the finding of the indictment against it, and that such labor was not in the household or other work of necessity or charity, unless it appears that the defendant is within one of the exceptions of § 17, ch. 149, of the Code of West Virginia. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362.

On the trial of an indictment, under section 4578 of the code, against the officer of a railroad company having in charge the transportation department thereof, which alleges that a freight train was run on Sunday, and specifies a particular day of a particular month in a given year, evidence is admissible that the train was run on a Sunday corresponding to any day of any month within two years preceding the finding of the bill of indictment; and proof of guilt on any Sunday to which the evidence applies will warrant a conviction, though there be no evidence touching the particular Sunday designated by the letter of the indictment. *Jackson v. State*, 54 Am. & Eng. R. Cas. 325, 88 Ga. 787, 15 S. E. Rep. 905.

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I. RIGHT OF ONE COMPANY TO CROSS THE RIGHT OF WAY OF ANOTHER, AND HOW EXERCISED.

1. *In General*.*

1. **Under company's charter or statute.**—To authorize a company to cross the track of another road it is not necessary that any express power should be given in its charter. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205.—REVIEWING *Boston Water Power Co. v. Boston & W. R. Corp.*, 23 Pick. (Mass.) 360.—REVIEWED IN *State (Morris & E. R. Co., pros.) v. Hudson Tunnel R. Co.*, 38 N. J. L. 548.

* Crossing of one railroad by another, see notes, 3 AM. & ENG. R. CAS. 522; 10 *Id.* 31; 14 *Id.* 76; 17 *Id.* 168; 36 *Id.* 571.

A company's charter gave the right to cross all railways and roads now or hereafter to be laid on Market street, Philadelphia, between Ninth and Front streets, at grade, and to intersect same at grade. *Held*, the right to cross and recross other roads does not mean a general and unlimited right to cross, but only such crossing as is absolutely necessary to enable the company to build a road on Market street. It appearing that there is sufficient room to build without crossing, an injunction against it will be perpetuated. *Market St. Pass. R. Co. v. Union Pass. R. Co.*, 10 Phila. (Pa.) 43.—FOLLOWING *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 72.

Railroad corporations in Ohio accept their charter and franchises, and own and use their tracks, subject to the power of the state to authorize the construction of other railroads across their tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604, 16 Am. Ry. Rep. 291.—APPLIED IN *Cincinnati I. P. R. Co. v. City & S. Tel. Assoc.*, 48 Ohio St. 390.

The Pennsylvania general railroad act of Feb. 19, 1849, P. L. 83, giving a general authority to lay out and construct a railroad between designated termini, confers the right to cross the tracks of another company, by necessary implication, and absolutely necessary to carry out the intent of the franchise. *Perry County R. Co. v. Newport & S. V. R. Co.*, 150 Pa. St. 193, 24 Atl. Rep. 709.

Where a company intends to cross with its line another railway, the consent in writing of the owner of such railway is necessary under a provision in the company's act that nothing therein should authorize it to enter the lands of any person without his previous consent, and also providing the procedure for establishing a railway crossing, and for making compensation. *Clarence R. Co. v. Great N. of E., C. & H. J. R. Co.*, 13 M. & W. 706, 3 Railw. Cas. 426, 7 Jur. 65, 3 G. & D. 389, 4 Q. B. 46, 12 L. J. Q. B. 145.

The general rule is that a mortgagor in possession can make no grant of any part of the mortgaged property, nor other contract in relation to it, which will prejudice the rights of the mortgagee; but under

the statutory provision regulating the indorsement of railroad bonds by the state, and declaring its lien and priority (Rev. Code, § 1424-35), express provision is made for the intersection of roads which have received aid from the state, and this provision is an implied stipulation in every mortgage executed under the law; nor is it limited to an intersection at right angles when, as in this case, the crossing is made in the boundaries of a prospectively large city, and a distance of four thousand feet is agreed on for the roads to approach and cross each other. *Alabama G. S. R. Co. v. South & N. Ala. R. Co.*, 84 Ala. 570, 3 So. Rep. 286, 5 Am. St. Rep. 401.

2. Under contract between the companies.—Where a company by a written agreement with another company gave the latter the right, upon certain considerations named, to construct its railroad across the main and side-tracks of the senior company, and afterwards permitted the junior company to locate its right of way and construct its track over a strip of ground owned by the senior company, but which had not been acquired for or devoted to a public use by said company, the latter could not thereafter, even though the compensation for the ground in dispute was not included in the agreement, enjoin the junior company from constructing a side-track on said strip of ground within the limits of its right of way, it not appearing that the side-track would in any way, directly or indirectly, affect the operation of trains over the senior company's road, or that it would necessarily obstruct any approach to the depot or other grounds of the senior company, and used in the transaction of its business. *Chicago, St. L. & P. R. Co. v. Cincinnati, W. & M. R. Co.*, 126 Ind. 513, 26 N. E. Rep. 204.

In a contract between two companies for the right of way, where the track of one crosses the other, a stipulation that it shall have "the perpetual and free use of the right of way" of the other, within the distance specified, not only contemplates its uninterrupted use, but also relieves it from the payment of compensation. *Alabama G. S. R. Co. v. South & N. Ala. R. Co.*, 84 Ala. 570, 3 So. Rep. 286, 5 Am. St. Rep. 401.—*RECONCILING Illinois C. R. Co. v. Chicago, B. & N. R. Co.*, 122 Ill. 473.

3. — specific performance of the contract.—A tripartite agreement be-

tween an incorporated land company and two railroad companies, whose tracks ran through its lands and crossed each other, by which the right of way and place of intersection are established, is supported by the twofold consideration of benefit to one party and detriment to the other, when it appears that the railroad company seeking to avoid it acquired valuable rights under it, and that the other company had, in consequence of it, abandoned another crossing previously selected. *Alabama G. S. R. Co. v. South & N. Ala. R. Co.*, 84 Ala. 570, 3 So. Rep. 286, 5 Am. St. Rep. 401.

Where the contract sought to be enforced, providing for the right of way and intersection of two railroads, contains a stipulation that one company shall have the free use of the other's right of way, "in a manner to be hereafter determined by deed," but no deed is ever executed, the uncertainty and indefiniteness of the stipulation, if objectionable, is obviated by proof of the contemporaneous construction of the parties in execution of the contract, one being placed in possession of the right of way selected, and the other acquiescing in that possession without objection, for more than nine years. *Alabama G. S. R. Co. v. South & N. Ala. R. Co.*, 84 Ala. 570, 3 So. Rep. 286, 5 Am. St. Rep. 401.

Equity will specifically enforce a contract between two companies, whereby one grants to the other and its successors the right to intersect its track, conditioned on the annual payment of a certain sum of money to defray the expenses of keeping a flagman at the point of intersection, against the successors of the respective companies under foreclosures of mortgages executed prior to such contract, notwithstanding neither company was made a party to the foreclosure of the mortgage against the other. *Rome, W. & O. R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

And such an agreement may be set up as a bar to proceedings, under N. Y. Laws of 1850, ch. 140, § 28, to acquire the right to cross and intersect the road, instituted by the successors under such foreclosure proceedings. *Rome, W. & O. R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

In consideration of the right to cross a right of way, a company gave another the right to cross in the future. The agreement could not be specifically enforced where the crossing was to be at a point not

contemplated by the parties and where great damage would result to the former company, such as interfering with its freight-yard. *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105; *reversed in* 34 *N. J. Eq.* 266.

4. Wrongful appropriation—Damages.—Where a graded right of way and roadbed of one company is crossed in several places by the road of another company, so that the first company contends that the second company has practically adopted its line and prevented the building of its road thereon, the damages to which the company owning such right of way is entitled are not to be based upon the rule that where a railroad company, in the exercise of the right of eminent domain, appropriates a part of a tract of land for a right of way it must compensate the landowner not only for the land actually taken, but for the depreciation in the value of the whole tract. That rule has no application to such a case. *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 51 *Am. & Eng. R. Cas.* 438, 86 *Iowa* 500, 53 *N. W. Rep.* 305.

In such a case the company owning the right of way is entitled to damages for any advantage gained by the company crossing its line and appropriating part of its right of way. *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 51 *Am. & Eng. R. Cas.* 438, 86 *Iowa* 500, 53 *N. W. Rep.* 305.

The evidence in this case does not support the contention of the company owning the right of way that it was in a situation to proceed with the construction of its road and was only prevented because the defendant's road crossed its line several times; the court holds that \$5000 is fully equal to any damages sustained. *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 51 *Am. & Eng. R. Cas.* 438, 86 *Iowa* 500, 53 *N. W. Rep.* 305.

2. Under Right of Eminent Domain.

a. In General.

5. Necessity for condemnation.—A crossing of the roadways and tracks of the Baltimore & O. R. Co. by another road, and a *fortiori* the use of them for the distance of five miles, could not be lawfully effected against its assent, save by an exercise of the right of eminent domain and subject to the constitutional mandate that just compensation therefor be first paid or tendered. *Pennsylvania R. Co. v. Baltimore*

& O. R. Co., 14 *Am. & Eng. R. Cas.* 79, 60 *Md.* 263.

6. Constitutional provisions.—Section 21, art. 14, of the Constitution of Alabama, providing that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," construed in connection with section 7 of the same article of the constitution, which provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed," etc., does not authorize one railroad to cross the track of another without making just compensation. *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.*, 96 *Ala.* 571, 11 *So. Rep.* 642.

Article 10, § 1, of the Constitution of Texas, provides: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and it shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay, under such regulations as shall be prescribed by law." The regulations to be prescribed by law for the purpose of carrying out the provisions of this section of the constitution may with propriety extend to just such matters as are embraced in the act imposing forfeitures upon railway companies failing to erect depots at the point of intersection with another road, where the site is practicable and the crossing not within five miles of a town in which is a union depot kept by such roads. *San Antonio & A. P. R. Co. v. State*, 45 *Am. & Eng. R. Cas.* 586, 79 *Tex.* 264, 14 *S. W. Rep.* 1063.

7. Constitutionality and validity of statutes.—(1) *Alabama.*—Section 1582 of the Alabama Code of 1886, which provides that a company has authority to cross or to intersect any railroad, and that if such crossing or intersection cannot be made by contract or agreement with the corporation or association or persons having or controlling the railroad to be crossed, or with which an intersection is to be made, "on the application of either party the judge of probate of the county * * * must appoint three arbitrators, * * * who must determine the terms and conditions upon which such crossing or intersection shall be made; * * * and such crossing or intersection must be made in accordance with such

award," is in conflict with section 7 of art. 14 of the Constitution of Alabama, prohibiting the general assembly from depriving any person of an appeal from any preliminary assessment of damages made by reviewers, or otherwise. *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.*, 57 Am. & Eng. R. Cas. 639, 96 Ala. 571, 11 So. Rep. 642.—QUOTING *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297.

The legislature, in the exercise of the right of eminent domain, can empower a railroad corporation to cross another railroad or a turnpike road on making compensation; and whatever damage may result therefrom the exercise of such a right cannot be considered as the condemnation of a franchise nor the impairment of a contract, within the meaning of the constitution of the United States. *Baltimore & H. de G. Turnpike Co. v. Union R. Co.*, 35 Md. 224.—DISTINGUISHED IN *Cumberland & P. R. Co. v. Pennsylvania R. Co.*, 10 Am. & Eng. R. Cas. 357, 57 Md. 267.

(2) *Indiana*.—A statute is contrary to public policy which undertakes to restrict a railroad incorporated under the general railroad law of Indiana from crossing another road in any city near the terminus of the latter, because such is special legislation tending to the benefit of certain localities and infringing commerce. *Aurora & C. R. Co. v. Lawrenceburgh*, 56 Ind. 80, 18 Am. Ry. Rep. 136.

(3) *Michigan*.—How. Mich. St. § 3350, as amended by art. 174, Laws of 1883, in so far as it provides for the payment by the railroad company whose road is crossed of any part of the expense of making such crossing, is unconstitutional. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 272, 62 Mich. 564, 29 N. W. Rep. 500.—DISTINGUISHED IN *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350.

(4) *New York*.—The legislature has power to pass an act authorizing parties, to whom the right to construct a railroad is given, to run upon, intersect, or use any portion of other railroad tracks upon making due compensation therefor. *In re Kerr*, 42 Barb. (N. Y.) 119.

(5) *Washington*.—Under § 1571, Washington Gen. St., providing that if two railroad corporations cannot agree upon the point and manner of railroad crossings, the

same shall be ascertained and determined in the manner provided by law for the taking of lands, and under § 651, Code Pro., providing that if, at the time and place appointed for the hearing of the petition, the court shall be satisfied by competent proof that the land or other property sought to be appropriated is required and necessary for the purposes of such enterprise, an intersecting railroad cannot determine for itself the point and manner of its crossing another road, but the necessity therefor is a matter for adjudication by the court. *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. Rep. 551.

8. Interpretation of statutes—Illinois.—The power to take the right of way, or any part of the right of way, of another company is expressly limited by the statute to the purposes of crossing, intersecting, and uniting, or, more shortly stated, to the "connections" of the two roads. *Illinois C. R. Co. v. Chicago, B. & N. R. Co.*, 30 Am. & Eng. R. Cas. 287, 122 Ill. 473, 13 N. E. Rep. 140, 11 West. Rep. 133.

Under present legislation a company is authorized to cross and intersect any intervening railroads at any point on its route; and this, by implication, is a legislative declaration that the subordination of premises already occupied by a railroad to the use of another for a cross-way is a change in the use which the public good demands; but the corporation seeking the right of way, when the parties cannot agree, must select the place and manner of the proposed crossing, and the character and conditions of the use sought, and should state the same in the petition for condemnation, to afford the proper basis for ascertaining the compensation to be paid. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 2 Am. & Eng. R. Cas. 440, 97 Ill. 506.—FOLLOWED IN *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21.

The sixth clause of section 19 of the general railroad law of Illinois, 1872, confers power upon any railroad corporation formed under that act, to cross, intersect, etc., any other railroad before constructed, at any point in its route, and upon the grounds of such other railway company; and provides that if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings, etc., the same shall be ascertained and determined in the manner

provided by law, which means by a proceeding under the Eminent Domain Act, *Chicago & W. I. R. Co. v. Illinois C. R. Co.*, 113 Ill. 156.

9. — Michigan.—The board of railroad crossings of the state of Michigan, acting under Pub. Acts 1887, p. 294, may approve of a map presented by a company desiring to cross a street with its track, upon condition that the company provide a passageway on the bridge proposed by it over the street for the use of teams and pedestrians. The authority of the board to impose such condition cannot be controverted after the railway company has agreed or assented to the order of the board and has proceeded thereunder. When assented to by the parties in interest the action of the board becomes in the nature of an agreement, and is conclusive and binding upon both. *Fort St. Union Depot Co. v. State R. Cross. Board*, 45 Am. & Eng. R. Cas. 113, 81 Mich. 248, 45 N. W. Rep. 973.

Where a company desires to cross a street at a point occupied by another railroad, the state railroad crossing board may, under How. St. Mich. § 3301, require such company to carry its tracks above those of the other company by means of a bridge, and to provide a passageway upon such bridge for teams and pedestrians, the cost of such passageway to be borne by the two companies equally. *Fort St. Union Depot Co. v. State R. Cross. Board*, 45 Am. & Eng. R. Cas. 113, 81 Mich. 248, 45 N. W. Rep. 973.

The Detroit, L. & N. R. Co. instituted proceedings for condemning a right of way across the defendants' road. An order of confirmation was made, which was appealed from and set aside by the supreme court as illegal throughout. But after getting the condemnation, without giving notice to defendants to see if they could not agree as to the manner of making the crossing, the complainants clandestinely made preparations to push the work through for making a crossing on a Saturday night; and, to prevent interruption, procured a void injunction to be issued by a circuit court commissioner, and went through the form of sending notice by telegram, not meant to reach the company to be enjoined. A show of armed force was also made. The crossing was then made by cutting through an embankment and putting in a bridge, which raised the grade of defendants' road.

After the work was done the defendants proposed to fill up the gap that had been made and restore the track to its proper level. A bill was then filed by the complainants to prevent the defendants from interfering with their crossing, and an injunction was issued *ex parte* by the circuit court commissioner. The answer of the defendants set up the above facts in defense, and asked the benefit of a cross-bill, and of an injunction against complainant's further occupancy. The complainant's case was sustained, and the injunction granted at the outset perpetuated. Defendants appealed. *Held*: (1) that the statute in relation to making railroad crossings contemplates that the crossing shall be made under or over the existing road, if possible, but it does not contemplate or authorize the road making the crossing, even where the condemnation is regular, to use its own discretion in making it, or to disturb the old road or change its grade; (2) that complainant's conduct presented a case which had no element of lawful right, but was a violent and lawless trespass, which would have justified the defendant in filling up the excavation made, if it could have been done without a breach of the peace on its part; (3) that while it is the duty of the court, under the circumstances, to see that defendants are placed in a proper condition, yet the facts that complainant's road is and has been for some time in full operation, that there is reason for using the preventive jurisdiction in defendants' favor for protecting what is imperiled and to undo or remedy such mischief as has come from the use or abuse of legal process, render it the duty of the court to render relief without creating further complications. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 280, 63 Mich. 645, 30 N. W. Rep. 595.

10. — Minnesota.—Under Minnesota Gen. St. 1878, ch. 34, § 47 (as amended by Gen. Laws 1879, ch. 35, § 3), a company has no absolute right, at its own mere election, to a crossing over the railroad of another company. The court to whom the application for the appointment of commissioners is made is first to determine whether the crossing sought is necessary and required by public interests. The provisions of section 17, in that regard, are applicable to proceedings under section 47. *In re St. Paul & N. P. R. Co.*, 30 Am. & Eng. R. Cas. 294,

37 Minn. 164, 33 N. W. Rep. 701.—REVIEWING State v. District Court, 35 Minn. 461.

A petition for the appointment of commissioners is authorized by Special Laws 1879, ch. 185, which empowers the Minneapolis & St. Louis R. Co. to construct all or any extensions, branches, and spur tracks within the city of Minneapolis which may be necessary to connect its road with other railroads, and, when necessary for such purpose, to enter upon and cross the roadbeds and tracks of other companies upon paying just compensation, to be ascertained under the condemnation proceedings thereby authorized. Held, upon the evidence produced before the district court, that a case was made out for its consideration, within the provisions of that act, and authorizing the appointment of commissioners as petitioned for. *In re Minneapolis & St. L. R. Co.*, 30 Am. & Eng. R. Cas. 279, 36 Minn. 481, 32 N. W. Rep. 556.

11. — **Missouri.**—Section 2741 of the Missouri Rev. St. of 1889, providing that the right to appropriate lands held by any corporation shall not interfere with the uses to which by law the corporation holding the same is authorized to put its lines of railroad, has no application whatever to railroad crossings, which are controlled absolutely by the constitutional provision that every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and by § 2543 of the Rev. St. of 1889, expressly authorizing any railroad to cross, intersect, join, or unite its road with any other railroad. *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478.

12. — **Nebraska.**—The right of way of the Union Pacific railway is not property of the federal government set apart for its own public use, so as to exempt it from the operation of a law of the state of Nebraska respecting the crossing and connecting of railroads, and the condemnation of property for those purposes. *Union Pac. R. Co. v. Burlington & M. R. R. Co.*, 1 McCrary (U. S.) 452, 3 Fed. Rep. 106.—FOLLOWING *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5.

Sections 97 and 113 of the General Statutes of the state of Nebraska, respecting the crossing and connecting of railroads and the condemnation of property for those

purposes, are applicable to foreign as well as domestic railway corporations. *Union Pac. R. Co. v. Burlington & M. R. R. Co.*, 3 Fed. Rep. 106, 1 McCrary (U. S.) 452.

13. — **New York.**—Under New York Code Civ. Pro. § 1350, an order of the supreme court appointing commissioners to ascertain and determine the localities of crossings and intersections of railroad tracks affects a substantial right, within the meaning of the statute. Such a proceeding is not affected by the provisions of N. Y. Laws of 1850, ch. 140. *In re Saratoga Elec. R. Co.*, 58 Hun (N. Y.) 287, 34 N. Y. S. R. 556, 12 N. Y. Supp. 318.—REVIEWING *In re Delaware & H. Canal Co.*, 60 Hun. (N. Y.) 209; *In re Prospect Park & C. I. R. Co.*, 85 N. Y. 489; *In re Lockport & B. R. Co.*, 77 N. Y. 558.

Where one railroad company undertakes to change the route of another company which is about to cross its track, the proceeding for this purpose cannot be instituted under N. Y. Laws of 1850, ch. 140, § 22, which relates to a change of route, but must be instituted under section 28. *In re New York, L. E. & W. R. Co.*, 110 N. Y. 374, 18 N. E. Rep. 120, 18 N. Y. S. R. 159; affirming 44 Hun 215, 7 N. Y. S. R. 791.—APPLYING *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 64, *In re Lake Shore & M. S. R. Co.*, 89 N. Y. 444; *In re New York, L. E. & W. R. Co.*, 99 N. Y. 388.

But where the objection to an application instituted under the N. Y. Laws of 1850, ch. 140, § 28, subd. 6, for the appointment of commissioners to determine the localities and manner of crossing of the tracks of two railroads, is that the crossing may not be necessary if located at another point, proceedings should be instituted under the N. Y. Railroad Act, § 22, to effect a change of route. *Boston, H. T. & W. R. Co. v. Troy & B. R. Co.*, 58 How. Pr. (N. Y.) 167.—FOLLOWING *In re Buffalo & L. R. Co.*, 15 Hun (N. Y.) 365.

The power of commissioners under the N. Y. Railroad Act of 1850 to decide as to the point and manner of crossing tracks of disagreeing railroad companies gives such commissioners discretion to determine the spot and the method of its accomplishment. *Boston, H. T. & W. R. Co. v. Troy & B. R. Co.*, 58 How. Pr. (N. Y.) 167.

The petitioning railroad, under the N. Y. Railroad Act (Laws of 1850, ch. 140), is entitled to the benefit of the act, notwithstanding

ing the fact that the proposed intersecting road is parallel to its road in many places; because the company is not restricted to one crossing of the tracks. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 64; *modifying* 58 How. Pr. 67.—APPLIED IN *Re New York, L. E. & W. R. Co.*, 110 N. Y. 374.

14. — Pennsylvania.—A railroad crossing, within the meaning of Act of June 19, 1871, § 2 (P. L. 1861), is such a crossing only as appropriates no part of the land or right of way of the company whose track is to be crossed, to the exclusive use of the company seeking to cross. *Sharon R. Co. v. Sharpville R. Co.*, 122 Pa. St. 533, 17 Atl. Rep. 234.

The Union Pass. R. Co. of Philadelphia did not obtain a right to cross the tracks of a railroad already constructed, under the Pennsylvania act of 1873, which supplemented the company's charter of 1864, giving the right to cross any "railways or railroads now or hereafter to be laid on Market street." *Maris v. Union Pass. R. Co.*, 10 Phila. (Pa.) 41. And see also *Market St. Pass. R. Co. v. Union Pass. R. Co.*, 10 Phila. (Pa.) 43.

15. — Vermont.—A second company cannot be deprived of the right of intersecting or crossing the track of an older company except at the dictation and permission of the latter, under the Vt. Gen. St. ch. 28, § 18, providing that a company "shall be deemed to be seised and possessed of the land" appraised by the commissioners. *Central Vt. R. Co. v. Woodstock R. Co.*, 50 Vt. 452.

Where there is a controversy between two railroad companies as to the crossing by one of the track of the other, when there are no provisions with respect thereto in their charters, § 84, Vt. Gen. St., applies, and the respective rights of the companies must be determined by the commissioners thereunder. *Central Vt. R. Co. v. Woodstock R. Co.*, 50 Vt. 452.

16. Power to condemn right to cross, generally.*—A right to cross an existing railroad may be taken by condemnation for the use of another railroad, or for the use of the public as a highway. *State (Central R. Co., pros.) v. Bayonne*, 43

Am. & Eng. R. Cas. 176, 52 N. J. L. 503, 20 Atl. Rep. 69.

And one company may condemn the right to cross the lands of another company of the same character, although those lands be necessary for the railroad purposes of the latter company. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

The right of a railroad corporation to hold land is not an unqualified right, but it is limited to the uses and purposes of the corporation, and is to be held for the purposes of the grant for public uses. The title which it has in its right of way is a qualified title, subject to the equal right of another railroad corporation to cross the same with its track, provided compensation be made as required in the case of individuals for the property appropriated, or the interest therein which is so appropriated. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604, 16 Am. Ry. Rep. 291.—QUOTING *Boston & A. R. Co. v. Greenbush*, 5 Lans. (N. Y.) 461. REVIEWING *Albany N. R. Co. v. Brownell*, 24 N. Y. 345; *Boston & W. R. Corp. v. Old Colony R. Corp.*, 12 Cush. (Mass.) 605.

17. Application for additional facilities.—The fact that one company has acquired a strip of land thirty feet wide across another company's right of way for a crossing, upon which to lay two tracks, at the expense of the former, by mutual agreement and for a consideration agreed upon, will not preclude the former from obtaining, under the Eminent Domain Act, an additional right of way of twenty feet across the latter company's road when rendered necessary by the increased business of the former road, where there is no restriction of such right in the agreement; and it matters not that such increased business is brought about by its contracts of connection with other railroad companies. *Chicago & W. I. R. Co. v. Illinois C. R. Co.*, 113 Ill. 156.

Where a right of one company to cross another company's road by two tracks has been acquired by purchase, and limited to a right of way thirty feet wide, and it does not appear that the relinquishment for the future of any right of further application for additional facilities of crossing in any way entered into the amount of compensation which was arranged, and the right to lay additional tracks across the same road is sought by condemnation, the company

* Right of companies to cross each other's tracks, see 28 AM. & ENG. R. CAS. 679, *abstr.*

Power of one corporation to condemn lands of another, see note, 40 AM. REP. 748.

seeking to condemn will not be required to surrender its rights acquired by the purchase in order that it may have the condemnation sought, and have compensation assessed for the four tracks in that proceeding. *Chicago & W. I. R. Co. v. Illinois C. R. Co.*, 113 Ill. 156.

18. Right to run road across another company's yards.*—The Pennsylvania act of June 19, 1871, P. L. 1361, § 2, relating to the crossing of lines of railroads by other railroads, is inapplicable where one company seeks to run its line through the yard of another company and to cross yard-tracks and switches of the older company therein, as mere incidents to the use of its main line. *Allegheny Valley R. Co. v. Pittsburgh Junction R. Co.*, 122 Pa. St. 511, 6 Atl. Rep. 564. — **DISTINGUISHED IN** *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.*, 146 Pa. St. 297. **FOLLOWED IN** *Sharon R. Co. v. Sharpville R. Co.*, 122 Pa. St. 533.

A company incorporated under the acts of February 19, 1849, P. L. 79, and April 4, 1868, P. L. 62, cannot appropriate for its road a part of the yard of another company reasonably necessary for the corporate purposes of the latter, merely for the sake of convenience, or to save expense, and in the absence of any actual necessity for such appropriation. *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.*, 146 Pa. St. 297, 23 Atl. Rep. 313.

It being found that a proposed construction of plaintiff company's road across defendant company's yard, upon an elevated structure occupying but a trifling part of the yard, would cause comparatively little injury, easily compensated in damages, and was absolutely necessary, plaintiff's right to effect such crossing will be sustained and enforced. *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.*, 146 Pa. St. 297, 23 Atl. Rep. 313.

19. What may be condemned—"Located route."—By the terms of the general railroad law of New Jersey a company organized thereunder may condemn the "located route" of an existing railroad only for the purpose of crossing the same; and where a petition of such a company for the appointment of commissioners shows that it seeks to condemn a part of such a route generally, and not merely for the pur-

pose of crossing, an order made thereon will be set aside. *United N. J. R. & C. Co. v. National Docks & N. J. J. Connecting R. Co.*, 44 Am. & Eng. R. Cas. 226, 52 N. J. L. 90, 18 Atl. Rep. 574.

20. Easement acquired by crossing company.—In the condemnation of a right to cross the track of another company, all that is required is the privilege or easement of crossing. The place of crossing is to be and remain in the common use of both companies for the exercise of their respective franchises. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

In such case, like the case where the manner of crossing is designated, a mere privilege or easement of crossing is acquired, the land being subject to a like privilege or easement in favor of the road crossed. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

A right of way over level crossings constructed by a company is not restricted to the purposes for which communication was necessary at the time the railway was made, but there is a right of way for all purposes which will not interfere with the proper working of the railway. *United Land Co. v. Great Eastern R. Co.*, 33 L. T. 292, 44 L. J. Ch. 685, L. R. 10 Ch. 586, 23 W. R. 896; *affirming* L. R. 17 Eq. 158, 43 L. J. Ch. 363, 22 W. R. 126.

21. Must not materially injure easement and franchise of other company.—Upon due compensation, the present use of the lands for the railroad crossed must yield to any necessary interference by the crossing road which will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose lands are crossed. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

It seems that the action of the commissioners appointed under the New York statute, for the purpose of locating the crossing of one railroad over the track of another, is unauthorized and subject to review when such location materially impairs the buildings and facilities of the company whose track is crossed, and where it appears that exclusive occupation of such buildings is necessary by the companies owning them. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 64; *modifying* 58 How. Pr. 67.

* Crossing premises of another railroad company. When necessity is shown, see note, 28 AM. & ENG. R. CAS. 270.

Under a statute authorizing the court to prescribe a location for the crossing of one railroad by another, the company whose land is taken for that purpose can have only the place and manner of a necessary crossing, so ordered as to be as little injurious to it as is consistent with the accomplishment of the purpose, regard being had for the necessities of both corporations and the public. *In re Minneapolis & St. C. R. Co.*, 39 Minn. 162, 39 N. W. Rep. 65.

And whether a certain manner of crossing one railroad by another is compatible "with the greatest public benefit and least private injury" is a question of fact to be determined with reference to the circumstances proved. *California Southern R. Co. v. Southern Pac. R. Co.*, 20 Am. & Eng. R. Cas. 309, 67 Cal. 59, 7 Pac. Rep. 123.

The land of a company, consisting of a portion of a disused public canal purchased from the commonwealth, upon which no tracks are actually laid by the owner, although they are shortly to be laid, is liable to be crossed by the tracks of another railroad company in such a manner as will not interfere with the use thereof by the owner for the construction of a railroad. *Appeal of the Western Pa. R. Co.*, 4 Am. & Eng. R. Cas. 191, 99 Pa. St. 155.

While under the Missouri statutes and constitution a railroad company accepts its charter and franchises and owns and uses its tracks, subject to the power of the state to authorize the construction of other railroads across its tracks, no railroad can be constructed so as to appropriate the exclusive possession of such tracks or deprive the company of its proper use of the same. *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478.

The general railroad law does not authorize a company organized thereunder to adopt a plan of crossing an existing railroad which will compel an alteration of its grade in order to its continued operations; but the crossing authorized to be acquired by condemnation is one where the previously existing use of the spot as a railroad continues in co-operation with the use by the new railroad. *United N. J. R. & C. Co. v. National Docks & N. J. J. Connecting R. Co.*, 44 Am. & Eng. R. Cas. 226, 52 N. J. L. 90, 18 Atl. Rep. 574.

In a controversy between two railroads as

to the location and manner of a crossing under the Pennsylvania act of June 19, 1871 (P. L. 1361), while the rights of the road first constructed are to be primarily regarded and protected, the rights and interests of the crossing road are also to receive a reasonable degree of care and consideration; and a comparatively slight injury or inconvenience to the former need not be avoided when the avoidance would necessarily inflict a great injury on the latter or would involve an unreasonable expenditure of money out of all proportion to the damage done. *Baltimore & P. R. Co. v. Philadelphia, W. & B. R. Co.*, 17 Phila. (Pa.) 396.

Plaintiff proposed to cross the defendant's tracks by means of a bridge supported upon abutments built entirely outside of the latter's right of way and iron pillars standing in the spaces between the main track and certain side-tracks (of which there were eight at that point) adjacent thereto and in the spaces between the side-tracks. The defendant objected to the pillars altogether, alleging that they would necessarily be so near to the tracks as to be dangerous. It appearing that a bridge with terminal supports only would be required to have a span of 317 feet—greater than that of any similar bridge in this country—and that it would cost fifty per cent. more than one of the kind proposed, and that the pillars would leave ample room for the safe movement of cars, the court was of the opinion that the erection of the pillars should be permitted. *Baltimore & P. R. Co. v. Philadelphia, W. & B. R. Co.*, 17 Phila. (Pa.) 396.

22. What is a taking requiring compensation—(1) *A taking.*—The crossing or intersecting of the road of one company by that of another is the "taking of property" within the meaning of the constitutional provisions requiring compensation to be made. *Memphis & C. R. Co. v. Birmingham, S. & T. R. Co.*, 96 Ala. 571, 11 So. Rep. 642. — **DISTINGUISHING** *Montgomery Southern R. Co. v. Sayre*, 72 Ala. 443. **QUOTING** *McCarthy v. Metropolitan Board of Works*, L. R. 8 C. P. 209; *Mobile & G. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 501. **REVIEWING** *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. (U. S.) 166; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 147; *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505.

There has been a taking of property for public use within the meaning of the Illinois constitution where a railroad track has been constructed across a street upon which another company has laid its track, though built on the same grade, and the latter company may enjoin such construction until the payment of the proper compensation. *Chicago & W. I. R. Co. v. Chicago, St. L. & P. R. Co.*, 15 Ill. App. 587.—APPROVED IN *Georgia Midland & G. R. Co. v. Columbus Southern R. Co.*, 89 Ga. 205.

Where one company constructs its track across the track of another the latter is entitled to compensation, although the tracks of the latter are upon piles over tide waters. *Grand Junction R. & D. Co. v. County Com'rs*, 14 Gray (Mass.) 553.

(2) *Not a taking*.—A company in building its road crossed the line of a projected railway upon a grade twelve or fourteen feet above the grade of the other. No work had been done on the projected line at or near the point of intersection, nor had the right of way been acquired from the owner, nor proceedings been taken to condemn it. Held, no injury to the projected road for which damages could be recovered. *St. Louis, I. M. & S. R. Co. v. Peach Orchard & G. R. Co.*, 20 Am. & Eng. R. Cas. 251, 42 Ark. 249.

Merely crossing a railroad or canal with another railroad, as it involves no exclusive use of the property occupied in crossing, is not a taking or impairment of the company's franchises whose property is thus burdened. *State (Lehigh Valley R. Co., pros.) v. Dover & R. R. Co.*, 14 Am. & Eng. R. Cas. 87, 43 N. J. L. 528.

23. What is a public use.—Where the record in proceedings for the appointment of commissioners to condemn a crossing for one railroad over the track of another shows that the construction of certain branches and spur tracks laid down on the map and survey is essential to any successful operation of the petitioner's road, such branches and spurs must be held to be necessary for public use (How. St. Mich. § 3332). *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436.

b. Proceedings to Condemn.

24. Generally — Commissioners.—The proper proceeding in such case is by bill or petition in equity to determine the

mode of crossing. *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.*, 20 Phila. (Pa.) 420.

The only questions before the court in condemnation proceedings being the mode of crossing and the compensation required, it was proper to leave the determination of these questions to commissioners appointed in accordance with the statute to provide for all details of condemnation and operation which would ordinarily be provided by a contract between the companies themselves, had they been able to agree. *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478.

There is no power vested in the commissioners appointed to investigate the feasibility and method of changing a railroad route, under the N. Y. railroad act of 1850, to determine the grade at which one line shall cross another; nor is it within their power to decide whether a company has located its line over land which cannot be taken under condemnation proceedings. *In re Lake Shore & M. S. R. Co.*, 89 N. Y. 442; *affirming* 25 Hun 316.—APPLIED IN *Re New York, L. E. & W. R. Co.*, 110 N. Y. 374. FOLLOWED AND QUOTED IN *Re Niagara Falls H. P. & M. Co.*, 51 N. Y. S. R. 887, 68 Hun (N. Y.) 391.

25. Jurisdiction — State crossing board.—The equitable powers conferred upon the courts of common pleas by Pa. act of June 19, 1871, § 2 (P. L. p. 1861), in regard to railroad crossings cannot be invoked in favor of a company whose primary object is to appropriate the lands or right of way of another company, the crossing of its tracks being a mere incident. *Sharon R. Co.'s Appeal*, 122 Pa. St. 533, 17 Atl. Rep. 234.—FOLLOWING *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 511.

Where the terminal branches of a railroad are designated, surveyed, and mapped with the main line, approved by a majority of the directors, and certified as essential to the development of business along the line of the road, it is sufficient to give the state crossing board jurisdiction. *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436.

The discontinuance of condemnation proceedings as to one point of crossing does not affect action to be taken as to other points. (Camubell and Morse, JJ.,

dissenting.) *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 *Am. & Eng. R. Cas.* 553, 72 *Mich.* 206, 40 *N. W. Rep.* 436.

26. Parties — Lessee. — Where one company gives another one a lease of a portion of its track between a certain place and its terminus, but reserves its franchise and the right to exercise its corporate powers and the "general control, management, and supervision of the main line of the track, * * * and the full and sole control and direction of the management, use, location, improvement, and repair of the same," etc., the lessee company will not have such an interest in the line of the road leased as to make it a necessary party to a proceeding by another company for the condemnation of a right of way across the track of the lessor company. *Englewood Connecting R. Co. v. Chicago & E. I. R. Co.*, 25 *Am. & Eng. R. Cas.* 227, 117 *Ill.* 611, 6 *N. E. Rep.* 684.

27. Effort to agree. — An intersecting railroad should attempt to agree with the road crossed upon the point and manner of crossing and compensation therefor before seeking the interposition of a court in proceedings to appropriate a right of way. *Seattle & M. R. Co. v. State*, 7 *Wash.* 150, 34 *Pac. Rep.* 551. — QUOTING *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 10 *Fed. Rep.* 497.

Under the provision of the Indiana statute authorizing a company to cross the track of another company, and providing that "if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or manner of such crossing and connections, the same shall be ascertained" by commissioners, it is essential that there should have been an effort made by the companies to agree, not only as to compensation, but also as to the point or manner of crossing; and a petition for the condemnation of right of way must allege a compliance with the statute in all these respects. *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 430, 116 *Ind.* 578, 19 *N. E. Rep.* 440.

If objections are seasonably and appropriately made in proceedings for the condemnation of lands of one railway company by another that the company failed to make the necessary attempt to acquire right of way by agreement, there is no room for the

presumption that the landowner has waived such effort to agree. *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 430, 116 *Ind.* 578, 19 *N. E. Rep.* 440.

Negotiations relative to the crossing of one road by another, had with the general manager, vice-president, and attorney of the road sought to be crossed, when such officers assume to negotiate for their company and no notice is given to the person with whom they confer that they have not authority to act, constitute an effort to agree with such company, within the requirement of the statute relating thereto. *In re Saratoga Elec. R. Co.*, 58 *Hun (N. Y.)* 287, 34 *N. Y. S. R.* 556, 12 *N. Y. Supp.* 318.

Under N. Y. Railroad Act 1850, ch. 140, § 28, subd. 6, relating to the crossing of the track of one railroad company by another, an effort to agree between two companies being a condition precedent to the authority of the court to appoint commissioners, the petition must aver an effort on the part of the companies tending to such an agreement as to the points and manner of crossing. *In re Boston, H. T. & W. R. Co.*, 79 *N. Y.* 69; *affirming in part (?)* 22 *Hun* 176. — FOLLOWING *In re Lockport & B. R. Co.*, 77 *N. Y.* 557.

A voluntary agreement entered into on the part of a lessee of a railroad with a company petitioning for a right to cross the track of the former is binding upon such lessee but not upon the lessor as to the reversionary interest. Consequently, the lessee alone being made a party, the estate in reversion cannot be affected. *In re Boston, H. T. & W. R. Co.*, 79 *N. Y.* 69; *affirming in part (?)* 22 *Hun* 176.

In such proceedings instituted against both lessor and lessee, a petition which alleges an attempt and effort to agree with the lessee, but containing no allegation as to an attempt to make such agreement with the lessor, does not authorize an appointment of commissioners under the statute as against the lessor company. *In re Boston, H. T. & W. R. Co.*, 79 *N. Y.* 69; *affirming in part (?)* 22 *Hun* 176.

Where there is an allegation that the two companies interested in the crossing of a railroad track were unable to agree upon the points and method of crossing and the compensation to be paid for the same, such allegations need not be proven unless put in issue. *In re Boston, H. T. & W. R. Co.*,

79 N. Y. 64; *modifying* 58 How. Pr. 167.

The burden of proof is upon the petitioning company with respect to the issue as to whether the two companies failed to agree as to the method and place of making the crossing. *In re Lockport & B. R. Co.*, 77 N. Y. 557, 632; *reversing* 15 Hun 365.

28. Petition—Complaint, generally.—A proceeding to ascertain compensation for crossing one railroad by another may be united with a proceeding to acquire lands for depot purposes. So also a proceeding to acquire a right of way for a railroad across the right of way of another, and to acquire a right of way over the lands of the latter, may be united under section 1244 of the California Code of Civil Procedure. *California Southern R. Co. v. Southern Pac. R. Co.*, 20 Am. & Eng. R. Cas. 309, 67 Cal. 59, 7 Pac. Rep. 123.

An averment in a petition of a company to condemn a crossing desired to be made of another railroad, which states that it is necessary for public use to take for use of petitioners the property described therein, is a sufficient averment on that subject. *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436.

A petition of a company to take the lands of another company for crossing purposes, which states that the petitioning company has decided that the property in question is necessary to accommodate the tracks proposed and to develop business along its line, is sufficient on that subject. *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436.

The survey of the route of the railroad, filed in the office of the secretary of state, limits the right of condemnation to the lands included in its description, properly construed; and an order for the condemnation of the located route of a railroad for a crossing by another road cannot be sustained where the petition therefor describes lands not included in the description in the original survey of the located route. *United N. J. R. & C. Co. v. National Docks & N. J. J. Connecting R. Co.*, 44 Am. & Eng. R. Cas. 226, 52 N. J. L. 90, 18 Atl. Rep. 574.

In proceedings, under the railroad act (subd. 6, § 28, ch. 140, Laws of 1850), by one railroad corporation to acquire the

right "to cross, intersect, join, and unite" its railroad with that of another corporation, the petition should state that the petitioner is a corporation, that the route of its road as laid down crosses the track of the other road, that it desires to cross or intersect such road, and that "the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossing and intersection." It is not necessary to state the matters required by said act (§ 14) where the proceeding is to acquire title to lands. The reference in said provisions to the provisions of the act in respect to acquiring title is simply to regulate the mode of appointing commissioners. *In re Lockport & B. R. Co.*, 77 N. Y. 557, 632; *reversing* 15 Hun 365.—FOLLOWED IN *Re Boston, H. T. & W. R. Co.*, 79 N. Y. 69.

Where the petition contains such unnecessary statements and they are put in issue by the answer, the issues thus formed are immaterial and may be disregarded by the court. *In re Lockport & B. R. Co.*, 77 N. Y. 557; *reversing* 15 Hun 365.

The ordinary rules of pleading are inapplicable in the special proceeding instituted under Kansas Comp. Laws, ch. 23, § 47, by one company to cross the tracks of another. A defendant should be allowed to be heard in the selection of the commissioners who are to determine the points and manner of the crossing and the compensation to be paid therefor; and this is true irrespective of the points sought to be made the places of crossing. *Union Pac. R. Co. v. Leavenworth, N. & S. R. Co.*, 29 Fed. Rep. 728.

A company has a right to secure a crossing for its roadbed and cars over the track and right of way of another, and to make the necessary connection for that purpose, and it may also secure the right to cross another railroad with side-tracks, and the use of its right of way for the location of switches, provided such use is not inconsistent with the enjoyment by the other company of its franchises; but in condemnation proceedings to acquire such rights, the petition must describe fully the rights sought to be condemned, and a petition which seeks for the condemnation of the title to the land covered by the right of way is fatally defective. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 272, 62 Mich. 564, 29 N. W. Rep. 500.—EXPLAINED IN *Flint &*

P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

29. Allegations respecting place and mode of crossing.—The condemning company may, by its petition in condemnation proceedings, designate a lawful manner in which it will cross the lands of the other company and make compensation for that single manner of crossing, in which case it can thereafter cross only in accordance with the plan thus designated. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

In condemnation proceedings by a railroad company the land sought to be condemned must be within the located route of the condemning company, and must be described with certainty, so that they shall be capable of definite and unmistakable ascertainment. Uncertainty in this respect will vitiate the proceedings. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

How. Mich. St. § 3350, as amended by Act 174, Laws of 1883, § 36, requires that the right to cross a company's track by another railroad shall be acquired by purchase or condemnation, in the same manner as prescribed by the act for obtaining title to real estate or other property, which act, in prescribing what the petition shall contain, does not require the petitioner to state whether such crossing is to be made at grade or above or below the track to be crossed. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.—**DISTINGUISHING** *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 62 Mich. 564. **QUOTING** *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 273.

In a petition and warrant for the assessment of damages occasioned by the crossing of one railroad by another, the place injured is sufficiently described as a "part of the land and bridge heretofore held and occupied by them for railroad purposes, measuring about five rods in length and forty feet in width, and lying a little west of the draw in their bridge from Charlestown to Somerville, and nearly contiguous thereto," with a reference added to the filed location and actual construction of their road. *Grand Junction R. & D. Co. v. County Com'rs*, 14 Gray (Mass.) 553.

30. Allegations respecting effort to agree.—A failure to agree as to the

points and manner of crossing, as well as to the amount of compensation to be paid to the company whose track is crossed, must be alleged in positive terms in the instrument of appropriation, under Indiana Rev. St. 1881, § 3903, subd. 6. *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 37 Am. & Eng. R. Cas. 430, 116 Ind. 578, 19 N. E. Rep. 440.

An averment in proceedings for condemnation of right of way across another railroad, that, "having attempted and being unable to agree with the respondent in regard to the terms of, or in regard to the compensation therefor," the company did take the right of way, etc., is not an averment that the company condemning the right of way attempted to agree to the point or manner of crossing. *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 37 Am. & Eng. R. Cas. 430, 116 Ind. 578, 19 N. E. Rep. 440.

31. Verification of petition.—In a proceeding under New York Laws 1850, ch. 140, § 28, subd. 6, by one company to acquire the right to cross another's track, an objection that the petition was merely verified by one styling himself the consulting engineer of the petitioning company, without showing that he was an officer of the company—*held*, to come too late when raised in the first instance on appeal; this was not a jurisdictional defect. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 64; *modifying* 58 How. Pr. 67.

32. Map and survey.—The line or the lines which the board of directors may adopt for the road on entering a city or village at the terminal points, when made a part of the original survey and designated upon the map, become a part of the main line of the road. *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436.

When the map and survey have received the approval of the state crossing board and been duly filed, the rights of way of other roads may be condemned for crossings, as in the case of private property, whether the new road proceeds through the place to the terminal points by one or more terminal lines. *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436.

The points of crossing of one railroad

track by another are not necessarily fixed by the notice of the location of the new road and the failure of the company whose road is sought to be crossed to object within fifteen days. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 64; *modifying* 58 How. Pr. 67.

33. Objections and defenses.—In a proceeding for condemnation for a right of way for a railroad across the track of another company, questions as to the sufficiency of a city ordinance in respect to the right of the company seeking the condemnation, and as to the right of such company to cross the track, and as to injury to the company whose road is to be crossed, are such as may be interposed as a defense at law in the condemnation proceeding, but not in equity to enjoin proceedings. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 2 Am. & Eng. R. Cas. 437, 96 Ill. 125.—FOLLOWED AND QUOTED IN *Illinois C. R. Co. v. Chicago*, 138 Ill. 453.

Objections to the proposed points of crossing of two railroads, on the ground that they interfered with the lands of the old company already appropriated for stations, buildings, etc., cannot be raised for consideration on an application for the appointment of commissioners. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 64; *modifying* 58 How. Pr. 67.

34. Evidence, generally.—In a proceeding by one company seeking to condemn a right of way across the tracks of another, notwithstanding the petitioner stipulates to put down at its own expense, and keep in good repair, all necessary frogs and crossings for its main tracks across the tracks of the other company, the defendant company, on the assessment of the damages to be paid, has the right to show to the jury that the value of its road and its capacity to do business will be impaired by the proposed crossing, and it is error to exclude such evidence. *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. Rep. 246.—APPROVED IN *Georgia Midland & G. R. Co. v. Columbus Southern R. Co.*, 89 Ga. 205.

In proceedings to condemn a right of way across a railroad, all evidence of damage arising from the stopping of trains at railroad crossings, in compliance with a city ordinance, must be excluded, since a railroad company exercises its charter rights subject to all reasonable rules and regula-

tions of a public character. *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478.

35. Opinion evidence.—The opinions of witnesses as to the probability of collisions and accidents at such crossing are inadmissible for any purpose, being remote, indefinite, and uncertain; and no allowance can be made to defendant for any delay, inconvenience, or damage arising at such crossing, such as the possibilities or probabilities of collisions. *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478.

In proceedings by one road to cross another where it would be necessary to cut through an embankment 20 feet below the grade of the existing road, the following questions by the plaintiff company to its contractor were held improper: "If you put in the cut the work you propose to do and have described, what would be the damage?" "Do you expect to keep the work in repair?" "Whose duty would it be to keep the crossing and bridge in repair after the work is put in?" *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142.—APPLIED IN *Illinois C. R. Co. v. People*, 143 Ill. 434.

36. Documentary evidence.—In a proceeding for the condemnation of a right of way for a railroad across the right of way of another, the petitioning corporation offered in evidence a stipulation or covenant, regularly signed by the petitioner, in which it was expressly stipulated by the petitioner "that it would and should, at its own expense, put in, and thereafter maintain in suitable and proper repair, the frogs and crossing across two main tracks of the defendant; that this stipulation should be binding on the successors and assigns of said petitioner so long as a grade crossing should be maintained at the crossing, the right of way for which was being condemned therein." Held, that this was a valid obligation, enforceable against the petitioner, and its successors, and assigns, and was properly admissible in evidence. *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 14 Am. & Eng. R. Cas. 62, 105 Ill. 388.—QUOTING *Peoria & R. I. R. Co. v. Birkett*, 62 Ill. 332.—EXPLAINED IN *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173.

37. Reviewing proceedings—Certiorari.—In a proceeding to condemn a crossing over another railroad, the petitioning company is entitled, under Minn. Laws 1881, Ex. Sess., ch. 10, § 1 (which is an amendment to Gen. St. 1878, ch. 34, § 47), to proceed immediately to make and operate the same upon filing the bond in said section 1 prescribed, notwithstanding the adverse party has theretofore, and before any meeting of the commissioners, duly taken and perfected an appeal from the order appointing them, by, among other things, executing and filing an undertaking for a stay of proceedings under Gen. St. 1878, ch. 86, § 10. *State ex rel. v. District Court of Hennepin County*, 35 Minn. 461, 29 N. W. Rep. 60.—REVIEWED IN *Re St. Paul & N. P. R. Co.*, 30 Am. & Eng. R. Cas. 294, 37 Minn. 164, 33 N. W. Rep. 178.

Under the provisions of Minn. Sp. Laws 1879, ch. 185, § 4, the location and manner of crossing are to be determined upon the evidence produced and showing made before the trial court as questions of fact; and in reviewing the decision thereon this court will only inquire whether there are legal errors in the proceedings, or any abuse of discretion on the part of the trial court. *In re Minneapolis & St. L. R. Co.*, 30 Am. & Eng. R. Cas. 279, 36 Minn. 481, 32 N. W. Rep. 556.

The report of certain railroad commissioners, and the order founded thereon prescribing the terms and conditions of the crossing in question, gave certain benefits to the Lackawanna R. Co., and provided adequate and necessary protection for the Erie R. Co. Under proceedings by the latter company to acquire a crossing over the former's track—*held*, it could not be apportioned from in fragments, so that if the application were successful the benefits might be obtained and the protection withdrawn. *In re New York, L. & W. R. Co.*, 44 Hun (N. Y.) 275, 7 N. Y. S. R. 649.

Proceedings by one company to acquire a right to cross the tracks of another company are not stayed by an appeal taken from an order refusing to change the route. *In re New York, L. & W. R. Co.*, 33 Hun (N. Y.) 270.—DISTINGUISHING *New York & B. R. Co. v. Godwin*, 12 Abb. Pr. N. S. (N. Y.) 21.

When a petition for condemnation of the crossing over another company's right of way prescribes the manner of crossing, the

legality of the plan and manner of crossing proposed may be reviewed in the supreme court upon *certiorari*. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

c. Compensation; Damages.*

38. Necessity of making compensation.—Without first making compensation for the damages which will result therefrom, one railway company cannot lay and use its track across the track of another company located in a public street of a city. *Georgia Midland & G. R. Co. v. Columbus Southern R. Co.*, 51 Am. & Eng. R. Cas. 538, 89 Ga. 205, 15 S. E. Rep. 305.—APPROVING *Chicago & W. I. R. Co. v. Chicago, St. L. & P. R. Co.*, 15 Ill. App. 587; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21; *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375.

The eminent domain statute is remedial in its nature and should be liberally construed. The right to use a street for the purposes of operating a railroad, which was leased by one company to another, is property, so as to require the payment of compensation for its being crossed by another railroad. *Chicago & E. I. R. Co. v. Englewood Connecting R. Co.*, 17 Ill. App. 141.

39. What is a sufficient payment.—Compensation awarded and paid in money, on the basis that the parties would comply with the terms of the award as to the point and manner of making the crossing, satisfies the provision of the constitution requiring the compensation for the property taken to be paid to the owner or into court for his use. *Chicago & A. R. Co. v. Kansas City, I. & P. R. Co.*, 110 Mo. 510, 19 S. W. Rep. 826.

40. Assessment of damages.—Where the petition defines the manner of one railroad crossing another, the damages would naturally be awarded on that basis; but in case of disagreement between the two companies as to such manner of crossing, the petitioner has no right to cross, or in any manner interfere with, the respondent's property until the crossing board has determined that question; and in case the mode of crossing determined upon by the board is different from that specified in the petition, new proceedings must be taken to

* Damages where one railroad crosses another, see note, 10 AM. & ENG. R. CAS. 136.

condemn the right to cross in the manner designated by such board and to assess the damages upon that basis. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

In fixing the compensation to be paid a company whose track is crossed, the commissioners, in case the manner of the proposed crossing is unknown, may assess the damages on the basis of either of the three modes which may be adopted in making such crossing; and any additional expense created in the ordinary use of such road, or any other injury or damage to the company's track, right of way, or franchise, occasioned by such crossing, and which may properly be considered as a natural, necessary, and approximate cause thereof, should be allowed the respondent. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 272, 62 Mich. 564, 29 N. W. Rep. 500.

41. Measure and elements of damage, generally.—In assessing the damages for the crossing of one road over the tracks and right of way of another, the total obstruction of the road while the tracks are being laid, and the permanent interference, by means of the crossing, with the business transactions over the road, would be proper elements to be considered. *Chicago & W. I. R. Co. v. Chicago, St. L. & P. R. Co.*, 15 Ill. App. 587.

The company seeking to obtain the right of way is liable for all damages directly resulting to the defendant company from the making or using of the crossing, whereby the value of its property is diminished or its facilities are materially impaired for the transaction of its business. If the inconvenience or hindrance resulting from such crossings or other structures abridges the owner's capacity to transact an equal volume of business, it is an element of damages, even though it does not increase his expenses. *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. Rep. 246.—EXPLAINING *Peoria & P. U. R. Co. v. Peoria & F. R. Co.*, 105 Ill. 110; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 105 Ill. 388. QUOTING *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506, 100 Ill. 21.—QUOTED IN *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350.

The value of railroad property, outside of advantages of location and the amount of

business it controls, consists in the strength, permanency, and durability of its structures, and its adaptability and capacity for doing railroad business. Whenever, therefore, a proposed condemnation and subsequent user will injuriously affect such a property in either of these respects, the injury thus occasioned will form a proper basis for the assessment of damages in a proceeding to condemn. *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. Rep. 246.

In an application by one company against another for damages caused by taking the petitioners' land, under Mass. Rev. St. ch. 39, § 56, it is not a proper consideration for enhancing the damages that the petitioners own a railroad extending far into the interior, and are doing a large and profitable business, which would be incommoded by the track and conveniences of the respondents. But the fact that the land taken by the respondents is near a railroad communication with tide waters and the harbor of Boston, and the increased value of the property for any and all useful business purposes, are proper considerations in estimating the damages. *Boston & W. R. Corp. v. Old Colony R. Corp.*, 12 Cush. (Mass.) 605.—REVIEWED IN *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604.

Where the condemning company fails to define in its petition how it will cross, and seeks to condemn the privilege of crossing generally, the damages are to be assessed, not only for any manner of crossing at present lawful and necessary, but also for lawful changes in the manner of crossing in the future. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 All. Rep. 570.

In determining the compensation to be awarded to a railroad company whose track has been crossed by the track of another, under the N. Y. Act of 1850, ch. 140, § 28, the commissioners should not confine themselves to estimating the value of the real estate actually taken and the damage occasioned by the cutting of the rails, but should also allow all the actual and direct damages occasioned by the taking of the land for the purposes of the crossing. *In re Lockport & B. R. Co.*, 19 Hun (N. Y.) 38.

42. — inconvenience, delay, etc., from stopping trains.—It was repre-

sented in a particular case that if a crossing were established at a point proposed, the defendant company, in conforming to the requirement of the statute in respect to the stopping of trains on approaching a railroad crossing, at certain distances therefrom would be compelled to bring its trains to a halt upon an ascending grade, and that thereby the hauling capacity of its engines would be impaired, and it was contended that such impairment ought to be considered as an element of damages. But the statute in question is simply a police regulation with which all railroad companies are required to comply, the existence of which is subject to the will of the legislature, so it is of too uncertain duration to be made the subject of damages as for a perpetual inconvenience and injury. *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 14 Am. & Eng. R. Cas. 62, 105 Ill. 388.—QUOTING *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604.—QUOTED IN *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309.

43. — increased expense of keeping track in repair, etc.—One company is entitled to have condemnation for its right of way across the right of way of a previously constructed railroad, but the latter company is entitled to be compensated for all damages it may sustain, and for all extra cost in the future in maintaining its road in a safe condition. *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 487, 96 Ill. 274.—REVIEWED IN *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 38 Am. & Eng. R. Cas. 676, 87 Tenn. 712, 11 S. W. Rep. 943.

Where one company acquires the right to run its road through a high embankment of another, and on a grade twenty feet below the track of the other, it is under no legal obligation to erect or maintain a bridge to support the track of such other company, and therefore proof of what it would cost to build such bridge and keep the same in repair is proper in the assessment of damages. The defendant, in such a case, is entitled to have such sum for damages as will enable it to construct and keep in repair all such works as may be necessary to keep its track in a safe and secure condition, and also for all such incidental loss and inconvenience as may be a necessary result. *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142.—

DISTINGUISHED IN *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 14 Am. & Eng. R. Cas. 62, 105 Ill. 388. QUOTED IN *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21.

44. — expense of maintaining signal—Watchman.—The cost of maintaining a signal or a crossing system, as well as of a watchman, is a proper element of damages to a company whose road is sought to be crossed by another railroad. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

45. — expense in accommodating road to new conditions.—A railroad corporation across whose road another railroad or highway is laid out has the same right as all individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124.—QUOTED IN *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350.

46. — obstruction to use of land not condemned.—On proceedings to condemn a strip of land across the right of way of a company, a limitation of the damages to those for physical injury to the land sought to be condemned for another railroad will be too restricted. The defendant should be allowed to recover for the obstruction to the use of its remaining property and for all damage to it resulting from the operation of the second railroad on the strip so taken. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21.

The damages recoverable should not be limited to the actual and direct damage alone, but the obstruction to the use of land not condemned, and the incidental loss, inconvenience, and damage resulting should be considered. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21.—QUOTING *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 147; *Jones v. Chicago & I. R. Co.*, 68 Ill. 380; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 292.—RECORDED IN *Peoria & P. U. R. Co. v. Peoria*

& F. R. Co., 10 Am. & Eng. R. Cas. 129, 105 Ill. 110.

47. Distinguished from damages where private lands are condemned.

—Where the right of one company to cross the track of another is acquired by condemnation proceedings, the exclusive use is not taken, and the damages sustained arise from interference with the exclusive use by the respondent of its track and right of way for railroad purposes. In such a case the award of damages is governed by different considerations from those applied when a company seeks to condemn the right of way over lands of private persons. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.—QUOTING *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124; *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375.

48. Remote damages.—A company, across and twenty feet above whose road another railroad is laid out and constructed, cannot recover damages for the expense of maintaining a flagman at the crossing of a highway, alleged to be necessary to guard against the greater liability to accident occasioned by the obstruction of a view along its railroad by means of the abutments of the new railroad of the other corporation. *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124.—NOT FOLLOWED IN *State ex rel. v. Hennepin County District Court*, 42 Am. & Eng. R. Cas. 241, 42 Minn. 247, 7 L. R. A. 121. QUOTED IN *Central R. Co. v. Bayonne*, 51 N. J. L. 428.

The stopping of trains at a crossing, whether required by law or by the duty of the company in order to secure the safety of passengers, is not an element of damages to be made to a company by another company for the right to cross its road. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

The law requiring trains to stop before crossing another railroad, being a mere police regulation, and subject to repeal at any time, the damages sustained by a company for delay, inconvenience, and trouble in stopping before crossing another road, seeking a condemnation for right of way across the track of an existing railroad, are too vague, indefinite, and contingent to be an element in the assessment of damages in favor of the road to be so crossed; nor is the increased danger arising from the cross-

ing of the track to be considered. *Peoria & P. U. R. Co. v. Peoria & F. R. Co.*, 10 Am. & Eng. R. Cas. 129, 105 Ill. 110.—RECONCILING *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21.—EXPLAINED IN *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173.

In a proceeding under the Ohio statute to appropriate a right of way across the track of an existing railroad, to be used in common as a railroad crossing, the owner of such track is entitled to compensation for the property or interest therein actually appropriated, and for such consequential damages, not provided for by the act of 1860, as are the direct and proximate consequences of such appropriation; but the jury, in estimating these consequential damages, cannot include the additional expenses provided for by said act, nor take into account the detention of trains, loss of future business, nor additional expenses incident to the future exercise of their corporate powers. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604, 16 Am. Ry. Rep. 291.—QUOTING *Stone v. Fairbury, P. & N. W. R. Co.*, 68 Ill. 394. REVIEWING *Amsden v. Dubuque & S. C. R. Co.*, 28 Iowa 542; *Troy & B. R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Old Colony & F. R. R. Co. v. Plymouth*, 14 Gray (Mass.) 155.—QUOTED IN *Columbus, H. V. & T. R. Co. v. Gardner*, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309, 11 West. Rep. 264, 13 N. E. Rep. 69.

49. Damnum absque injuria.—How. St. § 3376 (amended by Michigan act No. 174, Laws of 1883), requiring trains to come to a full stop before crossing the track of another railroad, is a police regulation enacted by the legislature designed to promote the public safety, and is as binding upon an existing road as one newly organized; and any inconvenience or annoyance or loss suffered in obeying such regulation is *damnum absque injuria*. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

50. Bond to secure damages.—Proceedings relating to crossing of lines of railroads by other railroads are to be determined under the Pennsylvania act of June 19, 1871, P. L. p. 1360, and a bond to secure damages by reason of a crossing will not be approved until a decree made under said act. *Pennsylvania S. V. R. Co. v. Phila-*

delphia & R. R. Co., 20 Phila. (Pa.) 420.

And in determining the amount of the bond and sureties in cases in which a railroad crosses another the court should be informed whether the crossing is at grade or otherwise. *In re Schuylkill River E. S. R. Co., 17 Phila. (Pa.) 11.*

51. Costs.—A proceeding under the New York general railroad act by one company to secure a crossing over the track of another is a special proceeding wherein costs, ordinarily, are in the discretion of the court; and no question of damages having been raised, costs are properly adjudged against the corporation opposing the crossing. *In re Cortland & H. Horse R. Co., 98 N. Y. 336.*

*d. Award; Decree; Report.**

52. Award considered as a contract.—The award of the commissioners stands as a contract between the parties, and the latter have the same rights under it and it may be enforced in the same way as if it had been a voluntary agreement. *Chicago & A. R. Co. v. Kansas City, I. & P. R. Co., 110 Mo. 510, 19 S. W. Rep. 826.*

53. Fixing the location of the crossing.—In proceedings under the Minnesota statute (Laws 1879, ch. 35, § 3) to condemn a crossing over another railroad the court is not confined to the precise location mentioned in the petition, but may change or modify it, identity of the purpose of the crossing petitioned for and of that prescribed being sufficient. *State ex rel. v. District Court of Hennepin County, 35 Minn. 461, 29 N. W. Rep. 60.*

54. — at a place other than that stated in petition.—A commission appointed to ascertain and determine the points and manner of the crossing by one railroad of another has no power to locate the crossing at any place other than that stated in the petition and order, nor to review any fact on which the order was based, nor to question the right of the petitioner to a crossing; nor has such commission power to regulate the rate of speed at which trains on the intersecting roads shall pass the crossing. *In re Central R. Co., 1 T. & C. (N. Y.) 419.*

55. Prescribing the manner and conditions of crossing.—Commissioners

appointed under Missouri Rev. St. 1879, § 765, to make an award as to how one company shall cross another's right of way have power to provide for all the details of construction and operation which would ordinarily have been provided for between the companies themselves had they been able to agree. *Chicago & A. R. Co. v. Kansas City, I. & P. R. Co., 110 Mo. 510, 19 S. W. Rep. 826.*

The commissioners have power to provide in the award that temporary pile piers, permitted by them to be used in a bridge for the crossing, should be replaced within a year by stone masonry. *Chicago & A. R. Co. v. Kansas City, I. & P. R. Co., 110 Mo. 510, 19 S. W. Rep. 826.*—REVIEWING *Young v. Chicago & N. W. R. Co., 28 Wis. 171; Jones v. Seligman, 81 N. Y. 190.*

In an application by a company under Minnesota Laws 1879, ch. 80, for the appointment of commissioners to assess the damages for crossing the property and tracks of another railway company, the court may not only prescribe the place, angle, and elevation of the crossing, but also that the petitioning company shall do what to the court shall seem reasonably practicable to make and keep the crossing safe for the trains of the other company and for the public, and for that purpose may require it to construct and maintain a known and approved device to enable trains to pass a crossing without danger of collision. *Winona & S. W. R. Co. v. Chicago, M. & St. P. R. Co., 50 Minn. 300, 52 N. W. Rep. 657.*

56. Validity of report.—While it is the duty of the commissioners appointed under Missouri Rev. St. 1879, § 765, for the purpose of determining the points and manner of the crossing and joining, etc., of two railroads and the compensation therefor to view the premises, yet it is not required that such fact be recited in their report. *St. Louis Transfer R. Co. v. St. Louis, I. M. & S. R. Co., 100 Mo. 419, 13 S. W. Rep. 710.*

A report of such commissioners appointed to ascertain the points and manner of crossing other railroads and to ascertain the compensation, allowing plaintiff company a latitude of ten feet in which to make connections, explaining that it is for the purpose of a proper alignment of the frogs

* Powers of commissioners in making an award where one road crosses another, see 51 AM. & ENG. R. CAS. 542, *abstr.*

and leadbars, is sufficiently definite. *St. Louis Transfer R. Co. v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 419, 13 S. W. Rep. 710.

But a provision in the report permitting plaintiff to occupy a certain incomplete switch of defendant for the space of 250 feet, and which in effect condemns that much of defendant's side-track and appropriates the same to the use of plaintiff, was unauthorized by the order of the court appointing the commissioners, and an exception to the report on that ground should have been sustained. *St. Louis Transfer R. Co. v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 419, 13 S. W. Rep. 710.

57. Setting aside the award or report.—Where in a condemnation proceeding to acquire a right of crossing over a railroad the respondents placed before the commissioners all the testimony they desired upon each element of damage claimed by them, and the commissioners, after considering all the testimony, reported that they had appraised the damage for the value of the property taken as for the damages resulting from such taking, unless the award appears to be grossly inadequate, it will not be disturbed. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

The report of commissioners appointed under Missouri Rev. St. of 1879, § 765, need not state specifically that the commissioners went upon and personally viewed the track where the connections and crossings of two railroads were to be made, where there is nothing else to show that they had failed to perform their duty in this particular. *St. Louis Transfer R. Co. v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 419, 13 S. W. Rep. 710.

Nor will their report be set aside where there is nothing in the record to show prejudice to the defendant company, because it leaves it optional with the plaintiff company to make connections at either line of the street crossed by the defendant company, instead of fixing the point definitely at one of these places. *St. Louis Transfer R. Co. v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 419, 13 S. W. Rep. 710.

Nor will such report be set aside on appeal for the reason that the commissioners made no award of damages to the defendant company, where the record does not show the preservation of the evidence offered upon this objection to the report. *St. Louis*

Transfer R. Co. v. St. Louis, I. M. & S. R. Co., 100 Mo. 419, 13 S. W. Rep. 710.

Where companies have not been able to agree as to the terms upon which one company may lay its tracks across the line of the other, and commissioners have been appointed, the report of such commissioners upon the questions of the mode and manner of crossing, as well as the compensation, will not be set aside and the questions determined by a jury, under the statutory provision that the right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of the right of eminent domain any incorporated company shall be interested for or against the exercise of such right, the statutory provision having reference only to the question of damages. *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478.

3. *Under English and Canadian Statutes.*

58. Lands Clauses Act—"Taking."

—Where the right given to a railway company by its special act to cross the line of another company is the right of taking an easement, the exercise of such right is not a compulsory taking of "lands," within the Lands Clauses Act 1845, § 16. *Great Western R. Co. v. Swindon & C. R. Co.*, L. R. 9 App. Cas. 787, 53 L. J. Ch. 1075, 51 L. T. 798, 32 W. R. 957, 48 J. P. 821; *affirming* L. R. 22 Ch. D. 677, 53 L. J. Ch. 306, 47 L. T. 709, 31 W. R. 479.

59. 14 & 15 Vict. c. 51, section 9, subsec. 15.—The order of a judge appointing arbitrators to settle the terms on which one railway shall cross another, under the powers given to him by 14 & 15 Vict. c. 51, § 9, subsec. 15, cannot be reversed by the court. *In re Buffalo & L. H. R. Co.*, 14 U. C. Q. B. 397; *affirming* 2 Ont. Pr. 88.

On an application of the Buffalo & L. H. R. Co., under 14 & 15 Vict. c. 51, § 9, subsec. 15, for the appointment of arbitrators to arrange for their intersection with the Great Western R. Co., it appeared that in 1854 a negotiation was entered into between the Buffalo, B. & G. R. Co. (former owners of the applicants' line) and the Great Western R. Co. upon the same question, but no agreement was then made, as the latter company wished the crossing to be under their road, which the former would not accede to. Subsequently the Buffalo & L. H.

R. Co. wrote to the Great Western R. Co., requesting that a time of meeting might be appointed to settle the matter, and received an answer refusing to enter into any discussion on the point until the adjustment of certain claims by the latter company against the Buffalo, B. & G. R. Co. *Held*, that such refusal was unauthorized, and that a disagreement between the companies as to the point or manner of crossing sufficiently appeared to warrant the appointment of arbitrators under the statute. *In re Buffalo & L. H. R. Co.*, 2 Ont. Pr. 88.

Held also, that it was not necessary, before claiming a crossing, that the name of the Great Western R. Co. should be inserted in the plan and book of reference filed by the applicants, as the owners of the land to be taken for such crossing, or to tender compensation, for no land was required to be taken, but only an easement. *In re Buffalo & L. H. R. Co.*, 2 Ont. Pr. 88.

60. 51 Vict. c. 29, section 173.—The general railway act of Canada, 51 Vict. c. 29, § 173, provides that "no company shall cross, intersect, join, or unite its railway with any other railway without application to the railway committee for approval." Another section provides that the word "company" shall include any "person" authorized to construct a railway. *Held*, to include the railway commissioner. *Canadian Pac. R. Co. v. Northern Pac. & M. R. Co.*, 5 Man. 301.

61. Necessity for approval by "railway committee."—The Dominion parliament has power to provide that no provincial railway shall cross a Dominion railway without making application to the railway committee of the privy council for Canada. *Canadian Pac. R. Co. v. Northern Pac. & M. R. Co.*, 5 Man. 301.

Where a statute provides that no company shall cross, intersect, join, or unite its railway with another "without application to the railway committee for approval," it means that the approval must be obtained, not merely applied for. *Canadian Pac. R. Co. v. Northern Pac. & M. R. Co.*, 5 Man. 301.

Where it is necessary for a provincial railroad in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the commissioners of public works for Ontario, as well as the approval of the railway committee of the privy council of the Domin-

ion; and the railway companies cannot, by arrangement, waive this provision. *Credit Valley R. Co. v. Great Western R. Co.*, 25 Grant's Ch. (U. C.) 507.

4. Crossing at Grade.

62. Right to cross at grade, generally.—It is the policy of the law to discourage railroads from crossing each other on the same grade; but such crossings are not prohibited. *Appeal of Pennsylvania R. Co.*, 116 Pa. St. 55, 8 Atl. Rep. 914.

A crossing by one railroad over the track of another may be by tunnel, an overhead bridge, or a passage across the rails at grade. *United N. J. R. & C. Co. v. National Docks & N. J. J. Connecting R. Co.*, 44 Am. & Eng. R. Cas. 226, 52 N. J. L. 90, 18 Atl. Rep. 574.

A railroad company should not be allowed to construct its track so as to cross the track of another on the same plane at two different points within 290 feet, and less than a mile from another crossing of the same road, except under some paramount necessity for the service of the public or the state. *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 4 Woods (U. S.) 360, 10 Fed. Rep. 497.

Where a railroad corporation, formed under the general railroad law of New Jersey, locates its route so that its line crosses the route of another railroad, the law gives it the right to decide for itself whether it will cross such other road at grade or otherwise. Its right to cross at grade is subject to but two limitations: (1) it shall not cross at a less angle than twenty degrees; and (2) it shall not cross in such manner as will destroy the reasonably fair enjoyment of the franchises of the road whose route is crossed. *Jersey City, N. & W. R. Co. v. Central R. Co.*, 49 Am. & Eng. R. Cas. 256, 48 N. J. Eq. 379, 22 Atl. Rep. 728.

One railroad will not be prohibited crossing another at grade when it appears that the crossing is necessary to the successful operation of plaintiff's road and will not seriously interfere with defendant's, and that the city authorities have consented to the crossing, it being on a street in an outlying portion of a city. *Appeal of Pennsylvania R. Co.*, 116 Pa. St. 55, 8 Atl. Rep. 914.

The *prima-facie* presumption of law is that a crossing at grade can be reasonably avoided, and the burden of proving that it

cannot in any particular case is on the company seeking to cross. *Appeal of Moosic Mt. & C. R. Co., (Pa.) 13 Atl. Rep. 915.*—FOLLOWING Baltimore & C. V. R. Extension Co.'s Appeal, 3 Am. & Eng. R. Cas. 242, 10 W. N. C. (Pa.) 530; Pittsburgh & C. R. Co. v. South-west Pa. R. Co., 77 Pa. St. 173.

63. Under the Pennsylvania Constitution of 1874.—The provision in the Pennsylvania Constitution of 1874 that every railroad company shall have the right "to intersect, connect with, or cross any other railroad," does not change the policy of the state as embodied in the act of June 19, 1871, to prevent railroad crossings at grade where that is reasonably practicable. *Northern C. R. Co.'s Appeal, 103 Pa. St. 621.*—QUOTING Pittsburgh & C. R. Co. v. South-west Pennsylvania R. Co., 77 Pa. St. 173.—DISTINGUISHED IN Sharon R. Co. v. Sharpsville R. Co., 122 Pa. St. 533.

The Pennsylvania Constitution of 1874, art. 17, § 1, authorizing the crossing of railroads, does not declare whether the crossing shall be at grade or not; that is left to legislative action and judicial supervision. *Pittsburgh & C. R. Co. v. South-west Pa. R. Co., 77 Pa. St. 173.*—QUOTED IN Northern C. R. Co.'s Appeal, 103 Pa. St. 621.

Article 17, § 1, of the Pa. Constitution, providing that every company shall have the right with its road to intersect, connect with, or cross any other railroad, does not refer to or authorize grade crossings; and a decree preventing a grade crossing does not conflict with this provision of the constitution. *Perry County R. Extension Co. v. Newport & S. V. R. Co., 150 Pa. St. 193, 24 Atl. Rep. 709.*

64. Under the statutes of Pennsylvania, generally.—The Pennsylvania statutes must be liberally construed so as to prevent, as far as possible, grade crossings. Where a company laid out its route so as to cross another railroad twice within a distance of four miles, and it appeared that another reasonably practicable route was open for the location of this railroad, which would have avoided crossings altogether, the new company was restrained from crossing at a grade the said railroad already constructed. *Perry County R. Extension Co. v. Newport & S. V. R. Co., 55 Am. & Eng. R. Cas. 12, 150 Pa. St. 193, 24 Atl. Rep. 709.*

While it is the policy of the Pennsylvania statutes to prevent railroads crossing each

other at grade, yet a preliminary injunction will be granted to restrain an existing road from interfering with a second road making such crossing, where any other crossing seems practically impossible. *Appeal of Moosic Mt. & C. R. Co., (Pa.) 13 Atl. Rep. 915.*

65. Under Pennsylvania act of 1871.—The Pa. act of June 19, 1871, P. L. p. 1360, providing that the court shall "ascertain and define the mode of crossing which will inflict the least practical injury upon the rights of the road which is intended to be crossed, and if in the judgment of the court it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade," construed in accordance with our present surroundings should be held to prevent all grade crossings except in case of imperious necessity. And the necessity must not be of its own creation, as by locating the line in one place when another route is practicable. *Perry County R. Extension Co. v. Newport & S. V. R. Co. 150 Pa. St. 193, 24 Atl. Rep. 709.*—QUOTED IN Pennsylvania R. Co. v. Braddock Elec. R. Co., 152 Pa. St. 116.

The act of April 4, 1868, giving railroad companies the right to cross at grade the tracks of any other railroad, is modified by the act of 1871, the purpose of the latter act being the protection of the rights of the public and prior corporations. *Perry County R. Extension Co. v. Newport & S. V. R. Co., 150 Pa. St. 193, 24 Atl. Rep. 709.*

The Pennsylvania railroad act of June 19, 1871 (relating to crossing of lines of railroads by other railroads, and authorizing the court, if it is reasonably practicable to avoid a grade crossing, to prevent such crossing at grade by their process), does not apply to proceedings to condemn, and locate a railroad through another company's yard; and the master, on a reference, is not justified in relocating such a road under that statute. *Pittsburgh Junction R. Co.'s Appeal, 28 Am. & Eng. R. Cas. 266, 122 Pa. St. 511, 6 Atl. Rep. 564, 9 Am. St. Rep. 128.*—QUOTING Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325.

Where the jurisdiction conferred by the act of 1871 on courts of equity is invoked, it is for the court to ascertain, as a conclusion from the special facts and circumstances of each case, whether it is reasonably practicable to avoid a crossing at

grade, and if so, to prevent such grade crossing, and by its decree define the mode of crossing to be adopted. *Northern C. R. Co.'s Appeal*, 103 Pa. St. 621.—QUOTING *Baltimore & C. V. R. Extension Co.'s Appeal*, 3 Am. & Eng. R. Cas. 242, 10 W. N. C. 530.

The courts of equity of Pennsylvania are by the Act of April 10, 1871, § 2 (P. L. p. 1361), imperatively required to restrain by injunction the crossing of one line of railroad by another at grade if, in the judgment of the court, it is reasonably practicable to avoid such grade crossing. *Baltimore & C. V. R. Extension Co.'s Appeal*, 3 Am. & Eng. R. Cas. 242, 10 W. N. C. (Pa.) 530.—REVIEWING *Pittsburg & C. R. Co. v. South-west Pa. R. Co.*, 77 Pa. St. 173.

Railroads chartered prior to the act of June 19, 1871, authorizing courts of equity to regulate grade crossings, are subject to that act. So under the act of April 4, 1868, relating to the same matter, the crossing was subject to review by a court of equity. *Pittsburg & C. R. Co. v. South-west Pa. R. Co.*, 77 Pa. St. 173.—REVIEWED IN *Baltimore & C. V. R. Extension Co.'s Appeal*, 3 Am. & Eng. R. Cas. 242, 10 W. N. C. 530.

By the Pa. act of 1871 the rights of crossing railroads are secondary to those of that crossed, and the crossing company must show evidence that no unnecessary injury is inflicted on the other by crossing at grade, and that such crossing cannot be reasonably avoided. The intent of the act is to discourage grade crossings involving danger to the public as well as injury to the company whose road is crossed. *Pittsburg & C. R. Co. v. South-west Pa. R. Co.*, 77 Pa. St. 173.—QUOTED IN *Pennsylvania R. Co. v. Braddock Elec. R. Co.*, 1 Pa. Dist. 111.

66. Under the statutes of Illinois—
Iowa.—In the state of Illinois it is the policy of the law to allow a new railroad to cross on the track of an old one at grade; but at the same time the legislature has clearly shown that it is intended that a railroad should not cross at grade in all instances. If a new road can, at small expense, cross at a different level the track of another road it should be required to do so, particularly in cases where a grade crossing would jeopardize life and property. Additional expense should be apportioned between the roads. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. (U. S.) 219.

In a suit to enjoin one company from con-

structing a grade crossing over the track of another, it appeared that the track of the plaintiff, upon one side of the point where it was proposed to construct the crossing, had been constructed upon a heavy grade, and that if trains were stopped within 200 feet of the crossing, as required by the statute, it would be impossible for them to gain sufficient momentum before reaching the ascending grade to carry the trains over it, whilst on the other hand trains coming the other way would be required to stop on the descending grade, and that this would be attended with many difficulties, and would occasion constant danger of collision. It was shown that an under-crossing could be constructed at a cost of less than \$15,000 in excess of the cost of a crossing at grade. *Held*, that under the provisions of the Iowa statute which authorizes any company to carry its railroad across or under any other railway, and requires such company to so construct its crossing as not unnecessarily to impede the travel on the railway crossed, the plaintiff was entitled to an injunction. *Humeston & S. R. Co. v. Chicago, St. P. & K. C. R. Co.*, 35 Am. & Eng. R. Cas. 263, 74 Iowa 554, 38 N. W. Rep. 413.

The fact that the defendant company had, pending the proceedings, constructed various works at a cost of about \$6000, which would become useless in the event of an under-crossing being decreed, is not sufficient reason for the refusal of an injunction. *Humeston & S. R. Co. v. Chicago, St. P. & K. C. R. Co.*, 35 Am. & Eng. R. Cas. 263, 74 Iowa 554, 38 N. W. Rep. 413.

67. Under Massachusetts statutes.
—Mass. St. of 1872, ch. 53, § 12, and ch. 180, § 3, relating to railroads thereafter "constructed" crossing at grade, do not apply to a railroad corporation which prior to the passage of these statutes has located the line of its road, exercised its right of taking land for the use of its road, incurred liability for land damages and expense in laying the roadbed, in rock excavation, in the construction of abutments for a bridge, and in the building of a long bridge at grade in the immediate vicinity of the point where it intended to cross another railroad at grade, although the railroad and the crossing at grade were not completed. *Attorney-General v. Ware River R. Co.*, 115 Mass. 400.

68. Under New York statutes.—The question as to whether the crossing of one railroad track by the track of another com-

pany should be at grade is not determinable in a proceeding under the general railroad act (§ 22, ch. 140, N. Y. Laws of 1850) by an aggrieved landowner to procure a change of the proposed route of a railroad, when such proceedings are on appeal to the court of appeals; but it seems this question may be determined, and should be brought up under another provision of the act, found in section 28, subdivision 6. *In re New York, L. E. & W. R. Co.*, 99 N. Y. 388, 2 N. E. Rep. 35; *dismissing appeal from 26 Hun 673*.—APPLIED IN *Re New York, L. E. & W. R. Co.*, 110 N. Y. 374.

5. *Powers of Courts of Equity; Injunction.*

69. Scope and extent of the jurisdiction, generally.—A court possessing general equity jurisdiction is empowered to determine the relative rights of two companies with respect to the construction of a crossing by one over the track of the other, provided there is no statute regulating the manner of effecting such a crossing. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. (U. S.) 219.

A statute authorized the extension of a railroad and provided that it should not cross any existing railroad at grade, and that all necessary structures for crossing under grade should be subject to the approval of the railroad commissioners. A plan for the proposed structure of a crossing was submitted to such commissioners, and on hearing approved by them. After a hearing, and before notice of approval, the company whose location was to be crossed extended a side-track so as to make a second track at the point of crossing. The other company tore up the side-track and removed the embankment supporting it. The track of the railroad as it existed at the time of the hearing was not disturbed and the extension of the railroad was constructed under the same, according to the plan approved by the commissioners. *Held*, that the company whose location was thus interfered with could not restrain the other company from tearing up the side-track and removing the embankment; nor could it recover damages for such act. *Fitchburg R. Co. v. New Haven & N. Co.*, 14 Am. & Eng. R. Cas. 95, 134 Mass. 547.

If in the use of an easement to cross the right of way and track of another company, whether it be acquired under proceedings to condemn a crossing in a specified

manner or under proceedings to condemn a crossing generally, conflict should at any time arise between the companies entitled, the interposition of equity may be invoked to secure to each company the enjoyment of its privilege in a just and lawful manner. *National Docks & N. J. J. Connecting R. Co. v. State*, 53 N. J. L. 217, 21 Atl. Rep. 570.

Courts of equity, by the Pa. act of 1871, have power to impose regulations looking to the safety of the public, in reference to watchmen, manner of crossing, and such other matters as may be necessary to render the crossing the least dangerous to life and property. *Pennsylvania R. Co. v. Braddock Elec. R. Co.*, 1 Pa. Dist. 111.

70. Restraining company from crossing another's track.*—Where, pending an appeal from the award, the railroad company enters upon lands condemned without paying or depositing the compensation as required by law, its act is a naked trespass for which the landowner has an adequate remedy by an action at law; and an injunction will not be granted unless it is shown that irreparable injury will be inflicted. So *held*, where one company entered upon the roadbed of another and constructed its track thereon. *Mobile & G. R. Co. v. Alabama Midland R. Co.*, 39 Am. & Eng. R. Cas. 117, 87 Ala. 520, 6 So. Rep. 407.—FOLLOWING *Cooper v. Anniston & A. R. Co.*, 85 Ala. 106; *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297.

Under the Md. Act of 1878, ch. 192, entitled An act to enlarge the powers of the Pennsylvania R. Co. in Maryland, the appellant had the power, upon complying with the requirements of that act, to construct its road across the Potomac Wharf branch of the Cumberland & P. R., on the west side of Wills' creek, and then to cross over the creek to its east side. But as the appellant was not justified in making its crossing over the Potomac Wharf branch forcibly, and against the consent of the appellees, without a written agreement between them conferring the easement on the appellant, which agreement was not executed, the appellees were entitled to an injunction restraining the appellant from using said crossing over the Potomac Wharf branch. *Pennsylvania R. Co. v. Consolidation Coal Co.*, 55 Md. 158.

* See also *ante*, 66.

A company was chartered in 1828 with the exclusive right to make, keep up, and use a railroad from C. to H., with branches to two other points. In 1833 its main trunk from C. to H. was completed, but no branches were ever built. In 1835 another company was chartered to construct a road from C. to Cincinnati, with branches. The charter provided, with reference to the main trunk only, that the state should not "authorize the construction of any other railroad within twenty miles of" the same "which shall connect any points or places" thereon, "or which shall run in the general direction thereof." The second company purchased the road of the first from C. to H. and then constructed its own road from Branchville to Columbia, stopping finally at the latter point. In 1843, under an act of that year, "all the rights, privileges, and property" of the first company became vested in the second, and by charters granted in 1858 and 1863 a third company was authorized to construct a road from some point east of the second company's track, in or near C., to or near H. *Held*, that the third company had a right to cross the road of the second company, in or near C., and that an injunction attempting to restrain it from doing so was properly refused. *South Carolina R. Co. v. Columbia & A. R. Co.*, 13 *Rich. Eq. (So. Car.)* 339.

In a proceeding in equity by one railroad company to restrain another from crossing the tracks of the former at grade, complainants cannot avail themselves of the fact that defendants have, by their laches allowed a third company to build its tracks over that portion of the chartered route of defendants intended to be occupied by them after making said crossing. *Western Pa. R. Co.'s Appeal*, 104 *Pa. St.* 399.

In an application for an injunction to restrain one railroad from crossing another, the fact that plaintiff will resist the crossing by force, and so possibly cause bloodshed, is not cause in itself for granting the application; neither is it a bar to the application if otherwise proper. *Canadian Pac. R. Co. v. Northern Pac. & M. R. Co.*, 5 *Man.* 301.

71. Preliminary injunction to prevent a crossing.—On the filing of a bill for an injunction to restrain another company from constructing its road across that of plaintiff at grade, the court awarded a preliminary injunction which was afterwards

dissolved. *Held*, that the injunction should not have been dissolved where it appeared that it would be dangerous to have the roads cross at grade. *Reynoldsville & F. C. R. Co. v. Buffalo, R. & P. R. Co.*, 134 *Pa. St.* 541, 19 *Atl. Rep.* 674.

In an action by a stockholder to enjoin a railroad corporation from intersecting the road of the railroad corporation of which plaintiff is a member, a temporary injunction may be granted, without notice to the corporation about to make the intersection. Such injunction does not suspend the general and ordinary business of such corporation, within the meaning of Code Civ. Pro. § 1809. *Howlett v. New York, W. S. & B. R. Co.*, 14 *Abb. N. Cas. (N. Y.)* 328.—**DISTINGUISHING** *Wilkie v. Rochester & S. L. R. Co.*, 12 *Hun* 242; *Middletown v. Rondout & O. R. Co.*, 43 *How. Pr.* 144.

72. Enjoining condemnation proceedings.—Where a railway company has acquired, by agreement, the right to lay two railroad tracks across a railroad previously constructed, and it seeks to condemn, under the Eminent Domain Act, an additional strip on which to construct two other of its tracks across the same road, the fact that it will produce an obstruction and an inconvenience to the company whose road is sought to be crossed is no reason for enjoining the proceeding to condemn, as all the damages caused thereby, when ascertained, will have to be paid, and it will be presumed they will be fully awarded. *Chicago & W. I. R. Co. v. Illinois C. R. Co.*, 113 *Ill.* 156.

The provision that "every railroad company shall have the right with its road to intercept, connect with, or cross any other railroad," as used in the Texas Const. art. 10, § 1, is not self-executing, but requires legislation to regulate the exercise of the rights conferred thereunder. And a court of equity may restrain the exercise of the right conferred under this clause until, by proper legal proceedings, it has been established under the proper limitations and conditions. *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 4 *Woods. (U.S.)* 360, 10 *Fed. Rep.* 497.

73. Enjoining proceedings of commissioners.—An injunction will not lie from a court of equity to enjoin commissioners, who are appointed to condemn the right of one railroad to cross the tracks of another, from considering a certain plan of

crossing which is alleged to be different from that described in the petition, the respondent having denied that there was any material difference between the two plans. *Pennsylvania R. Co. v. National Docks & N. J. J. Connecting R. Co.*, 56 *Fed. Rep.* 697.

A court of equity will not interfere to control the proceedings pending in a special statutory tribunal, such as condemnation proceedings, under a petition to condemn the right to cross the track of one railroad by the track of another, under the New Jersey statutes; nor will it give relief where there is an adequate remedy at law, as by *certiorari*, from the state courts. *Pennsylvania R. Co. v. National Docks & N. J. J. Connecting R. Co.*, 56 *Fed. Rep.* 697.

II. SUBSEQUENT DUTIES AND LIABILITIES OF THE COMPANIES.

1. In General.

74. Sic utere tuo alienum non lædas.—The maxim *Sic utere tuo alienum non lædas* applies to a railway company that has a right of passage over the track of another, and binds it so to use its right as not, by negligence, to injure others having like rights. *Patterson v. Wabash, St. L. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 130, 54 *Mich.* 91, 19 *N. W. Rep.* 761.

75. Priority of passage.—Under the provisions of an agreement between two companies that all trains and engines of the plaintiff should have priority over those of the defendant at a crossing of the tracks, the words "all trains and engines" were ambiguous as making no distinction of trains and engines into classes; and there was no warrant to go outside of the agreement to ascertain the rules of priority given to the various classes of trains and engines so as to apply them to the terms of the agreement. *Cornwall & L. R. Co.'s Appeal*, 125 *Pa. St.* 232, 23 *W. N. C.* 494, 46 *Phila. Leg. Int.* 360, 20 *Pitts. L. J. N. S.* 59, 17 *Atl. Rep.* 427.

76. Construction, maintenance, and keeping in repair.—Where the proposed crossing was upon grade, it would be the duty of both parties to see to it that the crossing was properly constructed and maintained in a safe condition. *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 14 *Am. & Eng. R. Cas.* 62, 105 *Ill.* 388.—DISTINGUISHING *Chicago & A. R. Co. v. Spring-*

field & N. W. R. Co., 67 *Ill.* 142; *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.*, 96 *Ill.* 274.

Under Indiana Rev. St. 1881, §§ 3904, 3905, all companies interested in a crossing of railroads must assist in keeping them in repair, and be responsible for a failure to do so. *Indiana, B. & W. R. Co. v. Barnhart*, 115 *Ind.* 399, 13 *West. Rep.* 425, 16 *N. E. Rep.* 121.

The provision in How. Mich. St. § 3350, that a railroad corporation whose road is crossed shall bear a proportion of the expense of keeping the crossing in repair, is only justified by the necessities of the case growing out of the connecting of the two tracks, and should be limited, as near as may be, to what would have been necessary to keep the track of the company whose line is thus crossed in repair at the crossing if the same had not been made; and this rule should be observed whether the crossing is made on, above, or below grade. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 28 *Am. & Eng. R. Cas.* 272, 62 *Mich.* 564, 29 *N. W. Rep.* 500.

By the terms of the Ohio act of 1860, where the tracks of two companies cross each other at a common grade, the crossing shall be made, kept up, and a watchman maintained thereat, at the joint expense of the companies owning the tracks. *Held*, that the statute imposes upon both companies the expense of making and keeping such crossing as is required under the statute without regard to the date of their respective charters or the location or construction of their respective roads. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 *Ohio St.* 604.—QUOTED IN *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 14 *Am. & Eng. R. Cas.* 62, 105 *Ill.* 388.

Under § 3333 Ohio Rev. St., imposing upon railroads the tracks of whose roads cross each other at a common grade, the joint obligation of making and keeping in repair the crossing, and maintaining watchmen thereat, and requiring the expense thereof to be borne by the companies jointly, the burden is common to both companies, and where either performs the whole duty, and pays the entire expense, it may compel contribution by the other to the extent of its equal portion thereof. *Baltimore & O. R. Co. v. Walker*, 36 *Am. & Eng. R. Cas.* 492, 45 *Ohio St.* 577, 14 *West. Rep.* 172, 16 *N. E. Rep.* 475.

A railroad seeking by condemnation proceedings to appropriate a right of way for crossing the tracks of another railroad may, by stipulation tendered, assume the burden of maintaining frogs and crossing apparatus. *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. Rep. 551.

Where a company seeks to compel another company which has formed a junction with its line to pay the expenses of erecting and maintaining signals and conveniences, as required by statute, it must prove that such expenses have been actually paid; proof of a liability incurred is not enough. *Carmarthen & C. R. Co. v. Manchester & M. R. Co.*, L. R. 8 C. P. 685, 42 L. J. C. P. 262.

77. Watchmen.—Under Ohio Rev. St. § 3333, providing that when the tracks of two railroads cross each other, or in any way connect at a common grade, the crossing shall be made and kept in repair, and a watchman maintained thereat, at the joint expense of the companies owning the track, etc., a company having the possession and control of a road in Ohio, which is in the management and operation of such road as lessee, is a company "owning the track" of such road, in the sense in which that phrase is used in the statute. *Baltimore & O. R. Co. v. Walker*, 36 Am. & Eng. R. Cas. 492, 45 Ohio St. 577, 14 West. Rep. 172, 16 N. E. Rep. 475.

Where a company desiring to cross the road of another agrees to provide signals at the crossing and watchmen to operate the same, and the contracting parties afterward agree upon a code of signals to be given by the watchmen and observed by the parties, the company first mentioned is responsible to the other company for damages caused by running its engine into the latter's train, which is crossing in obedience to a signal giving it the right to cross. *New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 35 Am. & Eng. R. Cas. 283, 116 Ind. 60, 15 West. Rep. 548, 18 N. E. Rep. 182.

Where there is a junction of two roads, one using the track of the defendant, and the defendant provided a switch at the junction which always kept its track open and in good condition—*held*, that the defendant was not required to keep a watchman or guard at the switch. *Sellers v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, 94 N. Car. 654.

78. Erection and maintenance of stations.*—The Missouri act of 1881, relating to railroads crossing other railroads, and providing for the erection of suitable depots and waiting-rooms for the accommodation of passengers at such crossing, is constitutional as being a legitimate exercise of the police power vested in the legislature. *State v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep. 722.—*FOLLOWING* State v. Wabash, St. L. & P. R. Co., 83 Mo. 144.

Article 4238 Texas Rev. St. provides that the point of intersection of two railways shall be a depot for freight and passenger business on both lines. The roads so crossing each other cannot alter the general law prescribing the duties of railways to ship freight and carry passengers from the several railway depots. *Eddy v. Rider*, 79 Tex. 53.

The intersection of two roads was within less than five miles of the town of Flatonia. The two roads maintained each a depot in the town suited for the convenience of the inhabitants, but about 700 feet apart. The depot of the defendant company was established where it is at the instance of the people of the town. Both were made before the passage of the act relating to union depots, § 4238 Rev. St., as amended by act of April 8, 1889. *Held*, that such facts did not constitute a substantial compliance with the condition in the statute for a union depot excusing the erection of one at the crossing. That the depot had been built before the passage of the act requiring railways to provide depot accommodations at intersections of their roads will not excuse a disregard of the statute or relieve them of a penalty fixed for such neglect. *San Antonio & A. P. R. Co. v. State*, 45 Am. & Eng. R. Cas. 586, 79 Tex. 264, 14 S. W. Rep. 1063.

79. Liability for personal injuries.—In considering whether or not it was an act of negligence for the defendant to stop a car containing passengers on the crossing of another road, the question of defendant's convenience was entirely immaterial. *Kellogg v. Central Iowa R. Co.*, 21 Am. & Eng. R. Cas. 485, 68 Iowa 470, 23 N. W. Rep. 740, 27 N. W. Rep. 466.

Where an injury to a passenger upon a

* Duty of company to maintain station at point of intersection with another road. Constitutionality of statutes, see note, 45 Am. & Eng. R. Cas. 592.

railroad was caused by the negligence of the employes of a private railroad, crossing the former at grade, without negligence on the part of the passenger carrier also, the latter is not liable. *Bunting v. Pennsylvania R. Co.*, 118 Pa. St. 204, 10 Cent. Rep. 892, 12 Atl. Rep. 448, 21 W. N. C. 181.

A railroad is not required, at a place where its road crosses another railroad, to use such care and skill to avoid inflicting injury as the most prudent in like business are accustomed to exercise, but such as the mass of prudent persons in like business are accustomed to exercise. *Houston & T. C. R. Co. v. Brin*, 77 Tex. 174, 13 S.W. Rep. 886.

A passenger on the Southern Pac. R. was injured in a collision with a car upon the track of the Gulf, C. & S. F. R. Co., alleged to have been negligently left so as to occasion the collision. The passenger sued both companies. The Southern Pac. R. Co. alleged that the injury was caused alone by the negligence of the other railway company, and asked judgment over against it in case the plaintiff should recover. *Held*, that it was within the power of the court to allow such relief. *Gulf, C. & S. F. R. Co. v. Hathaway*, 41 Am. & Eng. R. Cas. 219, 75 Tex. 557, 12 S. W. Rep. 999.

It is not negligence *per se* for a company to fail to notify passengers not to alight at an intervening railway crossing because it has announced the succeeding station as such. *Minock v. Detroit, G. H. & M. R. Co.*, 97 Mich. 425, 56 N. W. Rep. 780.

2. Duty to Stop before Crossing.

80. Generally.—If the driver of a railroad train who has the right to the road at the crossing of another railroad knows, or has good reason to believe, he will come in collision with a train not entitled to the crossing if he attempts to exercise his right, prudence requires him not to attempt the exercise of his right. *Chicago & A. R. Co. v. Rockford, R. I. & St. L. R. Co.*, 72 Ill. 34.

An engineer in charge of a train approaching the crossing of an intersecting railroad should stop his train until he can ascertain that the crossing is clear, and if owing to his failure to take this precaution a passenger is injured the company is liable. *Grand Rapids & I. R. Co. v. Ellison*, 39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135.

3 D. R. D.—27.

The claim made by appellant to the use of appellee's track with its engines and cars is, if granted, destructive of appellee's franchise. It has no more right to require appellee to stop its cars at the junction of the two roads than an individual would have to require appellee to stop at the point nearest his residence. Nor can it run its cars over appellee's road without its consent. *Shelbyville R. Co. v. Louisville, C. & L. R. Co.*, 21 Am. & Eng. R. Cas. 233, 82 Ky. 541.

In the absence of a statute requiring trains to come to a full stop before crossing another track, the duty imposed by circumstances upon the corporation to adopt and observe proper precautions to protect the lives of passengers takes the force of law, and has its foundation on the same principles which underlie such a statute, which does not create a new duty, but compels the observance of one already incumbent on the corporation. *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

While it is the duty of an engineer on a passenger train approaching a crossing of another railroad to use due care to ascertain whether a train is approaching thereon, it cannot be said, as a matter of law, that he is bound to listen in addition to looking, although the view is limited by obstructions. *Kansas City, Ft. S. & M. R. Co. v. McDonald*, 51 Fed. Rep. 178, 4 U. S. App. 563, 2 C. C. A. 153.

81. Under agreement between the companies.—Where two companies enter into an agreement that all trains of one shall stop at least two hundred feet from the point of crossing of the other, such contract may be specifically enforced in the sound discretion of a court of chancery, taking into consideration the safety of the public and the convenience of the company crossing the road, by compelling trains to stop at not more than three hundred or four hundred feet from the crossing. *Cornwall & L. R. Co.'s Appeal*, 125 Pa. St. 232, 46 Phila. Leg. Int. 360, 20 Pitts. L. J. N. S. 59, 23 W. N. C. 494, 17 Atl. Rep. 427.

Where two companies have entered into an agreement with respect to the stoppage of trains just before crossing the tracks of each other respectively, a court of equity has power to grant an injunction to prevent the violation of such contract by one of the company. *Cornwall & L. R. Co.'s Appeal*,

125 Pa. St. 232, 23 W. N. C. 494, 46 Phila. Leg. Int. 360, 20 Pitts. L. J. N. S. 59, 17 Atl. Rep. 427.

82. Understatutory requirements.

—(1) *Alabama*.—Under statutory provisions, when the tracks of two railroads cross each other, engineers and conductors are required to stop their trains within one hundred feet of the crossing, "and not proceed until they know the way to be clear" (Ala. Code, § 1145); and the fact that such stoppage within one hundred feet will leave the cars in the rear standing on the crossing of another railroad, does not excuse the failure to perform this duty. *Birmingham Mineral R. Co. v. Jacobs*, 49 Am. & Eng. R. Cas. 263, 92 Ala. 187, 9 So. Rep. 320.—ADHERED TO IN *Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306. FOLLOWED IN *Ensley R. Co. v. Chewning*, 93 Ala. 24.

The Ensley R. Co., organized under the provisions of the Alabama act, approved February 25, 1887 (Sess. Acts 1886-7, p. 144), and engaged in operating a railroad between Ensley City and Birmingham with dummy-engines, is a railroad, within the terms of the statute (Code, § 1145), which requires trains on railroads which cross each other to stop within one hundred feet of such crossing. *Birmingham Mineral R. Co. v. Jacobs*, 49 Am. & Eng. R. Cas. 263, 92 Ala. 187, 9 So. Rep. 320.

When death ensues from a collision of trains at a crossing of two railroads, and one of such trains is not stopped on approaching such crossing, as required by Ala. Code 1886, § 1145, the company running said train, in the absence of contributory negligence, is liable for the death. *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 So. Rep. 800.

(2) *Illinois—Indiana*.—The fact that a state law requires trains to be brought to a full stop when approaching the crossing of another railroad does not make it negligence to fail to stop at such place to allow a passenger to get off. *Louisville, N. A. & C. R. Co. v. Johnson*, 44 Ill. App. 56.

Where a conductor fails to have the train brought to a stop not less than two hundred feet before reaching a crossing of another railroad, as required by the statute, and such failure contributes to a collision with a train on the other road, causing the death of the conductor so neglecting his duty, no recovery can be had by his personal representative. If the injury might have been

avoided by his bringing his train to a full stop at the proper distance before reaching the crossing, no recovery can be had, although the agent of both roads at the crossing may have been guilty of negligence in signaling the several trains when to pass. *Chicago & N. W. R. Co. v. Snyder*, 28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; reversing 18 Ill. App. 640; further appeal, 38 Am. & Eng. R. Cas. 188, 128 Ill. 655, 21 N. E. Rep. 520.

Until it appeared that there was a disregard of the signal by a company attempting to cross the track of another railroad, the employes of the latter company will not be deemed guilty of negligence in failing to anticipate a breach of duty on the part of the employes of the former, for they have a right to assume that the other company will obey the code of signals adopted for the management of trains in such cases. *New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 35 Am. & Eng. R. Cas. 283, 116 Ind. 60, 15 West. Rep. 548, 18 N. E. Rep. 182.

(3) *Missouri—New York—Wisconsin*.—A company need not stop its train at a station because a junction is there made with another road, unless a passenger desires to be transferred to a train on such other road. (Gen. St. Mo., p. 340, § 29.) *Logan v. Hannibal & St. J. R. Co.*, 12 Am. & Eng. R. Cas. 141, 77 Mo. 663.

In the absence of provisions of law upon the subject, save only the general rules relating to negligence, the commissioners who are to determine the manner of crossing, under the N. Y. Laws of 1850, ch. 140, § 28, subd. 6, are authorized to determine all such particulars respecting the manner of crossing as would be ordinarily provided for by the contract between the companies directly affecting the crossing had the companies been able to agree, and such as appertain not only to the interest of those companies, but such as relate to the safety of the public; for example, whether, on arriving at the point of intersection, a train should come to a full stop before entering upon the crossing, or whether a flagman should be stationed at such intersection. *In re Lockport & B. R. Co.*, 19 Hun (N. Y.) 38.

Under Wis. Rev. St., § 1808, it is the duty of a railway train approaching a railway crossing to come to a stop, not immediately at the 400-foot post, but some-

where between that post and the crossing. *Lockwood v. Chicago & N. W. R. Co.*, 6 *Am. & Eng. R. Cas.* 151, 55 *Wis.* 50, 12 *N. W. Rep.* 401.

(4) *Canada*.—A Grand Trunk train on which plaintiff was conductor, before crossing the track of the Great Western R., was brought to a stand until the signalman, who was in charge of the crossing and in the employment of the Great Western R. Co., dropped the semaphore, and thus authorized the Grand Trunk train to proceed. While crossing the track appellants' train, which had not been stopped, owing to the accidental bursting of a tube in the air-brakes, ran into the Grand Trunk train and injured plaintiff. It was shown that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way. Section 143 C. S. C., c. 66, enacts that "every locomotive * * * or train of cars on any railway shall, before crossing the track of any other railway on a level, be stopped for at least the space of three minutes." *Held*, that the appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand brakes in case of the air-brakes giving way, and that there was no evidence of contributory negligence on the part of the Grand Trunk R. *Great Western R. Co. v. Brown*, 3 *Can. Sup. Ct.* 159.—QUOTING *Stokes v. Eastern Counties R. Co.*, 2 F. & G. 691; *Bradley v. Boston & M. R. Co.*, 2 *Cush. (Mass.)* 539.

83. Statutory penalty for failure to stop.—A suit in the name of the people, for the use of C. D., to recover the penalty given by the Illinois Railroad Law, §§ 50, 51, will not be dismissed because it is brought for the use of an individual. *Indianapolis & St. L. R. Co. v. People*, 91 *Ill.* 452.

In an action to recover the penalty for neglecting to stop a train before crossing another railroad on the same level, there is no error in not allowing defendant to prove that it had rules requiring the engine driver to comply with the law in stopping at all railroad crossings, and that the rules were in his hands. *Indianapolis & St. L. R. Co. v. People*, 91 *Ill.* 452.

III. WHERE ONLY ONE OR NEITHER ROAD IS OPERATED BY STEAM.

84. Steam railroad crossing street railway.—After a bill in equity had been filed by a street railway against a steam-railroad company for the purpose of restraining it from building its road across a highway upon which the street-railway company had laid its track on the same grade with the highway, the county commissioner authorized the steam-railroad company to cross such highway at a level. *Held*, that the bill was properly dismissed, as there was not such an infringement of petitioner's rights as to warrant the granting of a preliminary injunction. *Lynn & B. R. Co. v. Boston & L. R. Co.*, 114 *Mass.* 88.

There is no privilege or right directly granting to the plaintiffs, a street-railway company, the sole and exclusive use of Fourth avenue for a railroad track. With reference to the defendant's road crossing plaintiff's track, it is not such an infraction of private property as to call for a preliminary injunction. *New York & H. R. Co. v. Forty-second St. & G. S. F. R. Co.*, 32 *How. Pr. (N. Y.)* 481, 50 *Barb.* 309; *affirming* 50 *Barb.* 285, 26 *How. Pr.* 68.

85. Street railway crossing steam railroad.—(1) *New York*.—A surface street-railroad company, except in the city of New York, cannot construct its road across the track of a steam railroad without consent, unless the question of compensation and manner of crossing has been first legally determined in proceedings under the statute. *People's R. Co. v. Syracuse, B. & N. Y. R. Co.*, 22 *Abb. N. Cas.* 427, 6 *N. Y. Supp.* 326.—DISTINGUISHING *New York & H. R. Co. v. Forty-second St. & G. S. F. R. Co.*, 50 *Barb.* 285.

Chapter 239, Laws 1893, providing that the court shall upon application direct that a street railroad be permitted to cross the track of another railroad pending the determination by commissioners of the points and manner of crossing, on giving bond to conform to the requirements imposed by the commissioners as to such points and manner of crossing and the compensation to be made, is not unconstitutional. *Buffalo, B. & L. R. Co. v. New York, L. E. & W. R. Co.*, 54 *N. Y. S. R.* 877, 72 *Hun* 58, 25 *N. Y. Supp.* 155.

The New York railroad law, Laws of 1890, ch. 565, § 12, as amended by Laws of 1892, ch. 676, authorizing the crossing of

one railroad by another, and prescribing the proceedings by which such right may be enforced, applies to street surface railroads seeking to cross steam railroads. *Buffalo, B. & L. R. Co. v. New York, L. E. & W. R. Co.*, 72 Hun 583, 54 N. Y. S. R. 872, 25 N. Y. Supp. 265.

Objections to the use of the electric trolley system in the places and in the manner proposed by the petitioner for a crossing, as unnecessarily dangerous, a public nuisance, a conversion of the highway into an entirely new use, etc., are not available to defeat the appointment of commissioners to determine the points and manner of crossing as provided by the N. Y. Laws of 1890, ch. 565, § 12, as amended by Laws of 1892, ch. 676, for it is the duty of the commissioners to determine these very questions, and their determination should not be anticipated by objection. *Buffalo, B. & L. R. Co. v. New York, L. E. & W. R. Co.*, 72 Hun 583, 54 N. Y. S. R. 872, 25 N. Y. Supp. 265.

(2) *Pennsylvania*.—Under Pa. act of May 14, 1889, providing that street railways "may cross at grade, diagonally or transversely, any railroad operated by steam or otherwise," it was not error in the trial court to continue an injunction restraining a railroad company from tearing up a street-car track laid at grade; but the court should reserve the power at final hearing to make any necessary order requiring gates or other means necessary to protect life and property. *Buffalo, R. & P. R. Co. v. Du Bois Traction Pass. R. Co.*, (Pa.) 24 Atl. Rep. 179.

Where the tracks of a passenger railway cross those of a steam railway at grade, the driver of the car on the road of the former company is not justified in attempting to cross the track of the latter company without stopping, looking, or listening, no matter what the action of the flagman of the latter company stationed at the crossing may be, if such driver have from other sources information which would lead a prudent man to infer that there was danger to be apprehended from an approaching train. *Philadelphia & R. R. Co. v. Boyer*, 2 Am. & Eng. R. Cas. 172, 97 Pa. St. 91.

A municipal ordinance of Philadelphia provides that conductors of passenger railway cars shall stop their cars and cross the tracks of steam railroads in advance of their cars, under a penalty for failure. *Held*,

that the ordinance does not apply to cars on which one man acts as both conductor and driver. *Held* further, that a municipal ordinance creates no new liability in favor of one injured by the negligence of another. *Philadelphia & R. R. Co. v. Boyer*, 2 Am. & Eng. R. Cas. 172, 97 Pa. St. 91.

The 18th section of the Pa. act of May 14, 1889, which authorizes street railways "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, now or hereafter built," is constitutional, although it does not provide for making or securing compensation to the corporation whose railroad is crossed. *Delaware, L. & W. R. Co. v. Wilkes-Barre & W. S. R. Co.*, 1 Pa. Dist. 627.—*APPROVING Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419.

The aforesaid section is not inconsistent with and does not repeal that provision of the act of June 19, 1871, which gives courts of equity jurisdiction "to ascertain and define by their decree the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed." *Delaware, L. & W. R. Co. v. Wilkes-Barre & W. S. R. Co.*, 1 Pa. Dist. 627.

The Pa. act of May 14, 1889, P. L. p. 211, providing that any street-railway company incorporated under that act shall have the right in its construction to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, is subject to the act of June 19, 1871, P. L. p. 1360, giving the courts power to regulate grade crossings and directing them to prevent crossings at grade when reasonably practicable. *Pennsylvania R. Co. v. Braddock Elec. R. Co.*, 152 Pa. St. 116, 25 Atl. Rep. 780; *reversing* 1 Pa. Dist. 626.

86. Electric railway crossing steam railroad.—The petition of an electric railroad company incorporated under ch. 252, N. Y. Laws of 1884, asking for the appointment of commissioners to ascertain the points of crossing another road, must allege that it has acquired the consent of one half in value of the adjoining property owners and of the local authorities to the construction of its road, in order to confer jurisdiction on the court to act thereon. *In re Saratoga Elec. R. Co.*, 58 Hun (N. Y.) 287, 34 N. Y. S. R. 556, 12 N. Y. Supp. 318.—**DISTINGUISHING** *In re People's R. Co.*, 112 N. Y. 578.

The provisions of section 12 of the N. Y. railroad law (ch. 565 of 1892), providing for the determination by commissioners of the method of railroad intersections when the companies cannot agree, apply to the intersection of a steam railroad, at a street crossing guarded by gates working by means of an overhead chain, with an electric street railroad operated by an overhead trolley wire. *Port Richmond & P. P. Elec. R. Co. v. Staten Island R. T. R. Co.*, 71 *Hun* (N. Y.) 179.

The Pa. act of June 19, 1871, P. L. p. 1360, regulating grade crossings of one railroad by another, does not apply to the crossing of a steam railroad by a street railway, although the latter is operated by electricity. *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.*, 149 *Pa. St.* 1, 24 *Atl. Rep.* 179.

The Pa. act of 1871, entitled "An act relating to legal proceedings by or against corporations," which provides that "when such legal proceedings relate to crossings of lines of railroad by other railroads, it shall be the duty of courts of equity of this commonwealth to ascertain and define by their decree the mode of such crossing, * * * and if in the judgment of such court it is reasonably practicable to avoid a grade crossing they shall, by their process, prevent a crossing at grade," applies to an electric railway crossing the tracks of a steam railroad; and the act of 1889, under which such electric railway was incorporated, authorizing it "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, now or hereafter built," cannot be construed to deprive the state of its power to exercise police supervision to preserve and promote the public welfare, and prohibit a crossing which would evidently be dangerous to public travel. *Pennsylvania R. Co. v. Braddock Elec. R. Co.*, 55 *Am. & Eng. R. Cas.* 1, 152 *Pa. St.* 116, 25 *Atl. Rep.* 780.

In an application by a steam-railroad company for an injunction to restrain an electric railway company from crossing the tracks of the former at grade, if it shall appear practicable for the electric company's cars to be brought to a full stop and to have its conductors go forward to the railroad tracks before attempting to cross, an injunction will be refused if the electric-railway company will undertake the above precautions. *Pennsylvania R. Co. v. Sub-*

urban Rapid Transit Co., 1 *Pa. Dist.* 636.

87. One street railway crossing another.—The right of the second street-railway company to cross the street tracks of the first one is conferred by general law. *St. Louis Transfer R. Co. v. St. Louis M. B. T. R. Co.*, 111 *Mo.* 666, 20 *S. W. Rep.* 319.

The Pa. act of June 19, 1871, providing for control by the court of crossings where one railroad crosses another, applies to street railways. *Baltimore & H. R. Co. v. Hanover & McS. St. R. Co.*, 2 *Pa. Dist.* 774.

This act imposes on the court in such cases a threefold duty: (1) to ascertain the mode of crossing which will least injure the company whose road is to be crossed; (2) to compel by its decree the adoption of that mode; (3) to prevent by its process a crossing at grade, if any other be reasonably practicable. *Baltimore & H. R. Co. v. Hanover & McS. St. R. Co.*, 2 *Pa. Dist.* 774.

The location of a street-railway track for a distance of 165 feet, on a street already occupied by another street railway, to connect the tracks of the first railway company on two other streets not opposite, was allowed as a diagonal crossing, under the Pa. act of May 14, 1889. The test is, whether the crossing can be made without invading the rights of the other railway to the exclusive use of the street under its charter. Where the court is in doubt upon this question, it seems that no restraining injunction will be granted. *Braddock & T. C. R. Co. v. Braddock Elec. R. Co.*, 1 *Pa. Dist.* 44.

Where two street-railway companies are operating their respective roads under a franchise granted by legal authority, their tracks crossing each other at the intersection of two streets, a court of equity will not entertain a bill for injunction by one of them to restrain the other from laying a double track at the crossing, unless a case of irreparable injury is averred and proved, or other special facts showing the inadequacy of legal remedies. *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.*, 50 *Am. & Eng. R. Cas.* 422, 93 *Ala.* 505, 9 *So. Rep.* 568.—*QUOTING East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 75 *Ala.* 275.

CROSSING OF STREAMS.

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CROSSING OF STREETS AND HIGHWAYS.

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— — cattle-guards at, see CATTLE-GUARDS, 11-13.

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I. RAILROAD CROSSING STREET OR HIGHWAY.

1. Right to Cross.*

1. Generally.—Railway companies hold their rights of way subject to the right of the public to extend the public highways and streets across such rights of way. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044. —FOLLOWING *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309.

Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the

interests of their stockholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. Railroad companies, in their relation to highways and streets which intersect their rights of way, are subject to the control of the police power of the state. *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109. —QUOTING *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*, 105 Ill. 388.

By locating its line across a highway, a company acquires the right to lay its track across said highway in the direction or line of its road, and, it may be, to lay a second track in the same direction and parallel with the first, if the whole line is of that character and the business of the road requires it; but not to lay a track in a different direction, on an angle or curve, though within the limits of its described location. *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34.

A company which has duly located its road across a highway, and acquired a right to construct it there at a certain grade, without any restriction as to the number of tracks or the place where they should be laid, is authorized to lay and maintain as many tracks as are essential to the convenient transaction of its business, and for that purpose may make any necessary alteration in the surface of the highway. *Commonwealth v. Hartford & N. H. R. Co.*, 14 Gray (Mass.) 379.

Where a right to cross or occupy a highway is granted by implication, the corporation can only occupy so much as may be reasonably necessary; and what is reasonably necessary, in case of dispute, must be settled by the courts. *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205, 7 Atl. Rep. 659.

In the absence of any admission or evidence, it will not be presumed that a company used or crossed the highway in question without permission of the supreme court. *Schermerhorn v. Mt. McGregor R. Co.*, 52 N. Y. S. R. 892.

2. Under statutory authority—Illinois.—The fifth paragraph of section 20 of the Illinois railroad act of 1872 is an absolute grant of power by the state to railway companies to construct their roads across any public highway. It is only

* Right to maintain railroad crossing, see note, 35 AM. & ENG. R. CAS. 266.

where the railroad is to be constructed along or lengthwise of a highway that the consent of the local authorities is necessary. *Cook County v. Great Western R. Co.*, 119 Ill. 218, 10 N. E. Rep. 564.

3. — Indiana.—Under Indiana Rev. St. 1881, § 3915, a railway company may construct its railroad over or across a public highway, and, where an embankment or cutting occurs, may make a change in the line of such highway, if necessary or desirable, and may take such lands for the construction of such change of highway as may be deemed requisite, by purchase or gift, or by appropriation. *Clawson v. Chicago & G. S. R. Co.*, 20 Am. & Eng. R. Cas. 56, 95 Ind. 152.

4. — Maine — New Jersey.—The Maine Act of 1853, ch. 41, § 3, relating to the construction of railroads across public highways, is not retroactive in its effect. *Wellcome v. Leeds*, 51 Me. 313.

The right of a company organized under the general railroad law of New Jersey (Rev., p. 925), to invade highways between its termini, for the purpose of crossing, exists by necessary implication. *Raritan Tp. v. Port Reading R. Co.*, 50 Am. & Eng. R. Cas. 169, 49 N. J. Eq. 11, 23 Atl. Rep. 127.—QUOTING Warren R. Co. v. State, 29 N. J. L. 353.

Authority for such invasion is limited, however, to the necessity of the railroad in crossing. *Raritan Tp. v. Port Reading R. Co.*, 50 Am. & Eng. R. Cas. 169, 49 N. J. Eq. 11, 23 Atl. Rep. 127.—QUOTING Thompson v. Paterson & H. R. R. Co., 9 N. J. Eq. 558.

5. — New Hampshire—New York.—Section 3, ch. 161, Gen. Laws of New Hampshire, which relates to securing railroad crossings of public highways, is not repealed by § 7, ch. 101, Laws of 1883. *Concord & P. R. Co. v. Portsmouth*, 64 N. H. 219, 9 Atl. Rep. 546.

Under the N. Y. Laws of 1850, ch. 140, § 28, subd. 5, as amended by the Act of 1864, ch. 582, an order from the supreme court made upon notice to the highway commissioners is essential to the obtaining of the right to construct the road of a company upon the surface of a highway. *Osborne v. Jersey City & A. R. Co.*, 27 Hun (N. Y.) 589.

The construction of a railroad across a highway should not be permitted where the usefulness of the highway is virtually

destroyed. *Osborne v. Jersey City & A. R. Co.*, 27 Hun (N. Y.) 589.

6. — Pennsylvania.—The Pennsylvania general railroad act of April 4, 1868, confers on all roads chartered under it power to build tracks across borough streets, and in doing so the company is not a trespasser, nor its acts unlawful. *Appeal of South Waverly*, (Pa.) 11 Atl. Rep. 245.

The manner of building railroads in borough streets is left to the discretion of the railroad company, and after a road is built and in operation a court of equity will not interfere, unless the facts show a gross abuse of this discretion. *Appeal of South Waverly*, (Pa.) 11 Atl. Rep. 245.

7. Under English acts.—Sections 53, 55, and 56 of the Railways Clauses Act 1845, relating to the crossing of highways by railway or other interference therewith, do not apply where the object of the special act is to change the nature of the road substantially, but are applicable only to the interference with roads incidentally. *Tanner v. South Wales R. Co.*, 5 El. & Bl. 618, 1 Jur. N. S. 1215, 25 L. J. Q. B. 7.

A special railway act making it lawful for a company to carry its line across a street on a level is not obligatory, and does not prevent the company from carrying the line across according to the provisions of the general act. *Dover Harbour v. London, C. & D. R. Co.*, 3 De G., F. & J. 559, 30 L. J. Ch. 474.

If a railway company intends to claim the benefit of the provisions of the Railways Clauses Act in a contract between it and an owner of land to be crossed by its line, such act must be expressly referred to. *Clarke v. Manchester, S. & L. R. Co.*, 1 Johns. & H. 631.

8. Right to cross gravel road.—Where a corporation, by an act of 1849, was granted a public highway for the purpose of constructing and maintaining thereon a plank road, but subsequently forfeited its rights in such highway, railroad companies which, by the same act, were given power to lay their tracks across the plank road without compensation, upon such forfeiture ceased to have any rights under that act, and can assert none as against a gravel road which is afterward maintained on the same highway by another corporation. *Indianapolis & C. Gravel Road Co. v. Belt R. Co.*, 32 Am. & Eng. R. Cas. 173, 110 Ind. 5, 10 N. E. Rep. 923.

Section 3903, Indiana Rev. St. 1881, conferring upon railroad companies the power to cross highways without compensation, has reference to ordinary highways, controlled by the public authorities and maintained by taxation, and does not embrace a highway which is used for gravel-road purposes by a private corporation under a grant from the board of county commissioners. *Indianapolis & C. Gravel Road Co. v. Belt R. Co.*, 32 *Am. & Eng. R. Cas.* 173, 110 *Ind.* 5, 10 *N. E. Rep.* 923.—REVIEWING *Seneca Road Co. v. Auburn & R. R. Co.*, 5 *Hill* (N. Y.) 170.

A gravel-road company has property rights in a highway used by it, under a grant for gravel-road purposes; and where a railroad company lays its track across such road without the consent of the gravel-road company, and without proceedings to condemn and the payment or tender of damages, the latter corporation has the right of action, and is entitled to at least nominal damages, and in such a case the maxim *De minimis non curat lex* will not apply. *Indianapolis & C. Gravel Road Co. v. Belt R. Co.*, 32 *Am. & Eng. R. Cas.* 173, 110 *Ind.* 5, 10 *N. E. Rep.* 923.

2. Construction of the Crossing.

a. Duty to Construct.*

9. Generally.—It is the duty of every company to properly construct and maintain in good repair crossings over all public highways on the line of its road, so that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road. *Burlington & M. R. Co. v. Koonce*, 34 *Neb.* 479, 51 *N. W. Rep.* 1033.

Testimony that a road had been traveled by the public for twenty years is not sufficient to show a dedication, in a country where any one feels himself at liberty to pass at will over all uninclosed lands. Such a crossing a railway company is not bound to maintain. *Gulf, C. & S. F. R. Co. v. Montgomery*, 85 *Tex.* 64, 19 *S. W. Rep.* 1015.

10. Under statutory requirements.

—(1) *Illinois—Iowa—Michigan*—The provision of section 8 of the Illinois act relating to the fencing and operating of railroads, passed in 1874, in requiring that

railroad companies shall construct and maintain the highway and street crossings, and the approaches thereto, within their respective rights of way, includes streets to be thereafter laid out or extended, as well as then existing streets. *Chicago & N. W. R. Co. v. Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.

Every company owning or operating a railway is required to construct crossings at all points where it intersects a public highway; and it is liable for all injuries resulting from a neglect of this duty. Any company claiming to be exempt from the provisions of the statute imposing this duty has the burden to establish, by affirmative proof, the facts upon which the exemption is based. *Farley v. Chicago, R. I. & P. R. Co.*, 42 *Iowa* 234.—DISTINGUISHED IN *Beatty v. Central Iowa R. Co.*, 8 *Am. & Eng. R. Cas.* 210, 58 *Iowa* 242.

The performance of work by a township on the roadway of an approach to a railroad crossing, in an endeavor to make it passable, will not relieve the road company from its statutory obligation to construct suitable crossings for the passage of teams. *Thayer v. Flint & P. M. R. Co.*, 93 *Mich.* 150, 53 *N. W. Rep.* 216.

(2) *Missouri—Nebraska—Texas*.—Under the Missouri act of 1875 railroads must construct crossings without being notified, and the act is not intended for the protection of travelers only. *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 *Mo.* 27.

In addition to the common law obligation resting on railroad companies to make reasonably safe crossings where they intersect a public highway, the statute (§ 807, Rev. St. Mo. 1879) provides: "Every such corporation shall construct and maintain good and sufficient crossings where its railroad crosses public roads or town streets, now or hereafter opened for public use, which crossings shall be constructed of the materials and in the manner following (providing for laying of plank and macadamized pavement); and if such corporation fail to construct and maintain such crossings, it shall be liable for all damages resulting from such neglect;" but there must be a direct connection between the negligent act and the injury. *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 98 *Mo.* 183, 11 *S. W. Rep.* 569, 17 *Mo. App.* 518.

The Nebraska act of March 31, 1887, requiring railroad corporations to construct

* Duty of company to make highway crossings, see note, 35 *AM. & ENG. R. CAS.* 260.

and keep in repair suitable crossings where railroads cross public highways, is constitutional. *State ex rel. v. Chicago, B. & Q. R. Co.*, 43 *Am. & Eng. R. Cas.* 248, 29 *Neb.* 412, 45 *N. W. Rep.* 469.

The right of the legislature to require railway companies to construct crossings at the intersection of public highways and the maintenance of cattle-guards is clearly within the scope of the police power, the exercise of which is impliedly reserved in granting the corporate franchise, and is not within the prohibition of the federal constitution against state laws which impair the obligation of contracts. But no implied reservation of power in the state exists to compel a railway, which has fenced its track in obedience to previous laws, to construct crossings within inclosures for the benefit and convenience of the owners of such inclosures. *Gulf, C. & S. F. R. Co. v. Rowland*, 35 *Am. & Eng. R. Cas.* 286, 70 *Tex.* 298, 7 *S. W. Rep.* 718.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Ellis*, 35 *Am. & Eng. R. Cas.* 292, 70 *Tex.* 307.

Texas statute of March 23, 1887, which requires railroad companies to make, at their own expense, crossings outside of any inclosure, on the demand of any two citizens "who either live or own lands within five miles of the place" designated for the crossing, is unconstitutional by reason that it is not necessarily for a public benefit, such citizens being authorized to require the establishment of a crossing, although actuated by selfish or malicious motives, and notwithstanding the fact that such crossing has no connection with any other way over which the public has a right to pass. *Gulf, C. & S. F. R. Co. v. Ellis*, 35 *Am. & Eng. R. Cas.* 292, 70 *Tex.* 307, 7 *S. W. Rep.* 722.—REVIEWING *Rhine v. McKinney*, 53 *Tex.* 354.

11. Proceeding to compel construction, generally.—In an action to compel a railroad company by writ of mandamus to construct a crossing at the intersection of the railroad with an alleged street, the municipality has the burden to establish that the alleged street was a public highway, and the fact of its being a highway is not established by the introduction of a duly acknowledged and recorded plat of the town, without showing further that the person laying out the town had title to the land. *Edenville v. Chicago, M. & St. P. R. Co.*, 77 *Iowa* 69, 41 *N. W. Rep.* 568.

It is necessary that the state crossing board determine the manner and conditions of making a crossing of a way before the court may assume any power to make the crossing, even after condemnation. *Detroit, L. & N. R. Co. v. Probate Judge*, 28 *Am. & Eng. R. Cas.* 285, 63 *Mich.* 676, 30 *N. W. Rep.* 598.

The board of transportation has jurisdiction to hear complaints and make orders in regard to the construction and repairing of such crossings. Its orders in that regard may be enforced by mandamus. *State ex rel. v. Chicago, B. & Q. R. Co.*, 42 *Am. & Eng. R. Cas.* 248, 29 *Neb.* 412, 45 *N. W. Rep.* 469.

Under the New York statutes requiring a railroad to construct crossings, it seems that the owners of the fee as well as their vendees are included in the term "proprietor," as used in the statute. *Haynes v. Buffalo, N. Y. & P. R. Co.*, 38 *Hun (N. Y.)* 17.

And such owners of the legal title should be made parties plaintiff or parties defendant, or the reason stated why their names were omitted as such parties in the complaint. *Haynes v. Buffalo, N. Y. & P. R. Co.*, 38 *Hun (N. Y.)* 17.

12. — to compel receiver to construct.—Where a city had obtained a peremptory writ of mandamus to compel a receiver appointed in foreclosure proceedings to construct a crossing over the tracks, a motion filed by the receiver asking a continuation of the case until the foreclosure should be terminated was properly overruled, as was also a motion that the cause be continued until the deposition of the receiver could be taken and until certain creditors could intervene, where the fact which the receiver claimed his deposition would show was that he had no funds with which to make the crossing, and the allegation in regard to the creditors was to the effect that the receiver had been notified of their intention to resist the expenditure which the crossing would make necessary. *Ft. Dodge v. Minneapolis & St. L. R. Co.*, 55 *Am. & Eng. R. Cas.* 58, 87 *Iowa* 389, 54 *N. W. Rep.* 243.

Where the proceedings were instituted in a court which appointed a receiver and which had authority to control his actions and the property in his possession, and the pleadings and evidence showed that the plaintiff was entitled to relief, such relief

should not be denied for the reason that it might have been obtained in a less formal manner; and where the pleading was sufficient to invoke the jurisdiction of the court, but the petition did not describe the kind of crossing desired, the request being for a "good, sufficient, and safe crossing over and across the excavation," it was proper for the court to order an overhead crossing and incorporate specifications therefor in the judgment rendered. It was not error to refuse to permit the receiver to adopt a plan for the crossing where the defendants relied upon their defense that the crossing was not needed and that the court was not authorized to order one. *Ft. Dodge v. Minneapolis & St. L. R. Co.*, 55 *Am. & Eng. R. Cas.* 58, 87 *Iowa* 389, 54 *N. W. Rep.* 243.

It was within the power of the court to order the receiver to construct the crossing required, notwithstanding the objection of mortgage creditors, since liens acquired by creditors on railway property must be subject to the burden of constructing and maintaining proper crossings. *Ft. Dodge v. Minneapolis & St. L. R. Co.*, 55 *Am. & Eng. R. Cas.* 58, 87 *Iowa* 389, 54 *N. W. Rep.* 243.

13. Notice of necessity for construction.—The service of the notice of the necessity for the construction or maintenance of crossings which the statute requires the overseer to give to the railway company is sufficient if the notice is actually delivered to the agent of the railway company most convenient to the crossing; the service need not be made by any particular officer or person. *Henry v. Wabash Western R. Co.*, 44 *Mo. App.* 100.

The fact that the notice served on a railroad demands the construction of a crossing within sixty days, when the statute requires the crossing to be constructed within thirty days after the service of the notice, does not affect the sufficiency of the notice if the overseer does not proceed to make any repairs until after the expiration of the sixty days; nor need the notice set forth the statute in all its details. *Henry v. Wabash Western R. Co.*, 44 *Mo. App.* 100.

14. Liability for failure to construct—Fine.—By section 11 of the Illinois act of 1874, if the railroad company fails to construct and maintain the street crossings and their approaches after being notified so to do, it shall not only be liable

for the expenses of the municipal authorities in that behalf, but it shall be subject to a fine. *Chicago & N. W. R. Co. v. Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.

15. Duty to construct and maintain sidewalk.—The duty of a railroad company in Illinois to maintain a sidewalk is predicated upon par. 71, ch. 114, S. & C. St. p. 1937, which provides that hereafter at all railroad crossings of highways and streets in this state the several railroad corporations in this state shall construct and maintain said crossings and the approaches thereto with their respective rights of way, so that at all times they shall be safe to persons and property. *Bloomington v. Illinois C. R. Co.*, 49 *Ill. App.* 129.

The term "approach" means a structure of some sort necessary to reach a railroad track from the common surface. It does not signify an ordinary sidewalk; it may be an embankment or a bridge or whatever is required for the purpose at a particular place. *Bloomington v. Illinois C. R. Co.*, 49 *Ill. App.* 129.

While a railroad company must provide a crossing over its railroad track, it is not required to provide a crossing over a right of way in the shape of a sidewalk or otherwise, unless it is necessary to do so in order to make a suitable approach to the crossing over the track. *Bloomington v. Illinois C. R. Co.*, 49 *Ill. App.* 129.

b. Mode of Construction; Sufficiency; Restoring Highway.

16. Sufficiency, generally.*—Where the approaches to a crossing are graded and planks are laid between the rails to make an even surface for the passage of persons and teams, and gates are erected to delay such passage until trains pass, there is no part of the track or right of way or land to be restored to its former state, nor is the usefulness of the railroad in any way impaired. *Chicago & N. W. R. Co. v. Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.—REVIEWING *Portland & R. R. Co. v. Deering*, 78 *Me.* 61; *Boston & M. R. Co. v. County Com'rs*, 79 *Me.* 386.

* Street and highway crossings; duty to fence, see notes, 35 *AM. & ENG. R. CAS.* 173; 19 *Id.* 542.

Company having power to cross streets. Manner of doing so is discretionary, see 32 *AM. & ENG. R. CAS.* 181, *abstr.*

A crossing so constructed as not to endanger the reasonable passage of persons and transportation of property, or as not to unnecessarily interfere with the public highway, is a substantial compliance with section 12 of the Pa. act of 1849 (P. L. p. 84), providing that whenever in the construction of such road it shall be necessary to cross or intersect any established road or way it shall be the duty of the officers of the company so to construct the road across such established road or way as not to impede the passage or transportation of persons or property along the same. *Appeal of North Manheim Tp., (Pa.)* 36 *Am. & Eng. R. Cas.* 194, 14 *Atl. Rep.* 137.

17. Width—Length.—By section 807 of Mo. Rev. St. 1879 a railroad company is required to construct and maintain good and sufficient crossings where the road crosses the public highways. But it is not meant by this statute that the crossing shall be constructed the whole width of the public highway (streets of a crowded town or city would doubtless be an exception to this rule); but ordinarily a crossing the full width of the highway is not constructed. *Ellis v. Wabash, St. L. & P. R. Co.,* 17 *Mo. App.* 126.—*FOLLOWING Bassett v. St. Joseph,* 53 *Mo.* 290.

A crossing at grade of a north and south turnpike at an angle of 45 degrees, which crossing, including the track, is 12 feet 8 inches high, the northern approach being 200 feet long, with an average rise of 5½ feet to the hundred, and the southern approach 244 feet, with an average rise of 7 feet to the hundred, both approaches being from 19 to 20 feet in width, the narrowest place being 17 feet in width, is a substantial compliance with Pa. Act of Feb. 19, 1849, § 12 (P. L. p. 84), although there is a cut to the west and a traveler approaching the crossing cannot readily see or hear a train going east, where the company has also constructed at its own expense a new road starting near the beginning of the northern approach and connecting with the highway which intersects the turnpike to the south, the distance of the new road to the point of intersection being only 100 yards farther than by the turnpike. *Appeal of North Manheim Tp., (Pa.)* 36 *Am. & Eng. R. Cas.* 194, 14 *Atl. Rep.* 137.

Section 51 of the Railways Clauses Act 1845, relating to railways crossing highways by bridges, taken in conjunction with section 49, is, that if the average available

width for the passage of carriages on the road is more than 35 feet, the road may be narrowed to 35 feet under the arch of the bridge; where it is less, the arch may be made the same width as the road, so that it be not less than 20 feet wide; if the road is afterwards widened the arch must be widened in proportion up to, but not beyond, 35 feet. In this reckoning, footpaths are not to be considered. *Queen v. Rigby,* 6 *Railw. Cas.* 479, 14 *Q. B.* 687, 19 *L. J. Q. B.* 153, 14 *Jur.* 329.

18. Approaches—Embankments.*—The embankment which is constructed as a necessary approach to the railway track is in legal contemplation a part of the crossing. *Farley v. Chicago, R. I. & P. R. Co.,* 42 *Iowa* 234.—*QUOTED IN Moberly v. Kansas City, St. J. & C. B. R. Co.,* 98 *Mo.* 183, 17 *Mo. App.* 518.

But where the railroad crosses the highway nearly on a level with it, there is no necessity for an embankment twenty rods long in order to reach the actual crossing. *Beatty v. Central Iowa R. Co.,* 8 *Am. & Eng. R. Cas.* 210, 58 *Iowa* 242, 12 *N. W. Rep.* 332.—*DISTINGUISHING Farley v. Chicago, R. I. & P. R. Co.,* 42 *Iowa* 234.

The term "crossing," as used in the Missouri statute, includes the necessary embankments and approaches. *Moberly v. Kansas City, St. J. & C. B. R. Co.,* 98 *Mo.* 183, 11 *S. W. Rep.* 569, 17 *Mo. App.* 518.—*QUOTING Farley v. Chicago, R. I. & P. R. Co.,* 42 *Iowa* 234.

In the construction of a railway which crosses a public highway, it is not only the duty of the company to leave the highway in such condition that its usefulness will not be impaired, but when its approaches have been materially interfered with by the construction work, these also must be left in as good condition as they were before the railway was built. *Gulf, C. & S. F. R. Co. v. Greenlee,* 23 *Am. & Eng. R. Cas.* 322, 62 *Tex.* 344.

The doctrine that the approaches form part of a bridge does not apply to a case where a railway company constructs a bridge with approaches to carry a road over its track and such bridge is required by statute to be of a certain width. *Reg. v. Birmingham & G. R. Co.,* 1 *G. & D.* 324, 4 *Jur.* 966.

The defendant company, erecting a bridge

* See also title EMBANKMENTS.

to carry a turnpike over its track, was bound (under its special act) to make the approaches to such bridge as wide as the turnpike road had been. In such case it was no excuse that the approaches, though of less width, were as convenient to the public as they could be made in execution of the powers of the act, and as convenient to the public as the original road had been; nor that the company could not widen the approaches without taking more land, and had exhausted the compulsory powers of purchasing. *Queen v. Birmingham & G. R. Co.*, 2 Q. B. 47, 2 Railw. Cas. 694.

Where a railway company has crossed a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than one inch above, or sink one inch below the level; but it is also the company's duty to construct and maintain such approaches as may be necessary to enable persons using the highway to avail themselves of the crossing. Therefore, where a railway company laid a plank fourteen feet long outside the rail, and did not grade the road up to the plank at one end of it, but left the ends of the ties exposed, the company was liable for an accident occurring to the plaintiff's mule by reason of the whiffletree catching upon one of these ties. *Moggy v. Canadian Pac. R. Co.*, 3 Man. 209.

19. Barriers—Guard-rails—Structures.—Where a railroad company has occupied a part of a public road, and made a cut across it, and a new road has been constructed, it is the duty of the company to erect and maintain for a reasonable time a proper barrier to prevent travelers from falling into the cut. *Pittsburg, C. & V. R. Co. v. Moses*, 24 Am. & Eng. R. Cas. 295, 2 Atl. Rep. 188.—**DISTINGUISHING** *Aston Tp. v. McClure*, 102 Pa. St. 323. **QUOTING** *Potter v. Bunnell*, 20 Ohio St. 150; *Veazie v. Penobscot R. Co.*, 49 Me. 119.

A railroad crossing a highway must erect whatever structures are necessary to the convenience and safety of the crossing. Such duty is a continuing one without any express statutory requirement. *Kansas City v. Kansas City Belt R. Co.*, 47 Am. & Eng. R. Cas. 157, 102 Mo. 633, 14 S. W. Rep. 808.—**DISTINGUISHING** *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131.

Evidence that a guard-rail at a crossing was $3\frac{1}{2}$ inches from the track rail, while $2\frac{1}{2}$ inches would amply accommodate the pas-

sage of defendant's engines, does not establish negligent construction rendering defendant liable for damages, in the absence of proof of a different condition at other crossings and of proof as to whether the deceased caught his foot between the guard and the main rail. *McPhillips v. New York, N. H. & H. R. Co.*, 12 Daly (N. Y.) 365.—**DISTINGUISHING** *Payne v. Troy & B. R. Co.*, 83 N. Y. 572.

20. Gates.—A request of the authorities of a municipality that a railroad corporation shall erect gates at a crossing imposes no duty upon it to do so, and it is not chargeable with negligence for omitting to comply with the request, until an order of the supreme court requiring it has been obtained as authorized by the New York act of 1884 (§ 3, ch. 439, Laws of 1884). *Daniels v. Staten Island Rapid Transit Co.*, 125 N. Y. 407, 26 N. E. Rep. 466, 35 N. Y. S. R. 435; reversing 55 Hun 606, 28 N. Y. S. R. 87, 7 N. Y. Supp. 725.

The owner of a private railway not constructed under parliamentary powers, when used for the conveyance of passengers is not bound by the provisions of 5 and 6 Vict. c. 55, § 9, as to making and maintaining gates at grade crossings. *Matson v. Baird*, L. R. 3 App. Cas. 1082, 26 W. R. 835, 39 L. T. 304.

21. Signs—Bell towers—Flagmen.—An ordinance requiring the stationing of flagmen and erection of bell towers at street crossings of railroads has reference to the duty required of the owners or lessees of the railroad tracks, and a failure to comply with this ordinance cannot be made the basis of a liability against a railroad company not owning or leasing the track, nor having any control over the same, but having only a license from the owner of the track to run its cars thereon under certain regulations. *Lake Shore & M. S. R. Co. v. Kaste*, 11 Ill. App. 536.

The failure of the company to provide a sign-board at a public crossing did not, under the provision of the Iowa Code, § 1288, render the company liable for injuries received at the crossing simply upon proof of this neglect. This statute must not be construed to act retrospectively, and it did not enlarge the liability of the company for an accident occurring before it took effect. *Payne v. Chicago, R. I. & P. R. Co.*, 44 Iowa 236.

An open and traveled street in a city,

though not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, is a "traveled place," within the meaning of the Act of 1849, ch. 222, § 2; and a railroad corporation is bound to maintain a sign-board, and the other precautions required by statute at railroad crossings, at the place where it crosses its road. *Whittaker v. Boston & M. R. Co.*, 7 Gray (Mass.) 98.

The commissioners of highways of a town are "local authorities," within Laws of New York 1892, ch. 676, § 33, which provides that the court may, on the application of the "local authorities," compel a railroad company to station a flagman or place gates at any point where a highway crosses the railroad at grade. *In re Highway Com'rs*, 25 N. Y. Supp. 231, 72 Hun 575.

An application under such statute need not state facts which show that the crossing is dangerous, as the only requirement of the statute as to the character of the crossing is that it shall be one at grade. *In re Highway Com'rs*, 25 N. Y. Supp. 231, 72 Hun 575.

Under the general railroad act of 1890, § 33, which authorizes a county court to make an order for a company to station flagmen at points where railroads pass over a highway at grade, or that gates be erected and maintained, or that the court may make such other order respecting the same as may be deemed proper, a court has authority to order the erection of an electric-bell signal at such crossing. *In re Highway Com'rs*, 74 Hun (N. Y.) 46, 26 N. Y. Supp. 293.

Proof showing that a person at a crossing could see a train coming in one direction but a short distance, except at one particular place where a train might be seen between buildings, and that in the summer time the view there was obstructed by the foliage, is sufficient to justify an order directing the company to maintain an electric signal bell. *In re Highway Com'rs*, 74 Hun 44, 26 N. Y. Supp. 384, 56 N. Y. S. R. 146.

22. Going under highway.—A railroad company is not bound to construct a tunnel for its road under a highway, where it is the opinion of competent engineers that it would be flooded, under Delaware act of 1869, providing that railroads crossing highways "shall be so constructed as

not to impede or obstruct the usual and necessary travel," either with bridges over or passages under the same, or at grade. *Kyne v. Wilmington & N. R. Co.*, (Del.) 14 Atl. Rep. 922.

A carriage road is not a turnpike road, within the meaning of section 50 of the Railways Clauses Act 1845, regulating the ascent where such roads are carried over a railway track, unless it is repaired by the trustees out of tolls. *Reg. v. East & W. I. D. & B. J. R. Co.*, 2 El. & Bl. 466, 17 Jur. 1181, 22 L. J. Q. B. 380.

Where a railway company carries a street over its track by means of a bridge, the ascent of which is wrong and contrary to section 50 of the Railways Clauses Act 1845, it cannot justify, under the proviso of section 16, "that in the exercise of the powers by this or the special act granted the company shall do as little damage as may be," and shall make full compensation for all damages sustained. *Reg. v. East & W. I. D. & B. J. R. Co.*, 2 El. & Bl. 466, 17 Jur. 1181, 22 L. J. Q. B. 380.

23. Going over highway.—It cannot be deemed an indictable nuisance to carry a railroad track over a highway crossed by it and not thereunder, for the company has the authority to decide for itself between the two modes of making such a crossing, under the general railroad act of New York. Mandamus is the proper remedy in such a case where the crossing as constructed by the company and the highway as left by it work an inconvenience to the traveling public. *New York C. & H. R. R. Co. v. People*, 12 Hun (N. Y.) 195; modified in 74 N. Y. 302.—REVIEWED IN *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

In a proceeding in equity, based on the N. Y. Act of 1890, ch. 568, § 15, to compel certain railway companies to carry a highway under their tracks, the complaint, *inter alia*, contained allegations to the effect that the attention of the state board of railroad commissioners had been called to the crossing, and upon examination they had reported that the road should be carried under the tracks, but after notice of such report the companies had failed to make said change. The defendants moved to strike out this part of the complaint as immaterial, which the court refused to do. *Held*, that the matter rested in the discretion of the trial court, especially as the

matter charged as immaterial had an important bearing on the question of costs. *Dunkirk v. Lake Shore & M. S. R. Co.*, 75 Hun 366, 27 N. Y. Supp. 105, 56 N. Y. S. R. 767.

The word "road," in an act empowering a railway company to raise or sink roads in order to carry the same over or under its track, means the whole road, including foot-paths, and the company does not reform the road as required by the act, in lowering the surface of the carriageway and leaving the footways at their original level. *Manchester & L. R. Co. v. Reg.*, 3 Railw. Cas. 633, 3 G. & D. 269, 3 Q. B. 528.

The words "bed of the turnpike road," in an act authorizing a railway company in carrying its track across a turnpike to lower the bed of such road, mean that the carriage road only shall be lowered; and the full breadth of the former carriage road is not intended to be preserved under the bridge, but to be preserved only as to part of the road lowered as it descended to the bridge on one side and ascended to it on the other. *Manchester & L. R. Co. v. Reg.*, 3 Railw. Cas. 633, 3 G. & D. 269, 3 Q. B. 528.

The defendant company was entitled, in carrying its track by means of a bridge over a street under the control of the commissioners, notwithstanding a local act, to lower the street so as to give the height to the centre of the bridge arch required by statute. *Reg. v. Eastern Counties R. Co.*, 3 Railw. Cas. 22, 2 Q. B. 569, 2 G. & D. 1, 6 Jur. 820.

24. Must not destroy usefulness of highway.—Where a company is authorized to cross highways it is under duty to construct its road across them in a reasonable manner with reference to the double use of crossing for its own purpose and for travelers, and the right is subject to the maxim, *Sic utere tuo ut alienum non laedas*. *Roxbury v. Central Vt. R. Co.*, 60 Vt. 121, 6 N. Eng. Rep. 534, 14 All. Rep. 92.

A railroad company crossing a public highway must do so with as little injury as possible to the highway. *Kansas City v. Kansas City Belt R. Co.*, 47 Am. & Eng. R. Cas. 157, 102 Mo. 633, 14 S. W. Rep. 808.

It must not destroy the usefulness of the highway. *Osborne v. Jersey City & A. R. Co.*, 27 Hun (N. Y.) 589.

Nor can it be permitted to destroy the usefulness of a public road by raising its rails so high at a crossing that it is danger-

ous to persons and animals to pass over its track. *Paducah & E. R. Co. v. Commonwealth*, 10 Am. & Eng. R. Cas. 318, 80 Ky. 147.

Even without a statutory requirement to that effect, it must so construct its road as not to prevent the public from using its highways, and this duty is a continuing one. *State ex rel. v. Hannibal & St. J. R. Co.*, 29 Am. & Eng. R. Cas. 604, 86 Mo. 13.

A street laid out by the commissioners, under § 7, Pa. Act of Feb. 14, 1866, P. L. p. 31, incorporating the city of Chester, their report being duly approved, is, although unopened, an established road or way, within the meaning of § 12, Act of Feb. 9, 1849, P. L. p. 84, requiring railroads to be so constructed across the same as not to impede the passage or transportation of persons or property. *Chester v. Baltimore & P. R. Co.*, 140 Pa. St. 275, 21 All. Rep. 320.

The charter of the Baltimore & O. R. Co. (Maryland Acts of 1826, ch. 123, § 10) provides "that whenever, in the construction of the said road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct the said road across such established road or way as not to impede the passage or transportation of persons or property along the same." In an action for damages against said company—*held*, that the above provision did not support an averment in the declaration "that it was the duty of the defendant to erect and keep a bridge over the railroad at a point where, it intersects and crosses the F. & W. turnpike road, in such manner that all persons might travel along and over said turnpike road with their horses," etc., "free from danger on account of their horses being frightened by the cars and engines of the defendant, used on its railroad at the said point of intersection; and that it was the duty of the defendant to place such safeguards on and about said bridge as were reasonably necessary to prevent the horses of persons traveling and using the turnpike from being frightened and alarmed at the cars and engines," etc. *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191.

25. Duty to restore highway to its former condition.*—(1) *Generally.*—

* Obligation of company to restore highways, see note, 10 AM. & ENG. R. CAS. 330.

At common law, where persons or corporations are given the right to build a railroad or make a canal across a public highway, they are given no right to destroy it as a thoroughfare, but are bound to restore or unite the highway at their own expense by some reasonably safe and convenient means of passage. *State ex rel. v. St. Paul, M. & M. R. Co.*, 35 Minn. 131, 28 N. W. Rep. 3.

It is the duty of a company in constructing its track across a street or highway to restore the street to its former state, or to such a state as not unnecessarily to impair its usefulness, and to keep such crossing in repair. *Peoria, D. & E. R. Co. v. Lyons*, 9 Ill. App. 350.

And failing to do so, the company is liable for damages sustained on account of injuries received by reason of the unsafe condition in which the street was left, provided the injured party used care commensurate with the apparent danger. *Louisville, E. & St. L. Con. R. Co. v. Pritchard*, 131 Ind. 564, 31 N. E. Rep. 358.

(2) *By charter*.—The duty of a company under its charter to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the railroad was constructed; but the duty was a continuing one, and embraced such alterations and improvements as should afterwards be made necessary by the growth of the city and the increased travel. *Burrill v. New Haven*, 42 Conn. 174.—DISTINGUISHING *New Haven v. New York & N. H. R. Co.*, 39 Conn. 128.

In the absence of express provision in its charter to the contrary, a railway is under obligation to leave every highway that it crosses in a safe condition; and where this duty was imposed by the original charter under which a road was built, the same duty will rest upon any company who may afterwards own the road. *People ex rel. v. Chicago & A. R. Co.*, 67 Ill. 118, 2 Am. Ry. Rep. 66.—DISTINGUISHED IN *O'Fallon v. Ohio & M. R. Co.*, 45 Ill. App. 572. REVIEWED IN *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92; *Little Miami R. Co. v. Greene County Com'rs*, 31 Ohio St. 338.

A railroad charter providing that the company shall construct its track across roads, highways, etc., "so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair and well constructed for public use all such roads, highways, etc., and shall re-

store the road or highway thus intersected to its former good condition, or in a sufficient manner not to have unnecessarily impaired its usefulness," does not exempt the company from its common law obligation to maintain perpetually a bridge over the road, made necessary by the crossing, but rather declares and enforces that obligation. *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 38 Am. & Eng. R. Cas. 676, 87 Tenn. 712, 11 S. W. Rep. 943.—DISTINGUISHING *Missouri, K. & T. R. Co. v. Long*, 27 Kan. 684; *Pittsburgh, Ft. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421; *Brookings v. Central R. & B. Co.*, 48 Ga. 523. REVIEWING *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 487, 96 Ill. 274.

(3) *By statute*.—A railroad company in the construction of its road across a public highway must restore the highway to its former state, or in a sufficient manner not to impair its usefulness, under the statutes of Illinois. *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534, 11 Am. Ry. Rep. 157.

And under the New York general railroad act of 1850. *People ex rel. v. Troy & B. R. Co.*, 37 How. Pr. (N. Y.) 427.

Under the statute (Wisconsin Rev. St. ch. 79, § 11) which requires a highway over which a railway is constructed to be restored "to its former usefulness," the company must so restore it that its use by the public shall not be materially interfered with, nor the highway be rendered less safe and convenient to persons and teams passing over it, except so far as diminished safety and convenience are inseparable from any crossing of a highway by a railroad. *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679.—REVIEWED IN *Little Miami R. Co. v. Greene County Com'rs*, 31 Ohio St. 338.

Under the New York law requiring a restoration of a highway when a company has constructed its track across the same, the company will not be compelled to restore a highway, in an action brought by the highway commissioners for that purpose, where it appears that the company had crossed the highway with the permission of the supreme court and changed its location; that the old highway had not been used nor worked for more than six years, but that the new highway was so used and worked, and its location acquiesced in by the proper authorities for that length of time. *Scher.*

merhorn v. Mt. McGregor R. Co., 23 N. Y. Supp. 417, 69 Hun 512.

A company made alterations in the grade of a road at the railway crossing, which road was owned by a legally incorporated road company, and the alterations were subsequently ratified and adopted by the road company by collecting and receiving tolls. *Held*, that the road company, by such adoption and acceptance, were to be treated as responsible for any injury resulting to a traveler from a failure to properly rebuild the road. *Whitmarsh v. Grand Trunk R. Co.*, 7 U. C. C. P. 373.

A charge that it was the duty of a company, under Texas Rev. St. art. 4170, to restore a road crossed by its tracks to such a state as not to necessarily impair its usefulness as a public highway, is misleading and erroneous, if it affects a material issue in the case, when the statute requires that the company shall restore the road to such state as not unnecessarily to impair its usefulness. *Dallas & G. R. Co. v. Able*, 37 Am. & Eng. R. Cas. 453, 72 Tex. 150, 9 S. W. Rep. 871.

26. Mandamus to compel restoration.—If the company which has extended its track across a public highway fails to restore it to its former condition, or to such a condition as to not unnecessarily impair its usefulness, a mandamus will lie to compel it to do so. *New York C. & H. R. R. Co. v. People*, 12 Hun (N. Y.) 195; modified in 74 N. Y. 302.—FOLLOWING *People v. Dutchess & C. R. Co.*, 58 N. Y. 152.

Mandamus will not lie to compel a railway company which has the option to carry a turnpike road over the railway or the railway over the turnpike, where the crossing is effected, to do one of these two things, unless it is shown that it is impossible for the company to exercise an option. *Reg. v. South Eastern R. Co.*, 4 H. L. Cas. 471, 17 Jur. 901; affirmed in 17 Q. B. 485, 15 Jur. 871, 20 L. J. Q. B. 428.

On proceedings by mandamus to compel a railway company to reform a road crossed by its track and to lower the whole width thereof, it is not a good return that the carriage road and footpaths as they existed were more commodious and convenient to the public than if lowered as required by the writ. *Manchester & L. R. Co. v. Reg.*, 3 Railw. Cas. 633, 3 G. & D. 269, 3 Q. B. 528.

Where in mandamus proceedings to compel a company to restore a street crossing to a suitable condition the court finds

that the plan proposed by the party complaining was suitable, appropriate, and adequate for such purposes, and the return to the supreme court fails to disclose the evidence upon which such finding is based, it will be presumed that the evidence was sufficient to justify the determination of the court below. Where the plan includes a bridge over the contiguous tracks of two railway companies, it must necessarily have reference to the rights of each in accomplishing the general purpose of the public accommodation and convenience, and neither can be compelled to surrender its property or change its route further than is reasonably necessary for such purpose. *State ex rel. v. St. Paul, M. & M. R. Co.*, 34 Am. & Eng. R. Cas. 168, 38 Minn. 246, 36 N. W. Rep. 870.

27. Right to change location of highway.—A railroad company in crossing a highway may make a change in its location, if necessary, so long as it does not unnecessarily interfere with the usefulness of the highway. *Schermerhorn v. Mt. McGregor R. Co.*, 52 N. Y. S. R. 892.

A railroad company, organized under the general railroad laws of Pennsylvania, has power to change the site of a township road, as well when it crosses the road diagonally as when it occupies it longitudinally. *North Mannheim Tp. v. Reading & P. R. Co.*, 18 Phila. (Pa.) 650.

Under the Massachusetts Pub. St. ch. 112, §§ 120, 129, 130, county commissioners, in ordering the separation at a crossing of the grades of a railroad and a highway, may change the highway to a place different from that of the existing crossing, if the change is not greater than is reasonably necessary in order to do away with the crossing at grade. *Davis v. Hampshire County Com'rs*, 153 Mass. 218, 26 N. E. Rep. 843.—FOLLOWED IN *Hammond v. Worcester County Com'rs*, 154 Mass. 509.

Where a railroad charter gives the company power to alter and grade the public and other roads crossing their railroad, so as not to impede the travel on such roads, the company have no right to change the route of any public or other road. *Warren R. Co. v. State*, 29 N. J. L. 353.—QUOTED IN *Greenwich v. Easton & A. R. Co.*, 24 N. J. Eq. 217; *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11.

A company has no right to alter the grade of a public highway which crosses

its track, under the New Jersey act of March 28, 1862. *Central R. Co. v. State*, 32 *N. J. L.* 220.

Where the charter of a company directs it to keep sufficient passages over or under its track where any public road crosses the same, so that carriages, etc., on said road shall not be impeded thereby, it is lawful for the company, having laid a public road over its track, subsequently to lay the same through a tunnel under the track, whenever the safety or convenience of the public demands such a change. *Central R. Co. v. State*, 32 *N. J. L.* 220.

Where the charter of a company prescribed that, if the railway should in the course thereof pass any highway, it should be so constructed as not to impede or obstruct the safe and convenient use of such highway, and gave the company power to raise or lower such highway, so that the road, if necessary, might pass under, or over, or across the same, and in case they did so raise or lower any highway, gave to the town council of the town where the highway was located power to require the company to do it in such a manner as should be satisfactory to them, by requesting any alteration or amendment which should be necessary for that purpose, and by a complaint to the court of common pleas in case of a refusal or neglect to comply with such request—*held*, that the company were not justified in widening a highway or diverting its course, or supplying its place with a new way, so that the railroad should be passed at a point different from its intersection with the original way, even though the change was approved or acquiesced in by the town council, and was for the convenience of the public; and that, in such case, they were liable in damages to private individuals who had suffered a special injury by their act. *Hughes v. Providence & W. R. Co.*, 2 *R. I.* 493.

Under the provisions of Indiana Rev. St. of 1881, § 3915, to the effect that whenever a railroad shall cross a public highway, such highway may be carried under or over the track as may be most expedient and convenient—*held*, that the old highway might be filled up and the new one established where a change in the road is desirable, and additional land may be taken for this purpose. *Clawson v. Chicago & G. S. R. Co.*, 20 *Am. & Eng. R. Cas.* 56, 95 *Ind.* 152.

3 D. R. D.—28.

28. Use of highway temporarily suspended during construction.

The location of a railroad across a public highway, in pursuance of the power conferred by the charter of the railroad company, does not, while the railroad is in process of construction at that point, operate a discontinuance of the highway, but only a temporary suspension of the use. *Willard v. Newbury*, 22 *Vt.* 458.—QUOTED IN *Batty v. Duxbury*, 24 *Vt.* 155. REVIEWED IN *Barber v. Essex*, 27 *Vt.* 62.

The town, in such case, during the temporary obstruction of the highway by the construction of the railroad, must provide a suitable by-way for the public, and use all proper and reasonable precautions to prevent travelers from passing upon the highway while it remains unsafe. *Willard v. Newbury*, 22 *Vt.* 458.—APPROVING *Currier v. Lowell*, 16 *Pick. (Mass.)* 170. REVIEWING *Lowell v. Boston & L. R. Co.*, 23 *Pick.* 24.

3. Keeping Crossing in Repair.*

29. Duty of company, generally.—

Where a company crosses a street or highway with its track, the company must maintain the street or highway in a reasonably safe condition for the use of the public. *Pennsylvania Co. v. Frund*, 4 *Ind. App.* 469, 30 *N. E. Rep.* 1116.

And for a failure to keep the crossing and so much of the highway as is embraced in its right of way in repair, it is indictable for a public nuisance. *Paducah & E. R. Co. v. Commonwealth*, 10 *Am. & Eng. R. Cas.* 318, 80 *Ky.* 147.

Where a railroad crosses a public road already in use, the company and its successors must, if not relieved by statute, not only restore the public road, but erect and maintain perpetually all structures and keep up all repairs made necessary by such crossing, for the safety and convenience of public travel. *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 676, 87 *Tenn.* 712, 11 *S. W. Rep.* 943.—REVIEWED IN *Memphis, P. P. & B. R. Co. v. State*, 38 *Am. & Eng. R. Cas.* 429, 87 *Tenn.* 746, 11 *S. W. Rep.* 946.

A company is required to keep its track and the approaches thereto at public crossings in good repair; but with this excep-

* Obligation of company to keep crossings in repair, see notes, 6 *AM. & ENG. R. CAS.* 57; 13 *Id.* 610, 614; 14 *Id.* 624.

tion the track is private property, and its use by private persons is governed by the same principles which apply to the property of private persons. *Pratt C. & I. Co. v. Davis*, 79 Ala. 308.

When a company constructs its track across a public highway the duty devolves on it to put and keep the crossing and approaches thereto in proper repair for the use of the traveling public; but this duty will be sufficiently discharged if they are maintained in a reasonably safe and convenient condition, so as not to materially impair the usefulness of the highway or interfere with its safe enjoyment by travelers who exercise ordinary care and prudence, *Patterson v. South & N. Ala. R. Co.*, 89 Ala. 318, 7 So. Rep. 437.

30. — under particular statutes.

—Section 8, 2 Starr & C. Ann. St. p. 1927, does not require railroad companies to reconstruct the crossings already made by the municipal authorities; it is sufficient to maintain them; but it requires each of them to construct any railroad crossing which may thereafter be made necessary by the building of its own road or by the opening of a new street. *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109.—FOLLOWED IN *Illinois C. R. Co. v. Chicago*, 141 Ill. 586.

Railway companies are required to repair and keep in safe condition for travel the crossings which the statute requires them to construct, although this requirement does not relieve the road districts from the duty of maintaining the highway in good condition. *Farley v. Chicago, R. I. & P. R. Co.*, 42 Iowa 234.—FOLLOWING *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.—FOLLOWED IN *Newton v. Chicago, R. I. & P. R. Co.*, 66 Iowa 422.

Under the English Railway Clauses Consolidation Act 1845, § 46, where a highway is carried over a railway track by means of a bridge, the roadway upon the bridge is part of the bridge itself and the company is bound to keep it in proper repair. *Lancashire & Y. R. Co. v. Mayor, etc., of Bury*, 14 App. Cas. 417; affirming 20 Q. B. D. 485.

31. — under company's charter.

Where the charter of a railroad company gives the corporation the right to cross highways, but makes it the duty of the corporation to construct and keep in repair good and sufficient bridges or passages over

or under the railroad, so that travel over the highway shall not be impeded, an obligation is thereby imposed which requires the corporation to keep the highway, where it is crossed by the railroad, at all times and under all circumstances in a condition fit for safe and convenient use. *Newark v. Delaware, L. & W. R. Co.*, 42 N. J. Eq. 196, 7 Atl. Rep. 123.

32. Repair of a new substituted crossing.—Where the municipal authorities, with the assent of a railroad, discontinued a road crossing which was considered dangerous, and substituted another a short distance from the old one—held, that such change did not exonerate the company from keeping up such new crossing. *People ex rel. v. Chicago & A. R. Co.*, 67 Ill. 118, 2 Am. Ry. Rep. 66.—RECONCILED IN *State ex rel. v. Dayton & S. E. R. Co.*, 36 Ohio St. 434.

33. — or crossing of road not a legal highway but used as such.—Where a road is used openly and notoriously by the public as a highway, and a railroad company recognizes it as such by permitting the public to cross their track, and by assuming to maintain a public crossing at that point, it is immaterial whether the road be a legal highway or not. Under such circumstances the company are bound to exercise the same precautions to keep the crossing in repair as if the road were in fact a legal highway. *Kelly v. Southern Minn. R. Co.*, 6 Am. & Eng. R. Cas. 264, 28 Minn. 98, 9 N. W. Rep. 588.—DISTINGUISHED IN *Missouri, K. & T. R. Co. v. Long*, 6 Am. & Eng. R. Cas. 254, 27 Kan. 684.

The public use of a footway as a crossing over a railroad track, with the acquiescence of the company, does not convert it into a public crossing, within the meaning of Rev. St. 1889, § 2608. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, 16 S. W. Rep. 11.—QUOTING *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 595.

Nor does such use and acquiescence devolve upon the company the duty of maintaining the footway as a public crossing and of keeping it open and unobstructed, subject to the statutory penalties for failure to do so. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, 16 S. W. Rep. 11.

34. Mandatory injunction to compel repairs.—When the crossing is in good condition, and there is nothing to in-

dictate that the railroad company will refuse to discharge its duty in the future, the court will not grant a mandatory injunction to compel the company to make future repairs. *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 676, 87 *Tenn.* 712, 11 *S. W. Rep.* 943.

35. Penalty for failure to keep in repair.—The charter of a company created by a special act of the legislature provided that the company should "keep good and sufficient crossings or adequate facilities for crossing the same;" but there was no claim that the charter was irrepealable, nor that the company was exempt from police regulations consistent with its charter. *Held*, that the company was subject to the provisions of the Mo. act of March 27, 1885, which provides how such an obligation shall be enforced, and prescribes a penalty for the violation thereof. *Henry v. Wabash Western R. Co.*, 44 *Mo. App.* 100.—DISTINGUISHING *Daniels v. St. Louis, K. C. & N. R. Co.*, 62 *Mo.* 43.

36. What deemed a failure to keep in repair.—Crossings of public roads upon railway tracks not placed and kept in such condition that persons with vehicles or otherwise may cross them without delay, danger, or injury, are not kept in condition in which their usefulness as crossings is not impaired. *Galveston, H. & S. A. R. Co. v. Matula*, 79 *Tex.* 577, 15 *S. W. Rep.* 573.

37. Duty of public officials to keep in repair.—The failure of a company to perform its duties as to crossing or otherwise using an established public road does not relieve the public officials from liability. *State v. Putnam County Com'rs*, 23 *Fla.* 632, 28 *Am. & Eng. Corp. Cas.* 164, 3 *So. Rep.* 164.

The obligation of a town to keep and maintain roads safe for the traveling public continues where such roads are crossed by railroads at grade, except so far as the necessary use of the crossing by the railroad may prevent it, and subject to such specific directions as may be given by the county commissioners. *Davis v. Leominster*, 1 *Allen (Mass.)* 182.—DISTINGUISHING *Sawyer v. Northfield*, 7 *Cush. (Mass.)* 490.

In Missouri, towns or cities are not obliged to keep the width of the street in good condition where crossed by a railroad track, but only such part as is required for convenience of the traveling public. *Ellis*

v. Wabash, St. L. & P. R. Co., 17 *Mo. App.* 126.

38. Recovery against company for repairs made.—In an action before a justice of the peace, instituted under the Mo. act of March 27, 1888, for the recovery of double the cost of repairs of crossings of public roads over a railroad, the statement filed before the justice may be amended on appeal in the circuit court, and jurisdictional defects may be supplied by such amendment, as long as the cause of action is not changed. *Henry v. Wabash Western R. Co.*, 44 *Mo. App.* 100.

When the railroad company fails or refuses to perform its duty touching structures and repairs at its intersection with a public road, the county having the work done can recover the reasonable cost thereof. *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 676, 87 *Tenn.* 712, 11 *S. W. Rep.* 943.

Where a railway act (incorporating the English Railways Clauses Act 1845, so far as it was not expressly varied) provides that if after notice the company does not repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees, the latter may repair and recover the costs, upon the cessation of the turnpike trust, the Railways Clauses Act 1845, § 65, revives, and an order to repair the bridge may be made under it. *London, C. & D. R. Co. v. Wandsworth Board of Works*, 42 *L. J. M. C.* 70, *L. R.* 8 *C. P.* 185.

39. Duty to keep approaches, etc., in repair.—Where a company carries its track over a highway by means of a bridge, and lowers the level of such highway, it is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge. *London & N. W. R. Co. v. Skerton*, 5 *B. & S.* 559, 33 *L. J. M. C.* 158, 12 *W. R.* 1102, 10 *L. T.* 648.

Where a company carried the highway across and over their road by a bridge—*held*, under *Consol. Stat. C. ch. 66, section 9, subsection 5, section 12, subsection 4*, that the company were bound to keep in repair such bridge and the fence on each side of it. *Van Allen v. Grand Trunk R. Co.*, 29 *U. C. Q. B.* 436.

40. Maintenance and tending of gates.—When railroads elect to erect gates they must be tended or they become false signals and lead travelers into the danger against which they are intended to

guard them. *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. Rep. 64.

A railroad company is not liable to contribute to the expense of maintaining gates at highway crossings upon the track of another railroad in which it has no right or interest except a right acquired under the statute to use the track at a fixed compensation. *Eastern R. Co. v. Portsmouth*, 62 N. H. 344.

II. LAYING OUT STREET OR HIGHWAY ACROSS RAILROAD.*

1. Right to Cross Railroad.

41. Generally.—Companies acquire the right to construct their tracks subject to the dominant right of the state to cross such tracks when the public necessity demands that new roads and streets shall be opened; but the right to take longitudinally is quite a different thing from the right to cross, and is governed by different rules. A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take a part of the right of a railroad company by constructing a public highway longitudinally to the right of way. *Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N. E. Rep. 215.

Public and municipal corporations, under their general authority to lay out highways, cannot take land for a parallel highway previously taken and occupied by a railroad company under and pursuant to their grant. Presumptively there is no necessity so urgent as to require it. But they may lay out highways across a railroad, because such lay-out does not dispossess the railroad company, and, being a more urgent and constantly occurring necessity, must be presumed to have been contemplated by the parties to the grant. *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255.—APPLIED IN *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527.

The rule that allows the construction of streets and other public highways across railroad tracks has its limitations. They cannot be so constructed when by so doing the company would be unable to use its track at the point of crossing for the pur-

pose for which it was constructed. *Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N. E. Rep. 215.

The appropriation of land to the public use of a railroad is not so inconsistent with its public use as a highway crossing as to prohibit its subsequent appropriation for that purpose. *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 2 N. E. Rep. 943.—QUOTING *Boston Water Power Co. v. Boston & W. R. Corp.*, 23 Pick. (Mass.) 361.

42. Under a city charter.—Under a city charter conferring a general power to lay out and extend streets an authority to extend the same across the roadway of a railway corporation will, as a general rule, be implied; but the appropriation of land occupied as such roadway for a street crossing in such cases is necessarily subject to the prior public use of the railway corporation, though not ordinarily inconsistent with it. *St. Paul, M. & M. R. Co. v. Minneapolis*, 24 Am. & Eng. R. Cas. 309, 35 Minn. 141, 27 N. W. Rep. 500.—DISTINGUISHING *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167.

Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise or render it impossible or very difficult to prosecute the object of its organization cannot be inferred from the general grant of power to establish a road across its track; but such general grant is sufficient to warrant the laying of a road across its track whenever public necessity demands it; and as to whether that public necessity exists a city council may be judge. *Hannibal v. Hannibal & St. J. R. Co.*, 49 Mo. 480, 1 Am. Ry. Rep. 40.—REVIEWING *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63.

43. Statutory authority—Eminent domain—Illinois.—The meaning of par. 89, § 1, art. 5, ch. 24, of the statute is broad enough to not only confer power upon the cities to make a street crossing over railroad rights of way at the same level or grade with the railroad tracks, but also to confer the power of extending streets above and over the track or right of way by means of a viaduct or bridge. The word "across" in such paragraph was intended to designate a crossing at grade. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044.—QUOTING *Newburyport Turnpike Corp. v. Eastern R. Co.*, 23 Pick. (Mass.) 326.

* Laying out highways across railway tracks, see note, 7 L. R. A. 121.

Authority to impose on railroad the duty to make bridges and crossings over new streets and highways, see note, 32 AM. & ENG. R. CAS. 276.

A city by the condemnation of a railroad right of way for the extension of a street acquires the right to open the street over and across the railroad and its right of way and thereafter to maintain and keep the same in repair, subject only to its joint use by the railway company, while the latter retains the right to use and occupy the same for the legitimate and reasonable management and operation of its railroad and transaction of its business, subject to all lawful rules and regulations applicable to public crossings. *Illinois C. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. Rep. 740.

44. — Indiana.—A city in Indiana has power under the law to lay out a street across a railroad's right of way. *Lake Erie & W. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. Rep. 780.

45. — Massachusetts.—Mass. St. of 1857, ch. 287, concerning the laying out of highways across railroads, applies to a petition for the laying out of a highway pending at the time of its passage. *Old Colony & F. R. R. Co. v. Plymouth County Com'rs*, 11 Gray (Mass.) 512.

Mass St. 1882, ch. 155, and St. 1887, ch. 282, providing for the construction of a bridge and avenue across the Charles river between the cities of Boston and Cambridge, authorized the city of Cambridge to lay out the avenue on its own side of the river at grade over the Boston and Albany railroad without the concurrence and assent of the city of Boston; and the board of railroad commissioners had no authority to order the city of Cambridge to construct an overhead crossing over the railroad. *Cambridge v. Railroad Com'rs*, 153 Mass. 161, 26 N. E. Rep. 241.

Under Mass. Rev. St. ch. 39, § 69, town or city authorities had no power to lay out a highway across a railroad on a level therewith; and a railroad company is not estopped from objecting to the exercise of such power by an agreement made by it with former owners of the land, which contained a stipulation for a right of way to be used by such owners and their assigns at the place where the highway was afterwards laid out. *Boston & M. R. Co. v. Mayor, etc., of Lawrence*, 2 Allen (Mass.) 107.

46. — Michigan.—A right of way for a boulevard across the tracks of a railroad company may be condemned and taken under act No. 388, Mich. Local Acts of 1889, which provides that the commissioners

therein named may acquire by legal proceedings "any lands or interest in land which may be found necessary for the opening of any park and enlargement or extension of any park or boulevard which may hereafter be laid out, located, or established." *Com'rs of Parks & Boulevards v. Michigan C. R. Co.*, 50 Am. & Eng. R. Cas. 144, 90 Mich. 385, 51 N. W. Rep. 447.—DISTINGUISHING *In re Amsterdam Water Com'rs*, 96 N. Y. 351; *State v. Hibernia Underground R. Co.*, 47 N. J. L. 43.—REVIEWED IN *Com'rs of Parks & Boulevards v. Detroit*, G. H. & M. R. Co., 93 Mich. 58.

47. — New Jersey.—Under the condemnation of a right to lay streets across a railroad track, or to lay the track of one railroad across another, nothing is acquired but a right of way; the place of crossing will remain in common use of the parties for the exercise of their several franchises. A right affecting so slightly the exercise of the franchises of the corporation whose track is crossed may be deduced from a mere grant of the power of condemnation. *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. L. 28, 14 Am. Ry. Rep. 211.

Under the New Jersey act of March 19th, 1874 (Rev. p. 944), municipal authorities may also construct bridges as parts of streets, to carry the public way above intersecting railroads. *Read v. Camden*, 54 N. J. L. 347, 24 Atl. Rep. 549; reversing 53 N. J. L. 322.

48. — New York.—The provision of the act regulating "the construction of roads and streets across railroad tracks" (§ 1, ch. 62, New York Laws of 1853), which authorizes the laying out of streets and highways across the track of any railroad without compensation, etc., has reference only to tracks used for public traffic, and for turnouts and switches. *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510; affirming 5 Lans. 461.—FOLLOWING *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

Under the N. Y. Laws of 1861, ch. 311, which provide that a highway not opened and worked within six years from the time of its establishment shall cease to be a public highway, a street not kept open nor worked for six years subsequent to the time it was laid out, may be crossed by a railroad company; and mandamus will not lie to compel such company to take the street across its tracks under the provisions of the Laws of 1853, ch. 62, § 2, which pro-

vide for the manner and means of taking streets and highways across railroad tracks. *People ex rel. v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 456.

And it is immaterial in the above case that the street where the tracks crossed it was in constant use, as was the fact in this particular case. *People ex rel. v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 456.

The word "track," in the provisions of the act regulating "the construction of roads and streets across railroad tracks" (§ 1, ch. 62, New York Laws of 1863), which authorizes the laying out of "any street and highway across the track of any railroad," without compensation, signifies the entire roadbed, including turnouts and switches or other contrivances used for passing engines or cars from one line of rails to another, or for public traffic purposes. *Delaware & H. Canal Co. v. Whitehall*, 10 Am. & Eng. R. Cas. 227, 90 N. Y. 21.—FOLLOWING Albany Northern R. Co. v. Brownell, 24 N. Y. 345; Boston & A. R. Co. v. Greenbush, 52 N. Y. 510.

Where, therefore, in an action to restrain defendants from laying out a street across the lands of plaintiff, it was found that the *locus in quo* is part of plaintiff's roadbed, "is five rods in width, is covered by four railroad tracks, two of which are the main tracks, * * * and two of which are extra tracks, extending several hundred feet, * * * and are used in connection with others for switching and making up trains, and for allowing cars to stand upon them until they can be put into trains, about to depart"—held, that the opening of the street across the land was authorized by said act. *Delaware & H. Canal Co. v. Whitehall*, 10 Am. & Eng. R. Cas. 227, 90 N. Y. 21.

40. — Vermont.—A town has no authority under the Vermont statutes, R. L. section 3881, to lay out and build a highway across a railroad at grade. *Central Vt. R. Co. v. Royalton*, 58 Vt. 234, 4 Atl. Rep. 868.

50. Respective rights and easements acquired.—In a proceeding by a city against a railway company to condemn a part of its track for the extension of a public street over or across such track, a judgment of condemnation, no matter in what language couched, will not take the land itself, or the exclusive use thereof, but the city will acquire only a joint right with the railway company to the use of the land condemned. The use by the public will be,

as a matter of fact, subject and subordinate. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044.—QUOTING *Illinois C. R. Co. v. Chicago*, 138 Ill. 453.

A judgment of condemnation in such case can only clothe the city with an easement or right to pass over the tracks. It cannot vest the city with the fee of the land or with the exclusive use thereof, because the statute enters into and forms a part of the judgment, and limits and qualifies the nature of the condemnation therein ordered. Neither the city nor the railway company will have the right of occupancy and user to the exclusion of the other, but each subordinate to the right of the other for the separate use contemplated. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044.

51. Dedication and its effect.—The dedication of lands by the owners of it for the purpose of a public avenue, across which a railroad has already been built, cannot impair or interfere in any way with the rights of the railroad company within the lines of their road under their charter, whether to the soil or to the right of way, to hold, occupy, and enjoy the same. *Ogle v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 302; affirming 3 *Houst.* 267.

52. Prescription*—Long user.—A public crossing over a railway may be established by sufficiently long use. *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236, 20 W. Rep. 1073.

53. Crossing within 500 feet of another highway.—A public road cannot be laid across a railroad within five hundred feet of an existing public road, since the passage of the act of 1881, Rev. Sup. N. J., p. 874, § 10. *State (New York & L. B. R. Co., pros.) v. Capner*, 49 N. J. L. 555, 9 Atl. Rep. 781.

Under "An Act Relative to Railroad Crossings and to Prevent Accidents," in order to determine whether a proposed new road is within 500 feet of an old one, the width of the highways where they cross the railroad bed and tracks, and not the width elsewhere, must be regarded. *State v. Drummond*, 17 Am. & Eng. R. Cas. 149, 45 N. J. L. 511; affirmed in 46 N. J. L. 644.

*Acquiring easement by prescription, for a crossing over a railroad track, see note, 35 AM. & ENG. R. CAS. 320.

By the act of March 25, 1881 (Pamph. L. N. J., p. 291), it is declared unlawful to lay a public road across a railroad within five hundred feet of an existing public road crossing the roadbed and track of the railroad. *Held*, that the burden is upon the company complaining to show the existence of a crossing within the prohibited distance. *State v. Drummond*, 20 Am. & Eng. R. Cas. 13, 46 N. J. L. 644; *affirming* 45 N. J. L. 511.

54. Crossing company's yards and grounds.—Where a statute authorized the construction of streets and highways across a railroad track without compensation to the owners of the track, the term "track," as there used, did not include grounds upon which tracks are laid for storing cars or exclusively for making up trains. *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510, 4 Am. Ry. Rep. 386; *affirming* 5 Lans. 461.—**FOLLOWED IN** Delaware & H. Canal Co. v. Whitehall, 10 Am. & Eng. R. Cas. 227, 90 N. Y. 21.

An injunction will lie to restrain commissioners of highways from laying out a highway across the grounds belonging to a railroad company purchased and intended to be used for a station-house, engine-house, turntable, etc. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

When a company has acquired the title to a piece of land for a site for building purposes for buildings which are necessary in its business, the local authorities cannot lawfully enter upon these grounds and lay out a highway, or in any way prevent the company from carrying into effect their purpose in the erection of buildings. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.—**DISTINGUISHED IN** *People v. Lake Shore & M. S. R. Co.*, 52 Mich. 277. **FOLLOWED IN** *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359; *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 510; *Delaware & H. Canal Co. v. Whitehall*, 10 Am. & Eng. R. Cas. 227, 90 N. Y. 21; *Prospect Park & C. I. R. Co. v. Williamson*, 14 Am. & Eng. R. Cas. 34, 91 N. Y. 552. **REVIEWED IN** *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604.

Where the opening of a street through the crowded freight-yard of a railroad company does not destroy any franchise of the company an injunction to prevent it will not be made permanent. *Philadelphia, W. & B. R. Co. v. Philadelphia*, 9 Phila. (Pa.)

563.—**QUOTING** *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339.

Where the ground of a railroad company called a yard is nothing more than a collection of tracks, a street may be extended over or across the same, under paragraph 89 of section 1, art. 5, ch. 24, of the Illinois statutes. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044.

55. Right to lay out footway across track.—Under Massachusetts Pub. St. ch. 112, § 125, authorizing a highway or town-way to be laid out across a previously constructed railroad, a footway may be laid out. *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 2 N. E. Rep. 943.

2. Construction of the Crossing.

a. In General.

56. Statutory duties of company—Indiana.—Under a fair construction of Rev. St. of Indiana 1881, § 3903, it is the duty of a company to construct its railroad where it intersects the public highway, in such a manner as to afford security for life and property; and this is so whether the highway is laid out and opened before or after the construction of the railroad. *Louisville, N. A. & C. R. Co. v. Smith*, 13 Am. & Eng. R. Cas. 608, 91 Ind. 119.—**QUOTING** *Indianapolis, & St. L. R. Co. v. Stout*, 53 Ind. 143.

57. — Kansas.—Where public highways are laid out and opened across an existing railroad, it is not the duty of the company to make a safe crossing and approaches. *Rock Creek Tp. ex rel. v. St. Joseph & G. I. R. Co.*, 42 Am. & Eng. R. Cas. 255, 43 Kan. 543, 23 Pac. Rep. 585.

58. — Maine.—A statute requiring that a railroad company shall build and maintain the crossings where highways are laid out across the track is constitutional and applies to a railroad built before the enactment of the statute, when the charter of the company made it subject to the general laws then in existence and to such as should thereafter be passed. *Portland & R. R. Co. v. Deering*, 23 Am. & Eng. R. Cas. 51, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. Rep. 670.—**DISAPPROVING** *Detroit v. Detroit & H. Plank Road Co.*, 43 Mich. 140. **EXTENDING** *State v. Noyes*, 47 Me. 189.

59. — Michigan.—The Michigan highway law of 1881, in providing that where any highway is established across a

railway the railroad shall open, construct, and maintain the highway and the necessary crossing therefor across its right of way and tracks, cannot be so construed as to compel the company to build that part of a highway which would cross its right of way, if the highway itself is not made necessary by the existence of the railroad. *People v. Lake Shore & M. S. R. Co.*, 13 *Am. & Eng. R. Cas.* 611, 52 *Mich.* 277, 17 *N. W. Rep.* 841.—DISTINGUISHING *Albany Northern R. Co. v. Brownell*, 24 *N. Y.* 345.—REVIEWED IN *Chicago & G. T. R. Co. v. Hough*, 61 *Mich.* 507.

60. — Minnesota. — Chapter 15, Minnesota Laws 1887, and chapter 222, Laws 1889, requiring railroad companies to construct crossings wherever highways intersect their tracks, are not, as to highways laid out after their passage, unconstitutional because they make no provision for compensation; for such provision is made by the statute regulating the laying out of highways. *State ex rel. v. Shardlow*, 45 *Am. & Eng. R. Cas.* 106, 43 *Minn.* 524, 46 *N. W. Rep.* 74.

61. — Missouri. — The statute imposes no duty on railroad companies to construct and maintain crossings where public streets cross their tracks. *Hopkins v. Kansas City, St. J. & C. B. R. Co.*, 79 *Mo.* 98.

62. — Nebraska. — Under the statutes of Nebraska it is the duty of a railroad company to make and keep in repair suitable crossings with approaches, notwithstanding the highway was laid out after the railroad was built. The public authorities are required to build that part of a highway within the right of way which they would have been required to make had the railroad not been constructed. *State ex rel. v. Chicago, B. & Q. R. Co.*, 42 *Am. & Eng. R. Cas.* 248, 29 *Neb.* 412, 45 *N. W. Rep.* 469.

b. Manner of Crossing; Sufficiency.

63. Going over track—Viaducts. — Under proceedings to open and extend certain streets across tracks used by a company, it appearing that the whole of the land was necessary for the operation of the railroad, and that the only mode of crossing the tracks was by viaducts—*held*, that the viaducts must be made in such a manner as to allow the trains to pass safely below, not to interfere with the right of way of the company, and must be constructed and maintained at the city's expense. *Northern*

C. R. Co. v. Mayor, etc., of Baltimore, 46 *Md.* 425.

A railroad company cannot be required to take a street across its tracks where such tracks are in constant use. *People ex rel. v. New York C. & H. R. R. Co.*, 52 *N. Y. S. R.* 530.

64. Option of going over or under tracks. — Gen. St. Conn. § 3481 provides that when a new highway shall be constructed across a railroad "such highway shall pass over or under the railroad, as the railroad commissioners shall direct." *Held*, that the commissioners could direct whether the highway should pass over or under the railroad before the laying out of the highway had been completed by the acceptance of the committee's report. *Smith v. New Haven*, 59 *Conn.* 203, 22 *Atl. Rep.* 146.

The language, "when a new highway shall be constructed," does not refer to the laying out of the highway, but to the building of the crossing over or under the railroad. *Smith v. New Haven*, 59 *Conn.* 203, 22 *Atl. Rep.* 146.—FOLLOWING *New York & N. E. R. Co. v. Waterbury*, 55 *Conn.* 19.

An incorporated city being invested by the statute with the power to extend its streets either over or across the tracks of railroads, either above the tracks by means of viaducts or on the same grade or level with the tracks, it has a discretion which mode to adopt which cannot be controlled or interfered with by the courts. *Illinois C. R. Co. v. Chicago*, 51 *Am. & Eng. R. Cas.* 528, 141 *Ill.* 586, 30 *N. E. Rep.* 1044.

By the charter of the plaintiff a railroad company is required to cause a highway to be taken across its track "as shall be most convenient and useful for public travel," and the provisions of the general railroad law are made applicable. *Held*, that the railroad company has the election of methods of carrying a new street across, and unless the reasonable usefulness of the highway is infringed, the selection of the company will not be interfered with. *Jamaica v. Long Island R. Co.*, 49 *N. Y. S. R.* 365, 66 *Hun (N. Y.)* 631, *mem.*, 21 *N. Y. Supp.* 327.

65. Interfering with company's track. — Neither a public nor a private highway can, under the provisions of the *N. Y. Rev. St.*, be laid out across the fixtures and erections upon the inclined plane

of a railroad which are used for the drawing up or letting down of cars for the conveyance of merchandise or passengers. *Mohawk & H. R. Co. v. Archer*, 6 Paige (N. Y.) 83.—APPLIED IN *Cruger v. Hudson River R. Co.*, 12 N. Y. 190; *Johnson v. Rochester*, 13 Hun (N. Y.) 285. FOLLOWED IN *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

66. Restoration of track.—The last clause of paragraph 89 of section 1, art. 5, ch. 24 of Illinois St., relating to extending streets across railroads, means that such track, right of way, or land shall be restored so as not to impair its usefulness more than is necessary in view of its use for the purposes of a street, subject to its use by the railroad. It is not expected that the crossing can be so restored as to obviate all danger and delay or inconvenience. It is only necessary that there shall be no unreasonable impairment of the usefulness of the railroad right of way. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044.

67. Sufficiency—Length and width.—Section 3482 of Connecticut St. provides that "in cases pending June 1, 1887, the railroad commissioners may determine the length, width, and material of such bridge at any stage of the proceedings." *Held*, that by "cases pending" is meant cases pending before the court and not before the railroad commissioners; and by "proceedings," the proceedings in such cases. *Smith v. New Haven*, 59 Conn. 203, 22 Atl. Rep. 146.

68. Gates.—A company is not required to place gates at a crossing where its track is crossed by a third-class road in an inclosure, under Tex. Rev. St. art. 4389, providing that any person through whose land a third-class road may run may, if necessary, erect gates across the road; and art. 4245, making railroad companies liable for stock killed or injured by reason of a failure to fence their roads. *Galveston, H. & S. A. R. Co. v. O'Neal*, 4 Tex. App. (Civ. Cas.) 128, 16 S. W. Rep. 537.

69. Obstruction of highway.—When a public highway is located over an existing railroad track, some years subsequent to the construction of the railroad, there is no liability upon the part of the railroad company, under section 43, ch. 84, Kan. Comp. Laws 1885, to the township in which the crossing is located for damages

for the obstruction of the highway. *Rock Creek Tp. ex rel. v. St. Joseph & G. I. R. Co.*, 42 Am. & Eng. R. Cas. 255, 43 Kan. 543, 23 Pac. Rep. 585.

c. Proceedings.

70. Generally.—A report of county commissioners had been made and filed in the clerk's office in the circuit court, to the effect that a bridge was necessary for the public safety and convenience over a certain railroad crossing. Afterwards, on petition of a landowner, a report of the same commissioners was made, and filed in the same court, laying out a substitute for the highway at that place and discontinuing the old highway. Both petitions and reports were pending in said court in the same term. *Held*, that a motion to accept the second report and recommit the first for injury as to change of circumstances ought to be granted. *Nashua & R. R. Co. v. Lee*, 55 N. H. 568.

71. Service of notice on station agent.—The station agent of a company at the depot on the grounds through which a highway is proposed to be laid is the occupant of such grounds, within the meaning of Wis. Rev. St. § 1267, upon whom notice of the supervisors' meeting may be served; and service upon such agent is also valid if it would be valid were it a summons in an action against the railway company. *State v. O'Connor*, 78 Wis. 282, 47 N. W. Rep. 433.

72. Parties.—Proceedings to open a street across the land of a railroad company are invalid when the company was not named in the proceedings and did not appear, even though damages were awarded to it for the land taken. *Detroit, M. & T. R. Co. v. Detroit*, 49 Mich. 47, 12 N. W. Rep. 904.

The mortgagees of the franchises and easements of a railway company need not be made parties to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed and the company is left in control of the road. *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641.

73. Review—Certiorari.—Under a city charter conferring a general power to lay out and extend streets, the action of the city council in determining the necessity and propriety of extending streets over a railroad, if regular, is not subject to judicial

revision except upon appeal. *St. Paul, M. & M. R. Co. v. Minneapolis*, 24 *Am. & Eng. R. Cas.* 309, 35 *Minn.* 141, 27 *N. W. Rep.* 500.

The exercise by a municipal corporation of the discretion intrusted to it by § 50 Ohio L. 223, in respect to the laying off and location of streets, so long as such corporation acts in good faith and within the limits of its authority in locating a street across a railroad, is not subject to judicial revision. *Little Miami & C. & X. R. Co. v. Dayton*, 23 *Ohio St.* 510.—QUOTED AND APPROVED IN *Illinois C. R. Co. v. Chicago*, 141 *Ill.* 586.

Under Mass. St. of 1857, ch. 287, an adjudication by county commissioners, laying out a highway across a railroad, which does not state whether the highway is to be carried over or under or on a level with the railroad, or show that special notice was given to the railroad corporation, is erroneous and will be quashed on *certiorari*, although the railroad corporation actually appeared and were heard before the commissioners. *Old Colony & F. R. R. Co. v. Com'rs of Plymouth County*, 11 *Gray (Mass.)* 512.

74. Enjoining condemnation proceedings.—A court of equity will not interfere to enjoin a proceeding by a city to condemn a part of the right of way of a company for the extension of streets across the same, on the ground that the passage of its trains over the proposed crossings will be so frequent and the amount of public travel upon the streets will be so great as to subject the company to great inconvenience and hindrance in the operation of its road. A court of equity has no jurisdiction to enjoin unless there is an abuse of the power conferred by law, or an attempt is made to take and appropriate the property without authority of law. *Illinois C. R. Co. v. Chicago*, 51 *Am. & Eng. R. Cas.* 528, 141 *Ill.* 586, 30 *N. E. Rep.* 1044.—QUOTING AND APPROVING *Little Miami & C. & X. R. Co. v. Dayton*, 23 *Ohio St.* 510. REVIEWING *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 *Ill.* 506.

A bill in equity to enjoin the prosecution of condemnation proceedings to open a boulevard across a railroad company's track, on the ground of irreparable injury and that the crossing will be dangerous to the public, etc., is properly dismissed, complainant having a complete legal remedy by making its defense in the condemnation

proceedings which are being conducted in the manner provided by the legislature. *Detroit, G. H. & M. R. Co. v. Detroit*, 91 *Mich.* 444, 52 *N. W. Rep.* 52.

An injunction will not lie to restrain the officials of a city from laying out an extension of a street across railroad tracks which are within the city limits, after due notice as required by chapter 62, Laws 1853. *Long Island R. Co. v. Silverstone*, 46 *N. Y. S. R.* 141, 64 *Hun* 634, 19 *N. Y. Supp.* 140.

3. Compensation of Company.

75. Generally.*—(1) *Right to damages.*

—A company is entitled to damages for the location of a public highway over its right of way. *Chicago, K. & W. R. Co. v. Chautauqua County Com'rs*, 49 *Kan.* 763, 31 *Pac. Rep.* 736.

When the lands of a company are crossed by the laying out of a public highway which intersects the tracks and station grounds of the railway at right angles, the railroad company is entitled to an assessment of damages by reason of laying out the highway. *State (New York & L. B. R. Co., pros.) v. Capner*, 49 *N. J. L.* 555, 9 *Atl. Rep.* 781.

Under the charter of Bayonne, N. J., a company, across whose railroad a highway is opened, is entitled to compensation for the expense of the removal of switches, the construction of culverts, the planking of the roadbed, and the erection of the statutory sign-board, when such changes are rendered necessary in order to adapt the crossing and the adjoining property of the corporation to its uses as a railroad, in conjunction with the existence of a highway. *State (Central R. Co., pros.) v. Bayonne*, 51 *N. J. L.* 428, 17 *Atl. Rep.* 971.—QUOTING *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.*, 121 *Mass.* 124.—NOT FOLLOWED IN *State ex rel. v. District Court of Hennepin County*, 42 *Am. & Eng. R. Cas.* 241, 42 *Minn.* 247, 7 *L. R. A.* 121.

It is not a taking of its property to compel a railroad company to pay half the cost of building a bridge to protect the public, nor damage incident to the taking of property, within the true meaning of the term. *New York & N. E. R. Co. v. Waterbury*,

* Right to compensation for construction of highway across railroad, see note, 42 *AM. & ENG. R. CAS.* 253.

Damages recoverable by railroad for laying out highway across railroad track, see note, 32 *AM. & ENG. R. CAS.* 278.

49 *Am. & Eng. R. Cas.* 307, 60 *Conn.* 1, 22 *Atl. Rep.* 439.

(2) *Elements and measure of damages.*—Paragraph 89 in the Illinois city act implies there may be cases where the company is entitled to compensation and cases where it is entitled to no compensation. In the extension of streets over railroad lands other than tracks or rights of way and in the construction of sewers under or through rights of way serious damage may be done, which may require compensation or restoration. *Chicago & N. W. R. Co. v. Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.—FOLLOWING *Illinois C. R. Co. v. Chicago*, 138 *Ill.* 453. QUOTING *Illinois C. R. Co. v. Willenborg*, 117 *Ill.* 203.

Where a city does not seek to condemn the land belonging to a company as its right of way, or to prevent the use of the tracks and right of way by the company, the just compensation to be paid by the city is not the value of the land where the street is to cross, nor is it the value of the use of the property for railroad purposes. *Chicago & N. W. R. Co. v. Chicago*, 50 *Am. & Eng. R. Cas.* 150, 140 *Ill.* 309, 29 *N. E. Rep.* 1109.

Where, long after the construction of a railroad, a street was extended so as to cross the same, and the city passed an ordinance requiring the company to make a safe and proper crossing by grading the approaches of the street at the crossing, nothing in the charter of the company nor in any general law in force at the time the company was created imposing such duty—*held*, that the company was not liable to this new burden any further than might have been required of an individual, and that, as the whole burden was sought to be placed upon the company without regard to benefits, the ordinance was in violation of the constitution, and could not create any liability upon the company. The legislature itself could not impose such burden without making compensation. *Illinois C. R. Co. v. Bloomington*, 76 *Ill.* 447.—FOLLOWING *Chicago v. Larned*, 34 *Ill.* 203; *Ottawa v. Spencer*, 40 *Ill.* 311; *Bedard v. Hall*, 44 *Ill.* 91.—DISTINGUISHED IN *Illinois C. R. Co. v. Willenborg*, 26 *Am. & Eng. R. Cas.* 358, 117 *Ill.* 203, 57 *Am. Rep.* 862; *Chicago & N. W. R. Co. v. Chicago*, 140 *Ill.* 309; *Lake Shore & M. S. R. Co. v. Sharpe*, 7 *Am. & Eng. R. Cas.* 543, 38 *Ohio St.* 150.

In opening streets crossed by the tracks

of a company damages must be assessed to the company with reference to the inconvenience and the mode of crossing the tracks by viaduct. *Northern C. R. Co. v. Mayor, etc., of Baltimore*, 46 *Md.* 425, 18 *Am. Ry. Rep.* 461.

The compensation to be paid to a railroad for crossing its right of way for street purposes not only includes the use of the land occupied by the street for such crossing, but any extra expense created by the use of the right of way for the street, in the ordinary use of the company's road, and such other damage as may be sustained by injury to its track, right of way, and franchise, occasioned by the crossing, and which may be properly considered as a natural and proximate cause thereof. *Grand Rapids v. Grand Rapids & I. R. Co.*, 66 *Mich.* 42, 9 *West. Rep.* 573, 33 *N. W. Rep.* 15.

This rule will not include, however, expenses made necessary in order to comply with the police regulations of a state or municipality, but such damages only as arise in making the structural changes necessary to comply with the statutory regulations, and which must necessarily continue in the future operation and management of the railroad. *Grand Rapids v. Grand Rapids & I. R. Co.*, 66 *Mich.* 42, 9 *West. Rep.* 573, 33 *N. W. Rep.* 15.

76. For lands taken.—A railroad corporation is entitled to damages for land taken by the laying out of a public highway across its railroad, subject to its use for said road; and for the expense of erecting and maintaining railroad signs and cattle-guards at the crossing, and of flooring the same and keeping it in repair; but not for any increased liability from accidents, for the increased expense of ringing the bell, or for its liability to be ordered by the county commissioners to build a bridge for the highway over its track. *Old Colony & F. R. R. Co. v. Plymouth County*, 14 *Gray (Mass.)* 155.—NOT FOLLOWED IN *State ex rel. v. District Court of Hennepin County*, 42 *Am. & Eng. R. Cas.* 241, 42 *Minn.* 247, 7 *L. R. A.* 121. REVIEWED IN *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 *Ohio St.* 604.

77. Inconvenience—Increase of risk.—Where a public street is extended across a right of way and track, not the grading of the approaches, the planking between the rails, or the making of gates, but the use of the crossing by the public, may

result in the stoppage or slower movement of trains and in the increased danger of accidents; but the law allows no compensation or damages for these inconveniences. *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109.—DISTINGUISHING *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447. QUOTING *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91.

A company is entitled to damages for land taken in locating ways across its track. In assessing such damages the use which the company may reasonably be expected in the near future to make of its located limits at the crossings may be taken into consideration, in order to ascertain present value. But the interference and inconvenience occasioned to the business of the company, as well as the increased risk and expense in running its trains, do not constitute elements of such damage. *Portland & R. R. Co. v. Deering*, 23 Am. & Eng. R. Cas. 51, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. Rep. 670.—REVIEWED IN *Boston & M. R. Co. v. Chicago*, 140 Ill. 309.

Damages are not recoverable by a company against a town which has laid out ways over its track for the interference and inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or increased expenses in running its trains caused thereby. *Portland & R. R. Co. v. Deering*, 23 Am. & Eng. R. Cas. 51, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. Rep. 670.—REVIEWED IN *Boston & M. R. Co. v. York County Com'rs*, 32 Am. & Eng. R. Cas. 271, 79 Me. 386, 4 N. Eng. Rep. 657, 10 Atl. Rep. 113.

Where, by reason of the condemnation of a highway crossing over a company's tracks, an adjacent warehouse, and the land on which its stands, are rendered less available and less valuable for warehouse purposes, the company is entitled to be compensated for such damage. *Com'rs of Parks & Boulevards v. Chicago, D. & C. G. T. J. R. Co.*, 91 Mich. 291, 51 N. W. Rep. 934.—FOLLOWING *Com'rs of Parks & Boulevards v. Michigan C. R. Co.*, 90 Mich. 385; *In re First Street*, 66 Mich. 55; *Riedinger v. Marquette & W. R. Co.*, 62 Mich. 41.

78. Expenses of constructing and maintaining crossing, generally.—In a condemnation proceeding by a city to open or extend a street across a railroad already constructed, the company owning such railroad is not entitled, as a part of its

just compensation, to the amount of its expenses in constructing and maintaining the street crossing, nor for the delay occasioned to trains, or the increased danger of loss by accidents. No compensation is allowed for the performance of duties required under the police power. *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109.

79. Expenses incurred in keeping crossing safe.—Where a new street was laid out across an existing railroad, evidence of the value of land taken was relevant, the company being entitled to recover for the fair value of its land taken, subject to its use for railroad purposes; and under the statute which provides that where a highway is laid out across an existing railroad "all expenses of, and incident to, constructing and maintaining the way at such crossing shall be borne by the county, city, town, or corporation" constructing or maintaining such way, the company is entitled to include as elements of damage the expense of making and maintaining the appliances and structures necessary to make the crossing safe and convenient for the traffic of the railroad and of the highway, but not the expense of constructing and operating gates by law required at such a crossing, such cost being properly included in the ordinary operating expenses of the railroad. *Boston & A. R. Co. v. Cambridge*, 55 Am. & Eng. R. Cas. 23, 159 Mass. 283, 34 N. E. Rep. 382.—FOLLOWING *Old Colony & F. R. R. Co. v. Plymouth County*, 14 Gray 155.

In opening a street across a railroad, the damage may include the expense entailed by the crossing, and may involve outlays in making it safe. *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641.—APPLIED IN *Com'rs of Parks & Boulevards v. Michigan C. R. Co.*, 90 Mich. 385. REVIEWED IN *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507.

80. Expenses of constructing cattle-guards.*—Where a public highway is located and established across a right of way, the company is entitled to just compensation for all its necessary expenditures in constructing and maintaining cattle-guards, fences, and such other things as are required by the statutes to be constructed by the company by reason of the highway.

* See also EMINENT DOMAIN, 675.

Kansas C. R. Co. v. Com'rs of Jackson County, 46 *Am. & Eng. R. Cas.* 26, 45 *Kan.* 716, 26 *Pac. Rep.* 394.—APPROVED IN *Com'rs of Greenwood County v. Kansas City, E. & S. K. R. Co.*, 46 *Kan.* 104. FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Com'rs of Osage County*, 48 *Kan.* 576.—*Com'rs of Greenwood County v. Kansas City, E. & S. K. R. Co.*, 46 *Kan.* 104, 26 *Pac. Rep.* 397.—APPROVING *Kansas C. R. Co. v. Com'rs of Jackson County*, 45 *Kan.* 716.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Com'rs of Osage County*, 48 *Kan.* 576, 29 *Pac. Rep.* 1084.—FOLLOWING *Kansas C. R. Co. v. Com'rs of Jackson County*, 45 *Kan.* 716; *Com'rs of Greenwood County v. Kansas City, E. & S. K. R. Co.*, 46 *Kan.* 104.—*Kansas City v. Kansas City Belt R. Co.*, 47 *Am. & Eng. R. Cas.* 157, 102 *Mo.* 633, 14 *S. W. Rep.* 808.

And a statute which imposes this expense upon the railroad company is in conflict with the constitutional provision forbidding the taking of private property without "just compensation." *Chicago & G. T. R. Co. v. Hough*, 61 *Mich.* 507, 28 *N. W. Rep.* 532.—REVIEWING *People v. Lake Shore & M. S. R. Co.*, 52 *Mich.* 277; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 *Mich.* 648.—NOT FOLLOWED IN *State ex rel. v. District Court of Hennepin County*, 42 *Am. & Eng. R. Cas.* 241, 42 *Minn.* 247, 7 *L. R. A.* 121.

The cost of cattle-guards and wings and crossing-signs should not be allowed to a railroad company as damages for laying out a highway across its track; but the cost of planking a crossing and grading it are legitimate items of compensation. *State ex rel. v. Shardlow*, 45 *Am. & Eng. R. Cas.* 106, 43 *Minn.* 524, 46 *N. W. Rep.* 74.—FOLLOWING *State v. District Court of Hennepin County*, 42 *Am. & Eng. R. Cas.* 241, 42 *Minn.* 247.

81. Expenses of erecting gates.—In proceedings to condemn a right of way for a boulevard across the tracks of a company, under act No. 388, *Mich. Local Acts* of 1889, it is error to refuse to permit the jury to consider the question of allowing the company compensation for the expense of erecting safety crossing gates. *Com'rs of Parks & Boulevards v. Michigan C. R. Co.*, 50 *Am. & Eng. R. Cas.* 144, 90 *Mich.* 385, 51 *N. W. Rep.* 447.—APPLYING *Grand*

Rapids v. Grand Rapids & I. R. Co., 58 *Mich.* 648.—FOLLOWED IN *Com'rs of Parks & Boulevards v. Chicago, D. & C. G. T. J. R. Co.*, 91 *Mich.* 291; *Com'rs of Parks & Boulevards v. Detroit, G. H. & M. R. Co.*, 93 *Mich.* 58.

Whether the erection and maintenance of gates or the employment of flagmen is at the time of condemnation necessary for the proper protection of the railroad company and the public is a question of fact for the jury; and if such necessity is found the company is entitled to compensation for the damage consequent upon such erection and maintenance or employment. *Com'rs of Parks & Boulevards v. Chicago, D. & C. G. T. J. R. Co.*, 91 *Mich.* 291, 51 *N. W. Rep.* 934.

82. Expenses of planking roadway.—Upon the laying out of a public highway across the track and right of way of a company the latter is not entitled to compensation for providing and maintaining cattle-guards and sign-boards at new crossings, but is entitled to compensation for planking the roadway where it crosses the track and for the maintenance of the planking. *State ex rel. v. District Court of Hennepin County*, 42 *Am. & Eng. R. Cas.* 241, 42 *Minn.* 247, 7 *L. R. A.* 121, 44 *N. W. Rep.* 7.—NOT FOLLOWING *Old Colony R. Co. v. Plymouth County*, 14 *Gray (Mass.)* 155; *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.*, 121 *Mass.* 124; *Chicago & G. T. C. Co. v. Hough*, 61 *Mich.* 507, 28 *N. W. Rep.* 532, *State v. Bayonne*, 51 *N. J. L.* 428, 17 *Atl. Rep.* 971.

83. Expenses for defending suits for accidents.—In estimating the damages of a company for land taken in laying out a way across its track the jury are not to take into account any damages for expenses in defending itself against claims for accidents at such a crossing. *Boston & M. R. Co. v. County Com'rs*, 32 *Am. & Eng. R. Cas.* 271, 79 *Me.* 386, 4 *N. Eng. Rep.* 657, 10 *Atl. Rep.* 113.—REVIEWING *Portland & R. R. Co. v. Deering*, 78 *Me.* 61.

84. Benefits to company.—In assessing damages to a railroad company for laying out a highway across its track, benefits by increase in its traffic or business arising from the increased facility for travel which the highway affords are not to be taken into account. *State ex rel. v. Shardlow*, 45 *Am. & Eng. R. Cas.* 106, 43 *Minn.* 524, 46 *N. W. Rep.* 74. *Old Colony & F. R. R.*

Co. v. Plymouth County, 14 Gray (Mass.) 155.

And evidence of payment of money by them for accidents at their several crossings, and of the comparative profit of the local and other travel over their railroad, is inadmissible. *Boston & M. R. Co. v. Middlesex County*, 1 Allen (Mass.) 324.

Although it is error to offset supposed benefits to the railway company for the opening of a street across its right of way, yet where a remedy is afforded by appeal for the correction of erroneous assessments, the proceedings are not void for such cause. *St. Paul, M. & M. R. Co. v. Minneapolis*, 24 Am. & Eng. R. Cas. 309, 35 Minn. 141, 27 N. W. Rep. 500.

85. When no compensation is recoverable.—Where two highways meet neither is entitled to destroy the other, but each must yield what is essential to the existence of the other. *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205, 7 Atl. Rep. 659.

The twelfth section of the charter of the Morris canal company vests in the company the right to cross public highways wherever it is necessary that they should do so, but they must exercise this right in such a manner as to cause the least possible inconvenience to the public. *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205, 7 Atl. Rep. 659.

Under the right to cross or occupy a highway a canal company does not take the fee of the land covered by the highway where the canal crosses, but simply a right of way, and so long as the free and unobstructed use and enjoyment of that is not interfered with, though the highway may be appropriated to other purposes than travel, there can be no cause for complaint. *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205, 7 Atl. Rep. 659.

A railway company cannot complain of a canal company which crosses its right of way and appropriates it to purposes other than those of travel, such as for the use of water-pipes, so long as the railroad company's use of the highway is not interfered with. *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205, 7 Atl. Rep. 659.

III. GRADE CROSSINGS.

1. In General.

86. In Illinois.—A railroad company being empowered in its charter to change

highways intersected, or to carry such highway either under or over the track, as might be found expedient—*held*, that the option to change highway crossings was vested in the company, and that the exercise of such option could not be controlled by a court of equity when there was no pretense that the company had failed to exercise the proper care, skill, and precaution. *Illinois C. R. Co. v. Bentley*, 64 Ill. 438.

If any obligation rests upon a city extending a street over a railroad right of way and tracks, when no compensation is made to the railway company to "restore such railroad track, right of way, or land to its former state, or in a sufficient manner not to have impaired its usefulness," since the passage of the Illinois act of 1874, requiring such companies to construct railroad crossings of highways and streets, such obligation will not be violated because a city may choose to extend a street at grade rather than by means of a viaduct. *Illinois C. R. Co. v. Chicago*, 51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044.

87. In Iowa.—Under the laws of Iowa there is nothing to prevent a railroad track being laid on an even level with a highway. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22.

Where a track is even with the surface of an ungraded street, an abutting property owner cannot require the company to bring its track to the established grade until the city has brought the street to that grade. *Given v. Des Moines*, 70 Iowa 637, 27 N. W. Rep. 803.

Where a company was by ordinance allowed to raise the grade of a street used for its track to a certain height—*held*, that it could not be allowed to so construct its road on the street that its track should be above the named grade, on the ground that in the construction of railroads the grade line of the road is the surface of the earth on which the ties are laid. *Given v. Des Moines*, 70 Iowa 637, 27 N. W. Rep. 803.

88. In Maine.—The provisions of Me. Rev. St. ch. 18, § 27, requiring that the expense of building and maintaining so much of a town-way or highway as is within the limits of the right of way, where such way crosses a track at grade, shall be borne by the railroad company, are constitutional. Those provisions are applicable to a company, though its charter provides that it is

not to be altered, amended, or repealed; and they do not impair the obligation of any contract with such company. *Boston & M. R. Co. v. County Com'rs*, 32 *Am. & Eng. R. Cas.* 271, 79 *Me.* 386, 4 *N. Eng. Rep.* 657, 10 *Atl. Rep.* 113.—FOLLOWED IN *Lander v. Bath*, 85 *Me.* 141.

89. In Minnesota — Nebraska. — Minnesota Laws 1887, ch. 15, relating to highway crossings by railroads, provides how grade crossings shall be constructed, but does not authorize all crossings to be at grade. *State v. Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.* 250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.

Where a railroad is constructed across a highway on a level materially below the level of the highway, it is the duty of the railroad company, at its own expense, to adapt the level of the highway to that of the railroad by proper gradients. And if the making of the necessary cuts and gradients on the highway for such purpose is a damage to adjoining lands, the company will be liable therefor. *Sioux City & P. R. Co. v. Weimer*, 20 *Am. & Eng. R. Cas.* 184, 16 *Neb.* 272, 20 *N. W. Rep.* 349.

90. In New Jersey.—If a railway company so builds its road as to cross a highway above its grade, it must bridge the entire width of the highway. *Raritan Tp. v. Port Reading R. Co.*, 50 *Am. & Eng. R. Cas.* 169, 49 *N. J. Eq.* 11, 23 *Atl. Rep.* 127.

An injunction will be granted at the instance of a city to prevent the use of four tracks across a street at grade in addition to five already there. *Mayor, etc., of Newark v. Delaware, L. & W. R. Co.*, 42 *N. J. Eq.* 196, 7 *Atl. Rep.* 123.—FOLLOWING *Newark & N. Y. R. Co. v. Newark*, 23 *N. J. Eq.* 515.

The Morris canal, although declared to be a public highway, is not, within the meaning of the New Jersey General Railroad Law, § 14, a street or highway which must be crossed by a railroad above or below grade. The streets and highways therein mentioned are the public thoroughfares in cities. *State (Lehigh Valley R. Co., pros.) v. Dover & R. R. Co.*, 14 *Am. & Eng. R. Cas.* 87, 43 *N. J. L.* 528.

It is not competent for a private individual to object to a crossing at grade on the ground that N. J. Rev., tit. "Railroads and Canals," § 14, par. 102, prevents railroads from crossing any street or highway in any city except above or below grade, especially

when he will not be particularly injured by a crossing at grade. *Packard v. Bergen Neck R. Co.*, 48 *N. J. Eq.* 281, 22 *Atl. Rep.* 227.

91. In New York.—(1) *Generally.*—The crossing of highways at grade by a railway is not unlawful. It is therefore neither a nuisance nor a trespass at law; nor does such crossing require the commissioners' consent thereto. *Baxter v. Spuyten Duyvil & P. M. R. Co.*, 61 *Barb. (N. Y.)* 428.

(2) *Option to carry over or under track.*—Under the provisions of N. Y. Laws of 1850, ch. 140, § 24, authorizing companies to carry highways crossing their track over it or under it as may be found most expedient, the election as to the mode of crossing, when exercised on the part of the company in good faith, is not reviewable. *People v. New York C. & H. R. R. Co.*, 74 *N. Y.* 302; *modifying* 12 *Hun* 195.—FOLLOWED IN *Gale v. New York C. & H. R. R. Co.*, 76 *N. Y.* 594, 13 *Hun* 1; *Hatch v. Syracuse, B. & N. Y. R. Co.*, 50 *Hun* 64, 24 *N. Y. S. R.* 36, 4 *N. Y. Supp.* 509.

Where a company carries a highway over its track by a bridge, it is bound to keep an approach to the bridge in suitable repair, and failing to do so it is subject to indictment. The remedy by mandamus is not inconsistent with the criminal indictment. *People v. New York C. & H. R. R. Co.*, 74 *N. Y.* 302; *modifying* 12 *Hun* 195.

92. In Pennsylvania.—(1) *Generally.*—The fact that the capital of a railroad is limited is not sufficient reason to justify a grade crossing; nor that the road is a local road through a sparsely settled country, with a limited amount of business and but few trains. *Perry County R. Extension Co. v. Newport & S. V. R. Co.*, 150 *Pa. St.* 193, 24 *Atl. Rep.* 709.

(2) *Interpretation of statute.*—The manifest purpose of the Pennsylvania act of 1871 was not merely to discourage grade crossings, because of their danger to the public as well as injury to the company whose road is crossed, but also to prevent them, whenever in the judgment of the court it is reasonably practicable to avoid such dangerous crossings. *Pennsylvania R. Co. v. Braddock Elec. R. Co.*, 152 *Pa. St.* 116, 25 *Atl. Rep.* 780; *reversing* 1 *Pa. Dist.* 626.—QUOTING *Perry County R. Extension Co. v. Newport & S. V. R. Co.*, 150 *Pa. St.* 193.

Being an exercise of the police power of

the state, grants of franchises are made and accepted in subordination to such statute. Nor is there anything in the title to the Pa. act of 1889 which conveys the slightest intimation of any intention to interfere with the jurisdiction theretofore conferred on courts of equity relating to railroad crossings at grade. *Pennsylvania R. Co. v. Braddock Elec. R. Co.*, 152 Pa. St. 116, 25 Atl. Rep. 780; reversing 1 Pa. Dist. 626.—QUOTING *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 149; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53.

(3) *Changing site of highway*.—The mere crossing of a public road by a railroad company may create a necessity for a change, under section 13 of the Pa. act of February 19, 1849, of the site of said road to avoid a grade crossing. There is nothing in the act to confine the question of necessity to original constructions or straightenings or widenings of the roadbed of the railroad company. *Abington Tp. v. North Pa. R. Co.*, 2 Pa. Dist. 68.

(4) *Proceedings of viewers—Costs*.—Where on the final hearing of a suit by a township to compel a railroad company, which was about to cross a turnpike at grade, to make the crossing above grade, it appeared that the grade crossing was properly and safely constructed, but it was shown that a new road constructed by the company, at its own expense, to connect with a highway intersecting the turnpike farther on was some three feet above the level of the adjoining country, and that a creek flowed along it for some distance, and that between the hearing before the master and the final hearing the company had begun to operate its line, but the road had not been fenced, although a year had elapsed since the building of the connecting road had been commenced—the company will be required to pay costs upon the bill being dismissed, the fencing being necessary under the Pa. Act of February 19, 1848, section 13 (P. L. p. 49), requiring the new road to be "forthwith constructed in as perfect a manner as the original road." *Appeal of North Manheim Tp.*, (Pa.) 36 Am. & Eng. R. Cas. 194, 14 Atl. Rep. 137.

(5) *Review of proceedings—Certiorari*.—In the laying out of a public road, viewers should avoid a location crossing a railroad track at grade, if it can reasonably be avoided. If they adopt such a crossing at grade, and the court of quarter sessions, on exceptions to the report, finds that the grade crossing could not be reasonably avoided,

and confirms the viewers' report, the supreme court cannot, on *certiorari*, go into the merits of the case, and where the record shows no error or abuse of discretion, the order will be affirmed. *In re Palmer Tp.*, 109 Pa. St. 274.

93. In Rhode Island.—A railway crossing a highway on the same level is not *prima facie* a nuisance, even where the charter of the railroad gives the power to raise or depress the highway, or to so construct their roadway that it shall not impede or obstruct the safe and convenient use of said highway; and unless it shall be shown that such railway did unreasonably impede or obstruct the safe and convenient use of the highway, no injunction will be granted to restrain it from maintaining such crossing. *Johnston v. Providence & S. R. Co.*, 10 R. I. 365, 6 Am. Ry. Rep. 139.

94. In Vermont.—Prior to the Vermont act of 1886, No. 20, the selectmen or the county court had no authority to establish a highway at grade across a railroad track; but while a case was pending on appeal in the county court, having been remanded from the supreme court, said act was passed, which authorized the laying of a highway at grade. *Held*, as the act gave no original jurisdiction, and as the jurisdiction of the county court was merely appellate, that it had in such case no power to establish such highway, and that proceedings must be commenced *de novo*. *Connecticut & P. R. R. Co. v. St. Johnsbury*, 59 Vt. 320, 4 N. Eng. Rep. 897, 10 Atl. Rep. 573.

A railroad company cannot resort to a court of chancery to restrain a town from building a highway across its track at level with it, unless it was informed and had reason to believe, and did believe, that the selectmen when they laid the highway intended to build the same above or below the track, and for that reason neglected seasonably to appeal, and thereby lost its opportunity to test the right to a grade crossing. There should be an allegation of irreparable injury in the bill. *Central Vt. R. Co. v. Royalton*, 58 Vt. 234, 4 Atl. Rep. 868.

95. In Canada—Ontario.—There was nothing in the resolution passed by the city of Ottawa March 15, 1882, purporting to grant to the Canada A. R. Co. certain lands, etc., which authorized the company to cross streets at a grade different from that prescribed by the Railway Act of 1879. *In re Bronson*, 1 Ont. 415.

96. In England.—(1) *Generally.*—Where a highway is crossed by a railway without diverting the road, a bridge must be made to carry the highway over or under the railway, but the highway may be diverted to a place where there is a level crossing, if such diversion will be more convenient than a bridge. *Attorney-General v. Ely, H. & S. R. Co., L. R. 4 Ch. 194, 38 L. J. Ch. 258, 20 L. T. 1, 17 W. R. 356, 13 Sol. J. 651.*—DISTINGUISHED IN *Pugh v. Golden Valley R. Co., L. R. 12 Ch. D. 274, 48 L. J. Ch. 666, 41 L. T. 30, 28 W. R. 44.*

(2) *Mandamus to compel erection of bridge.*—Where a railway company is wholly without funds, and has not the means to raise the necessary money, it will not be compelled by mandamus to construct a bridge in lieu of a level crossing, pursuant to an order of the board of trade. *In re British & N. S. R. Co., L. R. 3 Q. B. D. 10, 47 L. J. Q. B. D. 48, 26 W. R. 236, 3 Ry. & C. T. Cas. xviii.*

(3) *Option to bridge or make level crossing.*—A railway company authorized to divert a road crossing its line on a level and to carry it under the line by a bridge may be enjoined at the suit of the attorney-general from making or maintaining a bridge which by reason of the road thereunder being too low might cause such road to be flooded. *Attorney-General v. Furness R. Co., 47 L. J. Ch. D. 776, 38 L. T. 555, 25 W. R. 650.*

2. Under Connecticut and Massachusetts Statutes.

97. Generally.—It is the settled policy of the state of Connecticut to abolish grade crossings as rapidly as can reasonably be done. *New York & N. E. R. Co.'s Appeal, 62 Conn. 527, 26 Atl. Rep. 122.*—QUOTING *New York & N. E. R. Co.'s Appeal, 58 Conn. 532.*

98. Constitutionality of statutes.—(1) *Connecticut.*—The Conn. act, Gen. St. § 3489, to regulate crossings at grade at the intersection of highways and railroads, is a legitimate exercise of the police power of the state, and as such is constitutional. *Westbrook's Appeal, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.*

The Connecticut statute of June 19, 1889, authorizing the railroad commissioners to require the removal of dangerous grade crossings, is within the police power of the state,

3 D. R. D.—29.

and is therefore valid. *New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. Rep. 437; affirming 55 Am. & Eng. R. Cas. 38, 62 Conn. 527, 26 Atl. Rep. 122.*

The Connecticut statute providing for the abolition of grade crossings is constitutional, notwithstanding there is no present duty of common law or statute law which it is designed to enforce, since that statute makes it the duty of a town to unite with the railroad company in removing a dangerous nuisance. *Westbrook's Appeal, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.*

The object of such statute is to remove certain conditions, lawful in themselves, but which have become a source of danger to life and property, and as such the act is the valid exercise of the police power of the state. *Westbrook's Appeal, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.*

The Connecticut act of 1889 (Session Laws, ch. 220), which provides for an order by the railroad commissioners for the change of a highway where crossed at grade by a railroad laid out since the highway was made, and authorizes the commissioners to apportion the expense of the alteration between the town and the railroad company, but limits the amount to be set to the town to one quarter of the expense, and requires that the rest be paid by the railroad company, is not unconstitutional as conflicting with the provisions for "due course of law" in taking property, in the 14th amendment of the constitution of the United States, and in art. 1, §§ 9 and 12 of the constitution of this state. *New York & N. E. R. Co.'s Appeal, 45 Am. & Eng. R. Cas. 109, 58 Conn. 532, 20 Atl. Rep. 670.*—QUOTING *Woodruff v. Catlin, 54 Conn. 295.*—QUOTED IN *New York & N. E. R. Co.'s Appeal, 62 Conn. 527.*

The Connecticut act of 1889, relating to grade crossings (Session Laws of 1889, ch. 220), provides in effect that the directors of every company which operates a railroad in this state shall apply for the removal of at least one grade crossing each year for every sixty miles of road; * * * and if the directors of any company shall fail so to do, the commissioners shall order such crossing or crossings removed, etc. *Held*, that as grade crossings are in the nature of nuisances, the legislature has a right to cause them to be abated, and to require either

party to pay the whole or any portion of the expense. *New York & N. E. R. Co.'s Appeal*, 55 *Am. & Eng. R. Cas.* 38, 62 *Conn.* 527, 26 *Atl. Rep.* 122; *affirmed in* 151 *U. S.* 556.

And this is true, although the legislative act may impose an obligation which, previous to its passage, the charter of the corporation did not impose; and the statute in question is not unconstitutional because it authorizes the railroad commissioners to fix their own jurisdiction. *New York & N. E. R. Co.'s Appeal*, 55 *Am. & Eng. R. Cas.* 38, 62 *Conn.* 527, 26 *Atl. Rep.* 122; *affirmed in* 151 *U. S.* 556.

A state statute, such as the Connecticut statute of June 19, 1889, authorizing railroad commissioners to require the removal of dangerous grade crossings, does not deprive a company of the equal protection of the law by imposing the entire expense of the change upon the company, as the statute applies to all railroad corporations; neither does it amount to a taking of property without due process of law; nor does it impair the obligation of the company's charter contract where it is held subject to amendment. *New York & N. E. R. Co. v. Bristol*, 151 *U. S.* 556, 14 *Sup. Ct. Rep.* 437; *affirming* 55 *Am. & Eng. R. Cas.* 38, 62 *Conn.* 527, 26 *Atl. Rep.* 122.

(2) *Massachusetts*.—Since the whole subject of the crossing of highways by railroads can be regulated by the legislature, the legislature may, at any time before a final decree has been rendered, amend the statutes under which a proceeding has been commenced; and if the amended act is made applicable to the pending proceeding and is valid, the court, in rendering a final decree, must proceed in accordance with the statutes as amended; and in accordance with this view of the law, the Massachusetts statute of 1892, which provides that "in the proceedings now pending in the superior court for the abolition of certain grade crossings in the city of Northampton, no change shall be made in the grade of the public ways in the said city where the same are now crossed by one or more railroads at grade, without the consent of the city council," is constitutional. *In re Mayor, etc., of Northampton*, 55 *Am. & Eng. R. Cas.* 31, 158 *Mass.* 299, 33 *N. E. Rep.* 568.

99. Interpretation of statutes.—(1) *Connecticut*.—The Conn. act of 1883 (Session Laws of 1883, ch. 107, § 2) pro-

vides that "no new highway or portion of a highway shall be constructed across a railroad at grade." *Held*, that when a street had been laid out across a railroad at grade before the passage of the act and partially constructed, but had not been actually completed for public use at the time the act took effect, such crossing could not thereafter be made. And *held*, to be of no moment that the company had given permission to construct the crossing at grade. Private contracts cannot put limitations upon legislative power to protect life. *New York & N. E. R. Co. v. Waterbury*, 55 *Conn.* 19, 10 *Atl. Rep.* 162.—**FOLLOWED IN** *Smith v. New Haven*, 59 *Conn.* 203.

Conn. Gen. St. § 3489 provides that the selectmen of any town, the mayor and common council of any city, the warden and burgesses of any borough, and the directors of any railroad company, may bring their written petition to the railroad commissioners alleging that public safety requires an alteration in any crossing of a railroad and highway, and that the commissioners, after notice and a hearing, may determine what alterations shall be made, by whom, and at whose expense. A later section allows an appeal from any order of the commissioners. *Held*, that the officials named, in bringing a petition under this statute, act only as agents of the corporation which they represent, and not as agents of the state or of the law. The corporations and not the officials are the real party. *Westbrook's Appeal*, 37 *Am. & Eng. R. Cas.* 446, 57 *Conn.* 95, 16 *Atl. Rep.* 724, 17 *Atl. Rep.* 368.

When a railroad is operated by a company under a perpetual lease, it is the road of the lessee, within the meaning of the Connecticut statute for the alteration of grade crossings. *Westbrook's Appeal*, 37 *Am. & Eng. R. Cas.* 446, 57 *Conn.* 95, 16 *Atl. Rep.* 724, 17 *Atl. Rep.* 368.

The object of such statute is to remove certain conditions lawful in themselves, which are a source of danger, and the act is a valid exercise of the police power of the state. *Westbrook's Appeal*, 37 *Am. & Eng. R. Cas.* 446, 57 *Conn.* 95, 16 *Atl. Rep.* 724, 17 *Atl. Rep.* 368.

The *New York & N. E. R. Co.* was incorporated under a charter which did not impose upon it the burden of making crossings for new highways laid out thereafter, either under or over its track, but this charter was subject to amendment. *Held*,

that § 3481 of the Conn. Gen. St. constituted an amendment of such charter. *New York & N. E. R. Co. v. Waterbury*, 49 *Am. & Eng. R. Cas.* 307, 60 *Conn.* 1, 22 *Atl. Rep.* 439.

(2) *Massachusetts*.—The provision of the Mass. St. of 1848, providing that a certain railroad should not pass at grade any highway or avenue leading to Boston, was rescinded by the statute of 1853, which provided that the city council of Cambridge should have full power to determine in what manner that railroad should be constructed across the streets within the city, whether at grade or otherwise, and what security should be provided by the railroad company at such crossings; and it was not intended by the last-named statute that the damages to be awarded to the railroad company should be assessed otherwise than by the settled rule, or to abrogate the general statute requiring expenses incident to constructing and maintaining the way at such crossings to be borne by the city, notwithstanding the city council of Cambridge permitted the railroad to cross its streets and avenues, upon the condition that the company should provide and maintain at its own expense certain gates. *Boston & A. R. Co. v. Cambridge*, 55 *Am. & Eng. R. Cas.* 23, 159 *Mass.* 283, 34 *N. E. Rep.* 382.

The power conferred by Mass. St. 1872, in relation to the alteration of railroad crossings, is confined to alterations in the approaches to or in the "method of" a crossing within the limits of the existing highway. *Lancaster v. Worcester County Com'rs*, 113 *Mass.* 100.

A statute which simply authorizes a railroad corporation to cross a street at grade, abridges, but does not take away, the power of the county commissioners to prescribe what alterations may be made in the way, the time and manner of making them, etc. *Brewer v. Boston, C. & F. R. Co.*, 113 *Mass.* 52.

Under Mass. Rev. St., ch. 39, § 67, providing that every railroad corporation "may raise or lower any turnpike or way, for the purpose of having their railroad pass over or under the same," a railroad corporation may raise a turnpike road for the purpose of constructing the railroad across it upon the same level. *Newburyport Turnpike Corp. v. Eastern R. Co.*, 23 *Pick. (Mass.)* 326.—QUOTED IN *Illinois C. R. Co. v. Chicago*, 141 *Ill.* 586.

100. Right to demand alteration of grade crossing.—Under the provisions of section 11 of the charter of the Boston & Lowell R. Co., giving to said corporation the right to construct its road across highways, the selectmen of the town in which such crossing takes place have no power to interfere unless the corporation has raised or lowered the highway. Such selectmen have in such case no right to demand an alteration of the crossing, unless said alteration be reasonable and proper. Said corporation under said section of its charter does not discharge its duty by making such a crossing as to provide for the wants of travelers at the time of the construction of the road. If by the increase of population in the neighborhood, or by reason of the increasing use of the highway, the crossing, which was at the outset adequate, becomes inadequate, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway. *Cooke v. Boston & L. R. Corp.*, 10 *Am. & Eng. R. Cas.* 328, 133 *Mass.* 185.

101. Apportionment of expenses.

—(1) *Connecticut*.—It is provided by Conn. Gen. St. § 3481, that whenever a new highway is laid out across a railroad it shall pass over or under the railroad track, as the railroad commissioners shall direct; and that the railroad company shall construct the crossing, bearing half the expense of it, and being reimbursed for the other half by the town, city, or borough. A new street was laid out in a city across a railroad, the land occupied by which was owned in fee by the railroad company, and the crossing was constructed by the company. *Held*, that the company was not entitled, in addition to reimbursement for half the cost of the crossing, to payment by the city of the remaining half of the cost as damage to which it had been subjected by the taking of its land for the highway. *New York & N. E. R. Co. v. Waterbury*, 49 *Am. & Eng. R. Cas.* 307, 60 *Conn.* 1, 22 *Atl. Rep.* 439.

The commissioners or the superior court, when an appeal is taken to it, may, in their discretion, either apportion the expense or impose the whole burden upon the railroad company. *Fairfield's Appeal*, 39 *Am. & Eng. R. Cas.* 689, 57 *Conn.* 167, 17 *Atl. Rep.* 764.

The discretion allowed in apportioning the expenses of altering the crossings is ex-

hausted when exercised by the superior court on appeal. *Fairfield's Appeal*, 39 *Am. & Eng. R. Cas.* 689, 57 *Conn.* 167, 17 *Atl. Rep.* 764.

(2) *Massachusetts*.—Under the provisions of Mass. Pub. St. ch. 112, § 133, providing that a party aggrieved by an award made by a special commission as to the expenses of making an alteration in a railroad crossing may "apply to the court for a jury to revise and determine any matter of fact found therein," such party has the right to have the apportionment of the cost of making the alteration between the county, the company, and the city revised and determined. *Boston & A. R. Co. v. Newton*, 148 *Mass.* 474, 20 *N. E. Rep.* 106.

Where a statute provided that a railroad corporation should have the same right as the municipal authorities to apply directly to the county commissioners for a remedy in case of an inconvenient crossing, but the question of the necessity of the alterations and of the manner in which they should be made had been already settled and the work completed, the sole province of the jury being, therefore, to apportion the costs of the alteration, it was immaterial upon whose petition the changes were ordered, and whether the results sought could have been obtained without altering the crossing, and evidence upon these points should be excluded. *Boston & L. R. Corp. v. Winchester*, 55 *Am. & Eng. R. Cas.* 49, 156 *Mass.* 217, 30 *N. E. Rep.* 1139.—**QUOTING** *Boston & A. R. Co. v. Hampden County Com'rs*, 116 *Mass.* 73.

Where the general rule in the state is that the costs of altering crossings should be apportioned to the parties as justice might require, according to benefits received, it was proper to instruct the jury that they should not consider the question of what the alteration ought to have cost, or what such a benefit was worth to the town. *Boston & L. R. Corp. v. Winchester*, 55 *Am. & Eng. R. Cas.* 49, 156 *Mass.* 217, 30 *N. E. Rep.* 1139.

102. Proceeding to restrain city from paying part of expenses.—A city will not be enjoined upon the petition of ten taxpayers, under Mass. Pub. St. ch. 27, § 129, from paying its share of the expense of abolishing a level crossing therein of a street and railroad upon due proceedings had under the operation of which important rights have accrued, because the opinion of

the mayor and aldermen as to the necessity thereof, transmitted to the county commissioners as required by Pub. St. ch. 112, § 129, was not expressed by formal vote or evidenced by record; such an objection, if sound, should be taken before the county commissioners at the beginning of the proceedings, and if taken for the first time upon such a petition comes too late. *Parsons v. Northampton*, 154 *Mass.* 410, 28 *N. E. Rep.* 350.

Taxpayers in a city who have no particular interest in a school-house lot therein taken in separating the grade at a crossing of a street and a railroad, cannot maintain a petition under Pub. St. ch. 27, § 129, to prevent the payment by the city of its share of the expense of such separation upon the ground of a want of authority in the county commissioners, even if the commissioners could not lawfully take any part of the lot for the purpose of abolishing the crossing. *Parsons v. Northampton*, 154 *Mass.* 410, 28 *N. E. Rep.* 350.

A petition by ten taxpayers, under Pub. St. ch. 27, § 129, to prevent a city from paying its share of the expense of separating the grades of a railroad and a street at a crossing, which is filed immediately after a vote by the city council to raise the money, but more than a year after the order of county commissioners prescribing the work and an award fixing the city's share of the expense were made, cannot be maintained where the crossing is located near the centre of the city and the railroad company has already incurred large expense in prosecuting the work. *Parsons v. Northampton*, 154 *Mass.* 410, 28 *N. E. Rep.* 350.

103. Powers of commissioners.*—

(1) *Connecticut*.—Section 3489 of the Connecticut Gen. St. provides that upon the petition of any town, city, or borough, or railroad company, the railroad commissioners may discontinue any grade crossing of a highway by a railroad and determine at whose expense the change shall be made. Section 3491 allows an appeal to the superior court. The N. Y., N. H. & H. R. Co. petitions for the abolition of all grade crossings on its line in the town of Fairfield. One of these crossings is one fourth of a mile from a station where the public crossed at their pleasure as a public way.

* Power of commissioners appointed to carry tracks over streets under Connecticut statute, see 45 *AM. & ENG. R. CAS.* 112, *abstr.*

The commissioners ordered the abolition of both these crossings, treating them as if they were both highway crossings, and ordered the substitution of a new one between the two points. *Held*, that the commissioners had exceeded their power in assuming that there was a crossing in existence at the station for the purpose of determining what should be done in reference to the regular highway crossing. *Fairfield's Appeal*, 39 Am. & Eng. R. Cas. 689, 57 Conn. 167, 17 Atl. Rep. 764.

While the railroad commissioners cannot interfere with the general power of towns and selectmen to lay out new highways, yet they have, under the statute, power to deal with existing highways where a change becomes necessary to the removal of a grade crossing, and where the construction of short portions of new highway becomes necessary they may order such new highway made. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

(2) *Massachusetts*.—Under the statutes of Massachusetts the county commissioners have the power, in order to do away with grade crossings, to cause any deviation to be made from the existing highway which is reasonably necessary for a safe and convenient crossing over or under a railroad. *Davis v. Hampshire County Com'rs*, 55 Am. & Eng. R. Cas. 52, 153 Mass. 218, 26 N. E. Rep. 848.

County commissioners have no power, under the Mass. St. of 1872, to change the grade of a railroad where it crosses a highway. *Boston & A. R. Co. v. Hampden County Com'rs*, 116 Mass. 73.—FOLLOWED IN *Powers v. City Council of Springfield*, 116 Mass. 84. QUOTED IN *Boston & L. R. Corp. v. Winchester*, 156 Mass. 217.

Under Mass. Rev. St. ch. 24, § 13, county commissioners have final jurisdiction of the question whether a highway which crosses a railroad shall be laid out over, under, or on a level with it. *Boston & M. R. Co. v. Middlesex County*, 1 Allen (Mass.) 324.

104. Proceedings before commissioners, generally.—(1) *Connecticut*.—Gen. St. Conn. § 3483, which authorizes the railroad commissioners to make alterations in highways where necessary to the removal of grade crossings, provides that the commissioners shall determine the expense and by whom it shall be paid, with the right to

apportion it between the company and the town. *Held*, that an order, made before the work was done, that a town should on its completion pay a gross sum toward the cost of a bridge over the railroad track, to be constructed by the railroad company, was not invalid. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

With full means of ascertaining beforehand the entire expense to be incurred in building such a bridge, it is not to be presumed that the commissioners ordered the town to pay a greater sum than one half the entire cost, to which the assessment upon the town was limited by the statute. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

Where a town was a party to the proceedings before the commissioners upon an application of a railroad company for the removal of a grade crossing, and the selectmen were present and heard, and were notified of the decision, and knew it to be on file and record in the office of the railroad commissioners—*held*, that they were bound to take notice of the particulars of the decision, although a copy of it was referred to as thus on file and record and was not annexed to the alternative writ. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

And the objection to the alternative writ, as defective for this cause—*held*, to be one of form only, of which advantage could be taken only by a motion to quash the writ. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

The fact that an order abolishing all grade crossings in a town is erroneous as to one particular crossing, and there is nothing to show that such crossing was not considered on its own facts, does not disturb the order as to other crossings. *Fairfield's Appeal*, 39 Am. & Eng. R. Cas. 689, 57 Conn. 167, 17 Atl. Rep. 764.

(2) *Massachusetts*.—A company was authorized by the county commissioners to raise a highway at a certain grade so as to cross their road on a level, and raised the highway accordingly, but at a steeper grade. The commissioners subsequently, on the application of the towns between which the highway lay, modified their former order by postponing the time within which it

should be complied with, and assessed damages to the towns. *Held*, that that part of the second order assessing damage was unauthorized and that the whole order was therefore void, and would not justify the corporation in not complying with the first order. *Commonwealth v. Vermont & M. R. Corp.*, 4 Gray (Mass.) 22.

In order to authorize a company, under the provisions of the Mass. Rev. St. ch. 39, §§ 57, 68, to raise or lower any way, it is not necessary that a previous agreement therefor should be made with the selectmen of the town in which such way is situated, or that there should be a previous determination of the county commissioners as to whether any and what alteration should be made. The railroad corporation must first give the notice to the selectmen of its intention to raise or lower the way in question; the selectmen are then within thirty days to notify the corporation of the alterations, if any, which they require; if the selectmen and the corporation shall not agree what alterations are necessary, application may be made by either to the county commissioners, to determine the same; and if the selectmen give no notice to the corporation as to what alterations they require, the presumption is that they require none, but leave the whole matter to the corporation. *Parker v. Boston & M. R. Co.*, 3 Cush. (Mass.) 107.

105. Disqualification of commissioner.—Upon a petition to the county commissioners, under the Mass. St. of 1872, ch. 262, § 1, for an alteration in the crossing of a railroad by a highway, a county commissioner who resided in the city or town in which the crossing is situated is disqualified, by the Gen. St. ch. 17, § 12, to act, unless a board cannot be organized without him. *Boston & A. R. Co. v. Hampden County Com'rs*, 116 Mass. 73.

106. Duty of state's attorney.—The alteration of highways for the purpose of removing a grade crossing is not a matter of private and adversary nature, but of public concern, and the state's attorney should properly act in enforcing the order of the commissioners. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

107. Notice to the town.—Although the Connecticut Gen. St. § 3489, enacted to regulate grade crossings, makes no express provision for giving notice to the town in

such a case, the spirit of the act and general principles require notice to be given. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

And while the statute for the alteration of grade crossings does not require notice of an application to be given to the town when the petition is presented by the directors of the railroad company, such notice is, by implication, necessary. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

108. Parties.—A railroad that is operated by a company under a perpetual lease is the road of the latter company, within the meaning of the statute, and that company is the proper one to bring a petition to the railroad commissioners for the alteration of a crossing at the intersection of a railroad and a highway. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

A town should be made a party where a petition is brought by a company under Conn. Gen. St. § 3489, to regulate grade crossings. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

109. Petition.—In a petition under Conn. Gen. St. § 3489, the directors were described collectively and simply as such, and not individually and by name, and the petitions were signed in the same manner, and no objection was taken at an early stage of the case. *Held*, that the court below was justified in finding that the petitions were brought by the authority of the directors. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

Such petition is sufficiently authorized, if authorized by the railroad directors when convened for any purpose, whether with or without special notice, and whether in the state or out of it; and even if unauthorized, the failure of a corporation, within a reasonable time after obtaining knowledge of its presentment, to object will amount to a ratification and be sufficient evidence of authority. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

A petition under the statute was signed "The Directors of the New York, N. H. & H. R. R. Co., by Lynde Harrison, their Attorney." The commissioners made an or-

der in the matter, from which the respondent town appealed to the superior court, alleging that the petition was brought by the railroad company, which the appellee admitted. In subsequent pleadings the town alleged that the petition was not signed by the directors or by any person legally authorized to do so. *Held*, that this allegation could not be contradicted by the later pleadings; that the objection was in the nature of a dilatory plea and should have been taken at an earlier stage of the case; and that it should, at any rate, have been made a ground of appeal. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

An allegation that a company "by its directors brought its petition," asking for a change of the crossing of certain highways, is a sufficient allegation that the directors were duly authorized and that the proceedings were in due form. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

A petition purporting to be "the petition of the directors of the New York, N. H. & H. R. Co.," and signed "The Directors of the N. Y., N. H. & H. R. Co., by A. B., their Attorney," is a sufficient compliance with a statute authorizing the presentment of a petition by the directors of the company. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

A petition by the directors of the railroad company to the county commissioners, under the Massachusetts Statutes of 1872, ch. 262, representing that in their opinion it is necessary for the security of the public that the method of crossing two streets by their road should be altered, and requesting that such commissioners "prescribe such an alteration as will separate the grade of said railroad from the grades of said streets and allow said streets to pass under said railroad," does not prevent the company from objecting that an order passed by the commissioners upon such petition is invalid because it undertakes to change the grade of the railroad. *Boston & A. R. Co. v. Hampden County Com'rs*, 116 Mass. 73.

110. Plea in abatement.—An objection to a petition for the alteration of a grade crossing, brought under the Connecticut statute, that the application was not authorized by the board of directors, and was not in due form, is in the nature of a

plea in abatement, which should be presented at the hearing before the commissioners. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

111. Review of proceedings.—(1) *Connecticut.*—In proceedings by the railroad commissioners, under the Connecticut statute providing for the removal of grade crossings, to compel the removal of certain grade crossings, the commissioners represent the state; and in an appeal from their decision they should be made parties. *New York & N. E. R. Co.'s Appeal*, 55 Am. & Eng. R. Cas. 38, 62 Conn. 527, 26 Atl. Rep. 122.

The question whether or not public safety requires any change of a highway at a grade crossing is one that the legislature has intrusted solely to the railroad commissioners as an original one, and to the superior court only by an appeal from their doings. On the hearing of an application for a mandamus to compel a town to construct such highway the court has no authority to pass upon that question; the decision of the commissioners not having been appealed from becomes *res adjudicata*. *Doolittle v. Selectmen of Branford*, 49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336.

(2) *Massachusetts—Certiorari.*—A writ of *certiorari* to quash an order of a city council, altering the grade of a highway at a railroad crossing and awarding damages to the abutters, passed pending proceedings before the county commissioners for the same object, will not be granted upon a petition filed by an abutter after the work under the order has been, with his knowledge, commenced and prosecuted for more than a month and nearly to completion. *Noyes v. City Council of Springfield*, 116 Mass. 87. —*DISTINGUISHING Powers v. City Council of Springfield*, 116 Mass. 84.

While a petition of the mayor and aldermen of a city in which a railroad crossing is situated and of the directors of the company to the county commissioners, under the Massachusetts Statute of 1872, ch. 262, for an alteration of the crossing so as to allow the highway to pass under the railroad, is pending, the mayor and aldermen are not authorized to join with the common council in changing the grade of the highway at the same place, even with the consent of the railroad company; and a writ of *certiorari* to quash an order of the city council

to that effect will be granted upon a petition filed by an abutter before any work had been done under the order. *Powers v. City Council of Springfield*, 116 Mass. 84.—FOLLOWING *Boston & A. R. Co. v. Hampden County Com'rs*, 116 Mass. 73.—DISTINGUISHED IN *Noyes v. City Council of Springfield*, 116 Mass. 87.

Upon a petition of the mayor and aldermen of a city in which a railroad crossing was situated, and of the directors of the railroad company, under the Massachusetts Statutes of 1872, ch. 262, § 1, for an alteration of the same, the order of the county commissioners required an alteration in the grade of the railroad. *Held*, that upon the petition of the company, filed seven months after that order, but before any award of the special commissioners appointed under section 2 of the state statute, a writ of *certiorari* should issue to quash the order of the county commissioners. And under the Statutes of 1873, ch. 355, a writ of *certiorari* may be ordered to be issued in vacation and returnable forthwith. *Boston & A. R. Co. v. Hampden County Com'rs*, 116 Mass. 73.

112. Penalty for failure to comply with order of commissioners.—If a railroad company unreasonably neglect to comply with the order of county commissioners allowing the company upon their petition, in pursuance of the Mass. Act of 1846, ch. 271, to cross a highway upon a level, the only remedy is for the penalty given by section 4, or by a proceeding in equity under the Act of 1849, ch. 222, § 5. The commissioners cannot assess damages or issue a warrant for a jury in such a case. *Vermont & M. R. Co. v. Franklin County Com'rs*, 10 Cush. (Mass.) 12.

113. Specific enforcement of commissioners' order—Equity.—An order of the county commissioners, passed on the petition of the mayor and aldermen, or selectmen, under the Massachusetts Statute of 1842, ch. 22, which determines that the raising of a highway at a place named where it is crossed by a railroad on a level, so as to pass over the railroad, is necessary for the security of the public, without defining the height above the railroad to which the highway shall be raised, the grade of the ascent, the mode and material of the structure, or the time within which it shall be made, is too indefinite to be specifically enforced by a court of equity under the Massachusetts Statutes of 1849, ch. 222, § 5.

Roxbury v. Boston & P. R. Co., 2 Gray (Mass.) 460.

A bill in equity under Mass. St. 1849, ch. 222, § 5, to compel a railroad corporation to raise or lower a highway in compliance with an order of county commissioners, may be brought by the town or city within which such highway is situated; although the case is one in which the mayor and aldermen, or selectmen, may, under St. 1842, ch. 22, on the neglect or refusal of the corporation to carry the decision of the commissioners into effect, maintain an action against the corporation for the expenses thereby incurred. *Roxbury v. Boston & P. R. Corp.*, 6 Cush. (Mass.) 424.—REVIEWED IN *Montclair Tp. v. New York & G. L. R. Co.*, 45 N. J. Eq. 436.

The bill in equity provided by Mass. St. 1849, ch. 222, § 5, for enforcing the order of county commissioners, respecting the manner of constructing a railroad where it crosses a public highway, can be maintained only by the mayor and aldermen of the city, or the selectmen of the town, within which the way is situated, and not by any individual inhabitant of such city or town, although he is owner in fee-simple of the land over which the way is located. *Brainard v. Connecticut River R. Co.*, 7 Cush. (Mass.) 506.—DISTINGUISHED IN *Currier v. Concord R. Corp.*, 48 N. H. 321. REVIEWED IN *Chandler v. Railroad Com'rs*, 141 Mass. 208.

IV. RIGHTS OF ABUTTING OWNER.

114. Right of action, generally.—The failure of a railroad company to provide proper crossings in a street is not a cause of action in favor of a private individual, unless the municipal authorities have refused to act. *Cusby v. Owensboro & R. R. Co.*, 10 Bush (Ky.) 288.

When county commissioners prescribe to a railroad company crossing a highway such alterations to be made and the way, the manner of making them, and all the particulars connected therewith, no action can be maintained against the company for acts properly done within such authority given; but for acts done by such company in excess of that authority, or for acts negligently or unskillfully done, though within the scope of such authority, one suffering a special injury different from that of the public at large may maintain an action.

Brewer v. Boston, C. & F. R. Co., 113 Mass. 53.

It is no answer to an action for injury accruing to the plaintiffs by the building of the defendant's road that the best possible crossing was made for the plaintiffs, considering the topography and physical surroundings present. The plaintiffs had no pecuniary interest in the betterments of the company, and the company was not compelled by any law to build the road. And if the crossing made by the company left the plaintiffs in a still worse condition than before, and largely depreciated their lands, their right of action was unquestionable. *Autenrieth v. St. Louis & S. F. R. Co.*, 36 Mo. App. 254.

115. Certiorari to quash proceedings.—A landowner in a city, the direct approach to whose estate by a public street from the principal business section of the city is cut off by the separation at a crossing of the grades of the street and a railroad, and by a discontinuance of the street within the railroad location, resulting in a serious and permanent injury to the estate as well as to others in the vicinity, cannot maintain a petition for a writ of *certiorari* to quash the proceedings of the county commissioners in abolishing the grade crossing, either on his own behalf or because of an injury to the city. *Davis v. Hampshire County Com'rs*, 153 Mass. 218, 26 N. E. Rep. 848.

116. Damages for construction of approaches.—Where a railroad crossing was so constructed that one of the approaches extended along in front of plaintiff's premises, the base at one end covering the street within two to four feet of the lot line, and at the other end extending to within twenty-one feet of said lot line, and rising at the latter end to a height of ten feet above grade—*held*, that such approach was a "railway track," within the meaning of section 464 of the Iowa Code, and that the plaintiff was entitled to recover of the railroad company for damages sustained. *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 27, 50 N. W. Rep. 222.

The company was not relieved from liability on account of such damage by reason of the crossing having been constructed under the authority of section 1262 of the Iowa Code. *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 27, 50 N. W. Rep. 222.

Nor can such liability be averted because

said crossing was erected under the sanction and direction of the city. *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 27, 50 N. W. Rep. 222.

117. — or embankments, or bridges.—The charter of a company required it, upon crossing any highway, to restore it to its former state, or in a sufficient manner not to impair its usefulness. It also provided that it should "construct and use that part of its road within the city of N., subject to such regulations as the common council of the city should prescribe." The charter of the city provided that the common council of the city should "have supervision over all bridges crossing railroads within the city, and might from time to time order the widening and repairing of the same in such manner as in their judgment the public convenience might require." The company had in the year 1848 constructed its road, crossing the highway in the outer part of the city of N., and had restored the highway by making a crossing at the grade of the road. In 1869 the city had so extended and the travel over this highway so much increased as to make it necessary to the public convenience that a bridge should be built over the railroad at the crossing, and the common council of the city made an order that one should be built by the railroad company. The company failing to build it, the common council authorized the road commissioners of the city to make a contract with the railroad company that if the company would build the bridge the city would construct the necessary embankments for approaching it, and under this agreement the railroad company built the bridge and the city made the embankments. These embankments raised the street so much in front of the house and lot of the plaintiff as to damage the property seriously. *Held*: (1) that the city was not liable for the damage; (2) that the company was liable. *Burrill v. New Haven*, 42 Conn. 174.

The city would not be liable because the only duty resting upon it with regard to highways was imposed by the legislature and was limited to the making of highways and maintaining them in a condition safe and convenient for the public use, while here the structure was made necessary only by the fact of the railroad crossing the highway. The necessity grew properly out of the existence of the railroad and not

out of the demands of public travel. *Burritt v. New Haven*, 42 Conn. 174.—APPROVING *English v. New Haven & N. Co.*, 32 Conn. 241.

If the common council, under the provision of the city charter authorizing it to supervise all bridges over railroad crossings and to order the widening and repairing of them, had not power to order the construction of a bridge, the railroad company would yet be liable, under the provision of its own charter that it should restore all highways to their former usefulness and should construct and use its road within the city of N., subject to the direction of the common council. *Burritt v. New Haven*, 42 Conn. 174.

The embankments at the end of a bridge, made necessary in restoring a highway to its former usefulness, are a part of the railroad structure authorized by the charter of the railroad company, and a party incidentally injured in their construction has as perfect a remedy against the company for consequential damages, as for a direct injury by it in the original construction of the road. *Burritt v. New Haven*, 42 Conn. 174.

118. Damages for erection of gates or barriers.—The erection and maintenance of gates or barriers in a street at a railroad crossing, pursuant to a municipal ordinance requiring the same for the safety of the public, is not such a taking of land as will entitle the owners of abutting lots to compensation. *Trustees v. Milwaukee & L. W. R. Co.*, 43 Am. & Eng. R. Cas. 182, 77 Wis. 158, 45 N. W. Rep. 1086.

119. Damages resulting from change in grade.—Where a company constructs its track across a highway in accordance with the directions and orders given by the county commissioners, no action can be maintained against it for the damages suffered in consequence of excavations at the instance of the owner of the adjoining land. Nor will it be liable in damages to such owner by the necessary acts of the town officers in grading down the highway, made necessary by reason of the construction of a railroad across it. *Whitdeer v. Portland & K. R. Co.*, 38 Me. 26.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

An owner of property abutting on a street of which the city has the fee, cannot recover damages of a railroad for raising the

grade of the centre of the street, compelling him to drive back some distance in order to cross the track by means of such changed grade. *Rauenstein v. New York, L. & W. R. Co.*, 31 N. Y. S. R. 911.—FOLLOWING *Ottenot v. New York, L. & W. R. Co.*, 28 N. Y. S. R. 483.

It is the duty of a company to construct and maintain sufficient crossings at points where its railroad intersects a public highway. If in so doing it is necessary to raise the bed of the highway, an additional burden is thereby imposed upon the land, for which the owner of the fee may recover damages. *Wead v. St. Johnsbury & L. C. R. Co.*, 64 Vt. 52, 24 Atl. Rep. 361.

In the construction of such crossing the company may extend the fill outside the limits of the highway and must make compensation for the additional land so taken. *Wead v. St. Johnsbury & L. C. R. Co.*, 64 Vt. 52, 24 Atl. Rep. 361.

The owner of property abutting upon a highway where a railroad crosses, may institute proceedings against the company, under section 1852, Wis. Rev. St. 1878, for injuring his property by grading the highway. *Buchner v. Chicago, M. & N. W. R. Co.*, 14 Am. & Eng. R. Cas. 447, 60 Wis. 264, 19 N. W. Rep. 56.

120. Damages for inconveniences due to stoppages, etc.—A landowner can claim no compensation for inconvenience sustained from the authorized crossing on a level of a public road by a railway. *Wood v. Stourbridge R. Co.*, 16 C. B. N. S. 222.

Where a company crosses a public highway on a level, under statutory authority, it is not liable for damages to private individuals for stoppages and other inconveniences incident to such crossing. *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229.—EXPLAINED IN *Caledonian R. Co. v. Walker*, L. R. 7 App. Cas. 259, 46 L. T. 826, 30 W. R. 569, 46 J. P. 676.

Where a railroad company has crossed the public highway on a level, under the sanction of parliament, abutting or neighboring landowners cannot recover damages for mere inconvenience and annoyance due or occasioned by and incident to the lawful operation of such crossing by the company. *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229.—EXPLAINED IN *Caledonian R. Co. v. Walker*, L. R. 7 App. Cas. 259, 46 L. T. 826, 30 W. R. 569, 46 J. P. 676.

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I. LIABILITY, GENERALLY.

1. Care to be observed by company.

—Under no circumstances are those in charge of trains required to exercise more than ordinary caution and care toward persons traveling with teams on a highway; and under no circumstances should this duty be permitted to interfere with the higher one which is due to passengers. *Bailey v. Hartford & C. V. R. Co.*, 37 *Am. & Eng. R. Cas.* 483, 56 *Conn.* 444, 16 *Atl. Rep.* 234.

Where a highway crossing a railroad at grade is very little used there is a less degree of vigilance required on the part of an engineer of a train approaching the crossing. The requirement of vigilance is to be measured by the total of danger. *Andrews v. New York & N. E. R. Co.*, 60 *Conn.* 293, 22 *Atl. Rep.* 566.

Carriers of persons are bound to use the highest degree of care and diligence consistent with the practical exercise of the business of carriers, and a person not a passenger is entitled to no higher degree of care from them than a passenger; and in such a case it is error to instruct the jury that the employes of the road were bound as far as possible to prevent injury to a person about to cross the track in front of a train. *Chicago, B. & Q. R. Co. v. Dunn*, 61 *Ill.* 385, 12 *Am. Ry. Rep.* 427.

It is the duty of a railway company in the running of its trains to use ordinary care and prudence to guard against injury to the persons or property of those who may be traveling upon the public highways and have occasion to cross its tracks, whether the specific duty be prescribed by statute or not. The fact that the statute may provide one precaution will not relieve the company from adopting such others as public safety and common prudence may dictate. *Chicago, B. & Q. R. Co. v. Perkins*, 125 *Ill.* 127, 14 *West. Rep.* 400, 17 *N. E. Rep.* 1; *affirming* 36 *Ill. App.* 67. — FOLLOWED AND QUOTED IN *Peoria & P. U. R. Co. v. Herman*, 39 *Ill. App.* 287. REVIEWED IN *Grand Trunk R. Co. v. Ives*, 144 *U. S.* 408.

When one railroad company is by permission using the track and easement of another the former is held to observe such precautions for the safety of the public at a crossing as shall be fully equivalent to those required by reasonable care and prudence of the latter. *Webb v. Portland & K. R.*

Co., 57 *Me.* 117.—REVIEWED IN *Pierce v. Concord R. Co.*, 51 *N. H.* 590.

In an action against a railroad corporation for an injury sustained at a crossing at grade, the defendant is not entitled to a ruling that the amount of care required of the railroad in using the crossing is the same that is required of the person who attempts to use the crossing, to avoid danger. *O'Connor v. Boston & L. R. Corp.*, 15 *Am. & Eng. R. Cas.* 362, 135 *Mass.* 352.

A railway company must be exonerated where a collision occurs at the crossing of a public highway between a traveler on the way and one of its trains, when the company has used such reasonable care to avoid the collision as ordinary prudence would suggest. *Hendrickson v. Great Northern R. Co.*, 49 *Minn.* 245, 51 *N. W. Rep.* 1044.

The care and caution required of railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of conveyance; and in running through towns and cities and over public crossings or in the vicinity of railroad stations they must exercise care and caution commensurate with the risks of accidents at such places. *Hicks v. Pacific R. Co.*, 64 *Mo.* 430, 17 *Am. Ry. Rep.* 273.

At street crossings in a town or city where the public have a right to be and where people are constantly passing and repassing, railroads should exercise a high degree of vigilance; the signals required by law for the protection of travelers upon the highway should be given, and the servants of the company in charge of the train should be at their posts observant of the track and ready at a moment's notice to avert, if possible, any apprehended danger. *Frick v. St. Louis, K. C. & N. R. Co.*, 8 *Am. & Eng. R. Cas.* 280, 75 *Mo.* 595.—DISAPPROVING *Brand v. Schenectady & T. R. Co.*, 8 *Barb. (N. Y.)* 368.—QUOTED IN *Gurley v. Missouri Pac. R. Co.*, 104 *Mo.* 211.

Where a company, at a crossing of a public highway or street, creates by the construction or maintenance of its tracks, buildings, or other erections a situation of unusual peril and risk to those having legal occasion to cross the track at such crossings, it is bound to avert such peril and risk by the employment of every reasonable precaution beyond the ordinary cautionary signals; and such precautions may extend to the erection of gates at such crossings and

to keeping them closed while trains are passing. *Delaware, L. & W. R. Co. v. Shelton*, (N. J.) 26 *Atl. Rep.* 937.

The company is allowed to create in the construction of its road such obstructions as cannot be avoided; but those that are not absolutely necessary to the making and using of the road are unlawful. It is the duty of the company to leave public roads, streets, and alleys as free from obstructions as it can, and to spare no reasonable expenditure of money or labor for that purpose. *Tennessee & A. R. Co. v. Adams*, 3 *Head (Tenn.)* 596.

2. Whether proper care was used is for the jury.—Proprietors of railroads must exercise reasonable care and diligence to prevent injury in running their engines over crossings, and whether such has been employed in a particular case is a question of fact to be decided by the jury upon all the circumstances, notwithstanding there may have been imprudence on the part of the injured person. *Macon & W. R. Co. v. Davis*, 18 *Ga.* 679.—APPLIED IN *Central R. & B. Co. v. Davis*, 19 *Ga.* 437.—*Hart v. Chicago, R. I. & P. R. Co.*, 56 *Iowa* 166, 7 *N. W. Rep.* 9, 9 *N. W. Rep.* 116.—QUOTING *Pennsylvania R. Co. v. Barnett*, 59 *Pa. St.* 259.—*Bradley v. Boston & M. R. Co.*, 2 *Cush. (Mass.)* 539.—DISTINGUISHED IN *Beisiegel v. New York C. R. Co.*, 40 *N. Y.* 9. QUOTED IN *Waldron v. Portland, S. & P. R. Co.*, 35 *Me.* 422; *Webb v. Portland & K. R. Co.*, 57 *Me.* 117, *Great Western R. Co. v. Brown*, 3 *Can. Sup. Ct.* 159. REFERRED TO IN *Bailey v. New Haven & N. Co.*, 107 *Mass.* 496.

3. Care required in cities.*—Where the streets of a city are diverted from their ordinary use by special license to private persons to operate a railway for their own benefit, extraordinary care is demanded. *Wilson v. Cunningham*, 3 *Cal.* 241. *Curley v. Illinois C. R. Co.*, 40 *La. Ann.* 810, 6 *So. Rep.* 103.—DISTINGUISHED IN *Herlich v. Louisville, N. O. & T. R. Co.*, 44 *La. Ann.* 280.

A railroad company, in operating its trains within the limits of the city at a point where persons are accustomed to crossing its tracks, is required to use greater caution than is required in the country.

Illinois C. R. Co. v. Dick, 91 *Ky.* 434, 15 *S. W. Rep.* 665.

A railroad company is only obliged to use such reasonable care and diligence as ordinary prudence would suggest and require, having regard to the business in which it is engaged, and its liability to collision with others, in the passage of its locomotive through the thoroughfares of a city. *Baltimore & O. R. Co. v. State*, 29 *Md.* 252.

Where a railroad company has a dangerous crossing in a crowded city it must exercise a degree of care to avoid injuring persons and property, commensurate with the danger of accident; on the other hand, persons using such a crossing must exercise care and watchfulness commensurate with the danger to which they are exposed. *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 *Mo.* 22.—FOLLOWED IN *Henze v. St. Louis, K. C. & N. R. Co.*, 2 *Am. & Eng. R. Cas.* 212, 71 *Mo.* 636. *Werner v. Citizens' R. Co.*, 81 *Mo.* 368. QUOTED IN *Lake Shore & M. S. R. Co. v. Bodemer*, 139 *Ill.* 596. REVIEWED IN *Frick v. St. Louis, K. C. & N. R. Co.*, 8 *Am. & Eng. R. Cas.* 280, 75 *Mo.* 595.

The law requires of persons operating railroads over public crossings in cities frequented by people affirmative and active watchfulness, and charges them with the duty of keeping a proper lookout for persons using the highway. Where the failure of servants in charge of the engine to discover the peril of the deceased and to avoid the injury is due to their negligent omission to keep a proper lookout along the track in the direction in which the engine is moving, the company will be liable. *Hils v. Missouri Pac. R. Co.*, 101 *Mo.* 36, 13 *S. W. Rep.* 946.—DISTINGUISHING *Barker v. Hannibal & St. J. R. Co.*, 98 *Mo.* 50.

In an action to recover damages for injuries received by plaintiff at a crossing on defendant's road, the court charged "that considering the nature of the business in which the defendant was engaged and the hazard attending the running of cars in the streets of a city, and particularly on a dark night, the defendant was bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest and which it was in its power to employ." *Held, error.* *Weber v. New York C. & H. R. R. Co.*, 58 *N. Y.* 451.—DISTINGUISHING *Johnson v. Hudson River R. Co.*, 20 *N. Y.*

* Negligence of railroad company in making flying switches at crossings, see 55 *AM. & ENG. R. CAS.* 267, *abstr.*

65. QUOTING *Kelsey v. Barney*, 12 N. Y. 425. — DISTINGUISHED IN *Nary v. New York, O. & W. R. Co.*, 9 N. Y. Supp. 153. QUOTED IN *Jones v. Utica & B. R. R. Co.*, 36 Hun (N. Y.) 115.

Railway companies operating their trains over tracks laid in the streets of a populous city are required to comply strictly with all the precautions prescribed by statute for the prevention of accidents. *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 271, 16 S. W. Rep. 613. — APPROVING *Katzenberger v. Lawo*, 90 Tenn. 235.

4. — **in towns or country.** — Greater caution must be used in running a train through a town or to a crossing within the town than would be required to be exercised in approaching an ordinary crossing in the country. *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338. — FOLLOWED IN *Louisville & N. R. Co. v. Schuster*, (Ky.) 35 Am. & Eng. R. Cas. 407, 7 S. W. Rep. 874. — *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261.

In running trains over crossings in thickly settled places ordinary care must be exercised; that is, such care as a prudent person would exercise under the same circumstances. *Cleveland, C. C. & St. L. R. Co. v. Doerr*, 41 Ill. App. 530.

5. — **at private and farm crossings.*** — Where trains have only been running some four months through a town, and the condition of the town as to streets is but temporary, the fact that persons have used a certain crossing for their own convenience, without objection from the company, does not make the crossing a public one, nor create any new duty on the part of the company; and it is only required to exercise ordinary care when a person is found to be in danger on the crossing, and will only be liable for an injury which is wilful or wanton. *Atchison, T. & S. F. R. Co. v. Parsons*, 42 Ill. App. 93.

Mere knowledge and passive acquiescence on the part of a company where persons are using a certain place as a crossing is not sufficient to make it a public crossing, so as to charge the company with additional care; and under such circumstances it is error to instruct the jury that if the company, with knowledge of the use of such crossing, did not prevent it or protest

against it, then the crossing became a public one, with all the duties, burdens, and obligations thereby created. *Atchison, T. & S. F. R. Co. v. Parsons*, 42 Ill. App. 93.

Where a railroad company constructed steps at the ends or sides of its freight-house platform, which steps were essential to the use of the freight house by its employes and the public with whom it transacted business, and the steps connected with no street sidewalks or public way, the fact that the public used such steps in going to and from the freight and passenger depot, or for convenience used it to shorten the distance in going to and from between different portions of the town, does not make them a part of the public crossing. *Illinois C. R. Co. v. Beard*, 49 Ill. App. 232.

Where a person is injured by a passing train in attempting to cross the track of a railroad by a footpath, a few feet distant from a public crossing, his right of recovery against the railroad company is the same as if he had used the public road; provided the danger from the cars would not have been less at the public road, and his precautions would not have been more availing. *Baltimore & O. R. Co. v. Owings*, 28 Am. & Eng. R. Cas. 639, 65 Md. 502, 5 Atl. Rep. 329.

If a railroad company constructs a grade crossing in a city and holds it out to the public as a suitable place to cross, it is liable to a person who is thereby induced to enter upon the crossing, and who is injured by the negligence of the company. *Murphy v. Boston & A. R. Co.*, 14 Am. & Eng. R. Cas. 675, 133 Mass. 121. — FOLLOWING *Sweeny v. Old Colony & N. R. Co.*, 10 Allen 368.

If a railroad corporation so constructs a private crossing over its track, at grade, in a city, as to hold it out as a suitable place for foot passengers to cross, it is bound to use reasonable precautions to protect them while so crossing. *Murphy v. Boston & A. R. Co.*, 14 Am. & Eng. R. Cas. 675, 133 Mass. 121.

A private road, being by law free to be traveled by all persons, is a "public highway" within Wagner's Mo. Stats. 520, § 5, regulating damages for a collision, etc., at a railroad crossing. *Walton v. St. Louis, I. M. & S. R. Co.*, 67 Mo. 56.

Where a person has used a crossing so long as to amount to a license, the duty is

* See also *post*, 115.

imposed upon the company, in respect to all persons using the crossing, to exercise reasonable care in operating its trains. *Vandewater v. New York & N. E. R. Co.*, 74 Hun 32, 26 N. Y. Supp. 397, 56 N. Y. S. R. 208.

A railway company must take reasonable precautions to avoid injuring persons in the habit of crossing its track at a particular place, although there is no right of way there. *Barrett v. Midland R. Co.*, 1 F. & F. 361.—QUESTIONED IN *Harrison v. North Eastern R. Co.*, 22 W. R. 335, 29 L. T. 844.

6. When crossing deemed public—Dedication.*—A railroad company is entitled to the exclusive use of its grounds, except at lawful crossings of public and private ways. It is not bound to guard against accidents at the crossing of an old, abandoned way which was never legally laid out. *Omaha & R. V. R. Co. v. Martin*, 19 Am. & Eng. R. Cas. 236, 14 Neb. 295, 15 N. W. Rep. 696.

The establishment of a flag station at a railroad crossing is legal evidence of the consent of the railroad corporation to whom the easement and right of passage with trains belong that the street may be used as a highway. *Webb v. Portland & K. R. Co.*, 57 Me. 117.

Where a corporation has for over twenty years maintained a road across its property, which has been used by the public as a connecting link in a road between two towns, and has laid railroad tracks across said road upon its property, and permitted the public to use the crossing, which it has planked, without any dissent, it is estopped from denying that, so far as said crossing is concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and is bound to use due care and diligence in running its trains over said crossing to prevent injury to passengers lawfully on the road. *Adams v. Iron Cliffs Co.*, 41 Am. & Eng. R. Cas. 414, 78 Mich. 271, 44 N. W. Rep. 270.

There was evidence that a road over a railroad had in 1856 been dedicated to public use by a landowner. In crossing the railroad on this road in 1866 his wagon was injured by the company's engine. The court charged: "If this strip of ground so thrown out was dedicated to the public use, without any intention of resuming the ex-

clusive right to or use of the said ground, and if from that time to this the public has used this as a public road, then it has become public, with all the characteristics of a public highway, so far as that question can have any legitimate bearing on this issue." *Held*, not error. *Pittsburg, Ft. W. & C. R. Co. v. Dunn*, 56 Pa. St. 280.

7. Prescribing certain precautions does not exclude others.*—The general duties and liabilities of railroad companies at public and private crossings, provided for in Me. Rev. St. ch. 51, §§ 15, 19, do not express all the precautions necessary to avoid injuries on city thoroughfares. The legislature does not undertake to define or point out all the precautions which reasonable and ordinary care may require at such places. *Webb v. Portland & K. R. Co.*, 57 Me. 117.

Municipal ordinances prescribing certain precautions to be observed by railroads in using its street crossings do not absolve them from the exercise of ordinary care in other particulars not mentioned in the ordinances, but required by the general law of the land, to avoid injury to those using public crossings where the company's tracks are laid. *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 93, 13 S. W. Rep. 893.

8. Reciprocal care to be observed by company and public.†—The rights and duties of a railroad company, and of persons traveling on a public highway which crosses the track of the railroad, are mutual. Both have the right to pass, and both are bound to use ordinary care and diligence to avoid injury. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185. *Indianapolis & V. R. Co. v. McLin*, 8 Am. & Eng. R. Cas. 237, 82 Ind. 435. *Baltimore & O. R. Co. v. Owings*, 28 Am. & Eng. R. Cas. 639, 65 Md. 502, 5 Atl. Rep. 329. *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.—REVIEWED IN *Webb v. Portland & K. R. Co.*, 57 Me. 117. —*Pittsburgh, Ft. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421. *Beyel v. Newport News & M. V. R. Co.*, 34 W. Va. 538, 12 S. E. Rep. 532.

Neither are bound to exercise extraordinary care. *Willoughby v. Chicago & N. W. R. Co.*, 37 Iowa 432.

Trains have precedence at crossings of public ways unobstructed; but it is the duty

* See also *post*, 111.

* See also *post*, 145-148.

† See also *post*, 110, 106, 248.

of those directing the trains to give proper and sufficient signals, and to take all reasonable precautions to avoid collision. It is equally the duty of those approaching the crossings as travelers on the highways to approach with care. *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. Rep. 105. *Brown v. Texas & P. R. Co.*, 42 La. Ann. 350, 7 So. Rep. 682.

The degree of care and diligence which a railroad company and the traveler are each required to exercise is that degree of care and diligence which an *ordinarily prudent person* would exercise under like circumstances, and not any higher or lower degree of care or diligence. An "ordinary person" is not necessarily an "ordinarily prudent person," and an instruction using the former phrase is faulty. *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. Rep. 462.

Where a railroad track is crossed by a path commonly used by passengers, trains should use great diligence to guard against accident; and a like diligence and caution devolve upon passengers. *Whalen v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 323, 9 Am. Ry. Rep. 224.

Railway corporations, in view of the dangerous machinery propelled by steam along streets of populous cities, are held to a greater degree of care and vigilance than a traveler thereon. This rule is based upon the ground of public policy. *White v. Wabash Western R. Co.*, 34 Mo. App. 57.

"In crossing ordinary roads caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads it is exacted to avoid being run over yourself. In the former case the blame attaches *prima facie* to the party doing the injury; in the latter it attaches, in the first instance, to the party obstructing the track." *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

In an action for injuries sustained by collision at a crossing the judge instructed the jury "that the plaintiff was bound to use ordinary care in the conduct and management of his vehicle in the highway, and in the approach to and passage of the crossing; and the defendants were bound to use reasonable care in the conduct and management of their engines and trains, the manner and extent of which would be such care in the management of their engines and trains as would be sufficient to enable a traveler upon the highway, who used ordinary care, to pass over the crossing in

safety." Held, objectionable, as implying that proof of due care on the part of the plaintiff would of itself show that the defendants were in fault. *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.—DISTINGUISHED IN FAVOR *v. Boston & L. R. Corp.*, 114 Mass. 350.

9. Mutual and reciprocal rights of company and public.—The rights of a traveler on a highway, where it crosses a railroad, are not subordinate to those of the railroad company, or superior to them, but equal; and both parties are bound to use ordinary care—the one to avoid committing injury, and the other to avoid receiving it. *Pennsylvania Co. v. Krick*, 47 Ind. 368. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22. *Galena & C. U. R. Co. v. Dill*, 22 Ill. 265.—QUOTED IN *Chicago, B. & Q. R. Co. v. McGaha*, 19 Ill. App. 342. REVIEWED IN *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499.—*Chicago & N. W. R. Co. v. Hatch*, 79 Ill. 137.—QUOTED IN *Terre Haute & I. R. Co. v. Black*, 18 Ill. App. 45.

At a railroad crossing neither the travelers upon the highway nor the railroad company have an exclusive right of passage, but their rights are concurrent. *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60.

A railroad company is the owner of its right of way and has the right of passage and use, in the ordinary manner, of its tracks at highway crossings. Likewise do the public have a right of way and of passage across such tracks to be used and enjoyed in the ordinary manner. These rights are in a sense reciprocal, and must be exercised with due regard to the rights of each other. *Kelly v. Michigan C. R. Co.*, 28 Am. & Eng. R. Cas. 633, 65 Mich. 186, 31 N. W. Rep. 9c.

10. Company entitled to right of way.—While in a sense the rights of travelers and a railroad company upon a highway crossing are equal, yet in respect to the priority of passage the right of the company is superior. *Ohio & M. R. Co. v. Walker*, 32 Am. & Eng. R. Cas. 121, 113 Ind. 196, 15 N. E. Rep. 234, 12 West. Rep. 731. *Newhard v. Pennsylvania R. Co.*, 55 Am. & Eng. R. Cas. 258, 153 Pa. St. 417, 26 Atl. Rep. 105.—DISAPPROVING AND REVIEWING *Houston & T. C. R. Co. v. Carson*, 66 Tex. 345. QUOTING AND FOLLOWING *Reading & C. R. Co. v. Ritchie*, 102

* See also *post*, 191.

Pa. St. 425.—*Black v. Burlington, C. R. & M. R. Co.*, 38 *Iowa* 515.—QUOTING *Warner v. New York C. R. Co.*, 44 *N. Y.* 465.

While a railroad company has a superior right of passage at crossings, still a citizen has a right to use the track for the purpose of passage, subordinate to the right of the company, and may recover for an injury which is negligently inflicted. *Louisville, N. A. & C. R. Co. v. Phillips*, 31 *Am. & Eng. R. Cas.* 432, 112 *Ind.* 59, 13 *N. E. Rep.* 132, 11 *West. Rep.* 119.

Where a railroad crosses a highway at grade, trains upon the one and teams upon the other have each a legal right to cross, and each have the right to require the exercise of due care on the part of the other; but from the greater speed of the trains, the greater difficulty of stopping them, and the requirements of public travel thereon, the trains have precedence. *Morris v. Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 22.

A railroad company is entitled to precedence at highway crossings, on condition that it shall give reasonable and timely warning of the approach of its trains, and a failure to give such warning is negligence. *Indianapolis & V. R. Co. v. McLin*, 8 *Am. & Eng. R. Cas.* 237, 82 *Ind.* 435.—QUOTING *Continental Imp. Co. v. Stead*, 95 *U. S.* 161.

11. How far company's right of way at crossings is exclusive.—The right of the public in a highway crossing a railroad is simply a right of passage across the railroad, and no individual has the right to commit a trespass upon the company's property within the limits of the highway crossing, which is for the purpose of passage from one side of the railroad to the other; and any other use thereof, whether between the tracks or rails, is unwarranted. The right of way and of use, when not used or required for such passage, belongs to the railroad company, and may be used by it in the same manner as if no street crossing was there. *Kelly v. Michigan C. R. Co.*, 28 *Am. & Eng. R. Cas.* 633, 65 *Mich.* 186, 31 *N. W. Rep.* 904.

An instruction that asserts an absolute right of way in a railroad company over its track as against all foot passengers and vehicles at crossings, without regard to the circumstances, is properly refused. Such right of way is not absolute. *Chicago W. D. R. Co. v. Ingraham*, 33 *Ill. App.* 351.

The rule of law that trains have an absolute right of way as against persons crossing the track only applies to regular trains running on schedule time, and does not apply to a switch-train that is liable to move back and forth at any time. *Northern Pac. R. Co. v. Holmes*, 3 *Wash. T.* 543, 18 *Pac. Rep.* 76.

12. How far employees may assume that person will leave track.*—No general duty rests upon an engineer in respect to a traveler whom he sees approaching the crossing. He has ordinarily a right to assume that he will regard the signals if they have been given, and will stop when he reaches the railroad, and is called upon to act only when the traveler is so near the crossing as to alarm him. *Dyson v. New York & N. E. R. Co.*, 57 *Conn.* 9, 17 *Atl. Rep.* 137. *Wabash, St. L. & P. R. Co. v. Krough*, 13 *Ill. App.* 431. *Ohio & M. R. Co. v. Walker*, 32 *Am. & Eng. R. Cas.* 121, 113 *Ind.* 196, 15 *N. E. Rep.* 234, 12 *West. Rep.* 731. *Lesau v. Maine C. R. Co.*, 23 *Am. & Eng. R. Cas.* 245, 77 *Me.* 85.—QUOTING *Continental Imp. Co. v. Stead*, 95 *U. S.* 161; *Whitney v. Maine C. R. Co.*, 69 *Me.* 208.—*Graf v. Chicago & N. W. R. Co.*, 94 *Mich.* 579, 54 *N. W. Rep.* 388.—DISTINGUISHING *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99.—*Boyd v. Wabash Western R. Co.*, 105 *Mo.* 371, 16 *S. W. Rep.* 909.

An engineer of a railroad train is not required to be such an expert in psychology as to be able to read the mind of a man, in possession of his faculties, approaching the track, and to foretell that he will act differently from an ordinarily prudent man. *Boyd v. Wabash Western R. Co.*, 105 *Mo.* 371, 16 *S. W. Rep.* 909.

An engineer is not bound to anticipate that the driver of a team which is seen slowly approaching the track is asleep, nor is he bound to stop his train, or even to check its speed as soon as the team is seen, though the driver may be seen reclining on the load. Having given the signals, he has a right to assume that the team will be stopped before it reaches the track; and this is especially so where the team is pulling a loaded wagon up a grade toward the track. *Indiana, B. & W. R. Co. v. Wheeler*, 115 *Ind.* 253, 15 *West. Rep.* 133, 17 *N. E. Rep.* 563.

Where an engineer makes an effort to

* See also *post*, 210.

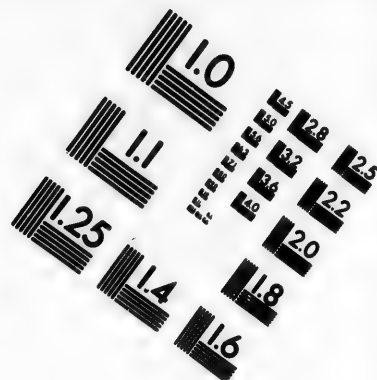
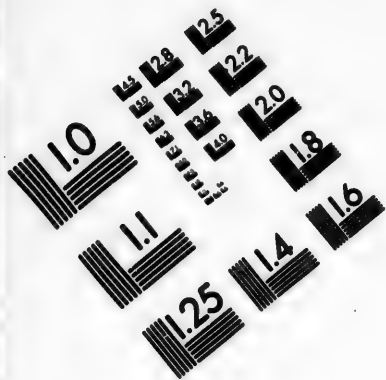
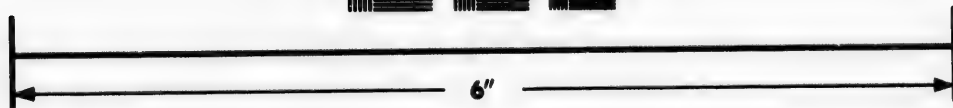
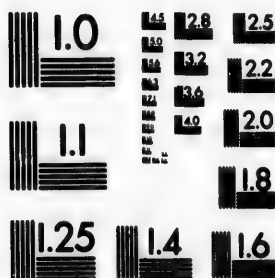


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stop the train after he has given signals, as soon as he sees that a person approaching the track with a team has not stopped, but fails to do so in time to avoid a collision, there is no ground for the assumption that the engineer "purposely, intentionally, or recklessly" caused the injury, though he may not have attempted to stop the engine when the party was first seen, and failed to see him as soon as others. *Indiana, B. & W. R. Co. v. Wheeler*, 115 Ind. 253, 15 West. Rep. 133, 17 E. Rep. 563.

A locomotive engineer is not entitled to assume in all cases that persons on a public crossing will get off in time to save themselves. In running a train at a public crossing in a city he is bound to observe reasonable diligence before he discovers peril as well as afterwards, and the company is responsible for his negligent errors of judgment. *Georgia Midland & G. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. Rep. 580.

Railroad companies have not the right to run their trains upon the assumption that travelers on a highway which the railroad crosses will always be prudent and careful. On the contrary, they may, very properly, presume that persons crossing the track will frequently be negligent, and therefore they should, in view of such well-known fact, observe the greater caution. *Card v. New York & H. R. Co.*, 50 Barb. (N. Y.) 39.

The plaintiff having been run over by defendant's engine at a street crossing, an instruction as to the degree of care to be exercised by an engineer on approaching such a crossing, to the effect that the mere fact that a traveler is approaching the track is not sufficient to require the engineer to give an alarm or stop his engine, especially where it is in broad daylight, the engine plainly visible, the engine bell ringing, and the traveler an adult in apparent possession of his senses and looking in the direction of the train; that in such a case the engineer would have the right to assume that the traveler would stop, but that he cannot rest on that assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in his course—*held*, sufficiently favorable to the defendant. *Heddles v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. Rep. 115.

13. Colliding with teams.—The proposition that plaintiff ought not to recover unless the locomotive or some part of the train came into actual contact with his horse or vehicle cannot be maintained. *Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.—DISTINGUISHING *Peru & I. R. Co. v. Hasket*, 10 Ind. 409; *Burton v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 252.

A railroad company is not responsible to a traveler on a public highway for striking with its train the wagon and horse of the latter, at a place where the highway crosses the track of the former, where the injury was the result of accident alone, without negligence or fault on the part of the company or its servants. *Zeigler v. Northeastern R. Co.*, 5 So. Car. 221.—EXPLAINING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.

Where a railroad company is sued to recover for the death of a person killed at a crossing, there can be no recovery where the facts show that the proximate cause of the accident was the inability of the deceased to control his horse, and not the negligence of the company. *Barringer v. New York C. & H. R. R. Co.*, 18 Hun (N. Y.) 398.—DISTINGUISHED IN *Masterson v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510.

A railroad engineer is not bound to stop his engine when approaching a crossing to avoid a collision with a team which he sees approaching the track. *Chicago, B. & Q. R. Co. v. Florens*, 32 Ill. App. 365.—QUOTING *Chicago, B. & Q. R. Co. v. Damrell*, 81 Ill. 453.—*St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300, 11 Am. Ry. Rep. 102. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.

If a team can be checked on seeing the approach of a train more readily than the train, it should be so checked up; and it is also the duty of the person having it in charge to use all reasonable efforts to see and avoid the danger. And the same duty devolves on those having charge of the train. Neither has the right to be upon the crossing at the same instant of time. *Illinois C. R. Co. v. Benton*, 69 Ill. 174.

14. — with stalled teams.—The mere fact that an engineer, at a distance of a mile or a mile and a quarter from a private crossing, sees a load of logs to which horses are attached standing on the

track at the crossing is not sufficient to warn him that the load is fast upon the track and that the horses are unable to move it, and he is not called upon to check the speed of his train until signaled, or until near enough to the crossing to see the danger for himself. *Frost v. Milwaukee & N. R. Co.*, 96 Mich. 470, 56 N. W. Rep. 19.

In order to convict a railroad company of wilful and reckless conduct, or of gross negligence in running a freight train into a load of logs to which horses are attached, and which has become stalled on a private crossing, it must be shown that the engineer knew the situation at the crossing in ample time to stop his train, and that he ran on in spite of such knowledge, knowing the consequences which must ensue if he failed to stop the train before reaching the obstruction. *Frost v. Milwaukee & N. R. Co.*, 96 Mich. 470, 56 N. W. Rep. 19.—QUOTING *Denman v. Johnston*, 85 Mich. 396.

As a railroad train passed a curve a loaded wagon was seen stationary across the track while yet a sufficient distance away to have stopped the train in time to have avoided a collision; but the engineer ran on supposing that the wagon would be removed, but the team was stalled and a collision occurred. *Held*, that it was the duty of the engineer to use the certain means within his control to avoid a collision by stopping his train, and his failure to do so was culpable negligence. *Chicago & A. R. Co. v. Hogarth*, 38 Ill. 370.—CRITICISED IN *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. FOLLOWED IN *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.

Plaintiff's portable engine was destroyed by collision at a defective crossing at which it had become stalled. His driver, upon seeing a train turn a curve more than 1000 yards distant, ran along the track waving a handkerchief. The engineer testified that he saw the driver upon the track waving his handkerchief as soon as he turned the curve, and the fireman testified that he called the engineer's attention to the obstruction 600 yards from the crossing. The train was running at a speed of about 35 miles an hour and could be stopped in 350 yards. The engineer made no attempt to stop it until within 10 yards from the crossing. *Held*, that the railroad company could not complain of the omission of the court to instruct the jury that it was negligence on the part of the defendant if the

engineer could have seen by watchfulness, though he did not in fact see, that the road was obstructed, in time to stop his train before reaching the crossing. *Bullock v. Wilmington & W. R. Co.*, 42 Am. & Eng. R. Cas. 93, 105 N. Car. 180, 10 S. E. Rep. 988.

15. Injuries caused by frightening teams, generally.*—A railroad company having a chartered right to propel their cars by steam, are not responsible for injuries resulting from the proper use of such agency. Whether alarming a horse and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.—QUOTED IN *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382; *Steiner v. Philadelphia Traction Co.*, 41 Am. & Eng. R. Cas. 535, 134 Pa. St. 199; *Abbot v. Kalbus*, 39 Am. & Eng. R. Cas. 594, 74 Wis. 504, 43 N. W. Rep. 367.

That a driver 20 or 30 yards away voluntarily urged a mule upon a railroad crossing, ahead of an approaching engine only 40 or 50 yards away, is less probable than that the mule was frightened by the blowing of the whistle and ran upon the crossing in spite of the driver's efforts to prevent it. *Central R. & B. Co. v. Hollinshead*, 81 Ga. 208, 7 S. E. Rep. 172.

So. Car. Gen. St. § 1529, relating to injuries at crossings, is intended to change the common law doctrine of contributory negligence, and must be construed strictly. The section by its terms applies only to cases in which a person is injured in his person or property by collision with the engine or cars of a company at a crossing, and cannot be construed or enlarged so as to include a person injured by being thrown from a vehicle in consequence of the fright of his horses, but so as not to come in collision with the train. *Whitton v. Richmond & D. R. Co.*, 57 Fed. Rep. 551.—DISTINGUISHING *Kaminitsky v. North Eastern R. Co.*, 25 So. Car. 53.

The plaintiff's intestate was driving toward a crossing with a wagon used for carrying wood, on which was an empty wood-rack, and he sat on a string-piece of

* See also *post*, 139, 140; and also title FRIGHTENING TEAMS.

Horses frightened at crossings, see note, 37 AM. & ENG. R. CAS. 488.

the rack. This gave him a low position, where he could not so easily see an approaching train and could not so easily manage his horse, if frightened, as upon a seat of ordinary height. The horse was frightened at the sudden sight of a locomotive near him, and became uncontrollable and dashed upon the track in front of the engine. The court correctly found that plaintiff's intestate was not guilty of contributory negligence. *Bates v. New York & N. E. R. Co.*, 60 Conn. 259, 22 Atl. Rep. 538.

The respondents, the plaintiffs in the court below, were lawfully driving in their carriage along the highway, and when within about 116 feet of the crossing of appellants' railway a train passed, which frightened the horse, causing it to turn and upset the vehicle, by which the plaintiffs sustained serious injury. It was shown that the driver of the locomotive had omitted to give the usual statutory signal by whistling or ringing a bell when at a distance of eighty rods from such crossing. In an action brought against the railway company a verdict was found in favor of the plaintiffs, which the Common Pleas Division refused to set aside. On appeal this judgment was affirmed, and the appeal dismissed with costs. *Rosenberger v. Grand Trunk R. Co.*, 15 Am. & Eng. R. Cas. 448, 8 Ont. App. 482.

16. Frightening teams by escaping steam.*—It is actionable negligence for an engine driver to blow off steam while passing a level highway crossing, so as to frighten horses waiting to pass. *Manchester S. J. R. Co. v. Fullarton*, 14 C. B. N. S. 54, 11 W. R. 754.

It is not negligence for an engineer to hold his train for a reasonable time at a crossing without drawing his fires or injecting cold water, so as to prevent an escape of steam, when it appears that by so doing public travel would have been delayed. *Louisville, N. A. & C. R. Co. v. Schmidt*, 55 Am. & Eng. R. Cas. 128, 134 Ind. 16, 33 N. E. Rep. 774.

Whether a railroad company should warn persons of the danger of passing a crossing when a locomotive near by is emitting steam, is a question of fact. *Lewis v. Eastern R. Co.*, 40 N. H. 187.

* See also *post*, 130, 140.

Frightening horses at crossing by escaping steam, see 45 Am. & Eng. R. Cas. 206, *abstr.*

In an action against a railroad for negligently killing a person at a crossing the question of the company's negligence is properly submitted to the jury, where the proof shows that the engine lay on the crossing, and after waiting some twenty minutes the gates were raised and deceased was attempting to cross in front of the engine, when the automatic valves of the engine began to emit steam, which frightened a horse near by, which ran over the deceased, causing his death. *Scaggs v. Delaware & H. Canal Co.*, 26 N. Y. Supp. 323, 56 N. Y. S. R. 319, 74 Hun 198.

Plaintiff was driving, and upon approaching a crossing was detained some time by a train of cars, and when they were removed the engine backed and lay on the crossing. Plaintiff then inquired if it was all right to go ahead, and some one on the engine replied, "All right; go ahead." The engine was automatic, and as plaintiff was nearing it steam suddenly escaped from the whistle, and it was sounded three times, and steam escaped from the side of the engine and frightened plaintiff's horse, causing him to be thrown from his buggy and injured. *Held*, that the direction to go ahead could not be restricted to mean only that the crossing was clear, but implied also that the engineer had control of his engine. *Keech v. Rome, W. & O. R. Co.*, 35 N. Y. S. R. 902, 59 Hun 617, 13 N. Y. Supp. 149.

17. Engine or car left standing near crossing.—Where a railroad company leaves its cars standing in a public highway, in violation of §§ 1964, 2170, Ind. Rev. St. 1881, and a horse, through fright, without fault of the driver, becomes uncontrollable and runs away, and in attempting to leap through one of the spaces between the coupled cars is killed, the company is liable. *Grimes v. Louisville, N. A. & C. R. Co.*, 3 Ind. App. 573, 30 N. E. Rep. 200.

In an action against a railroad company for injuries at a highway crossing, where the complaint alleged that defendant's negligence consisted in leaving a box car on the crossing, it was insisted that the evidence was not sufficient because it failed to show that the defendant placed the car on its track so as to extend into the highway, but that intermeddlers might have placed it there. It was positively proven that the car was on the crossing. *Held*, that the inference of the jury that the company placed the car on the crossing was reasonable.

Cleveland, C. & I. R. Co. v. Wynant, 55 *Am. & Eng. R. Cas.* 80, 134 *Ind.* 681, 34 *N. E. Rep.* 569.

18. Duty to supply brakes.—Railroad companies are bound to supply their trains with brakes, and if a person is injured on crossing a track and the injury could have been avoided by the use of brakes, the omission to have them or to use them is such negligence as to render the company liable. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 *Barb. (N. Y.)* 92; *appeal dismissed* (P) 55 *N. Y.* 641, *mem.*

19. Company liable where brakeman moves engine without authority.—Where a party is injured by an engine on the main track of the road, the company cannot escape liability by showing that the engine was being moved by a brakeman without authority from the company. *Houston & T. C. R. Co. v. Stewart, (Tex.)* 17 *S. W. Rep.* 33.

20. Regulating distance between trains.—The rules which regulate the distance from each other at which trains run on a railroad are intended solely for the protection of the property of the company and the safety of their employés and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains in an action to recover damages for an injury done to a person while crossing the track at a place not known or used as a public crossing. *Philadelphia & R. R. Co. v. Spearen*, 47 *Pa. St.* 300.

Where one train is run so close behind another as to make the statutory signals unavailing as means of warning travelers, the railroad company is guilty of negligence. *Chicago & E. I. R. Co. v. Boggs*, 23 *Am. & Eng. R. Cas.* 282, 101 *Ind.* 522, 51 *Am. Rep.* 761.

21. Certain rules for determining negligence.—The liability for injury to foot passengers, occasioned by a collision with carriages, cars, or engines, is the same as that which arises in respect to a collision between two carriages meeting on the highway. *Brand v. Schenectady & T. R. Co.*, 8 *Barb. (N. Y.)* 368.

An engineer is to be judged by the circumstances as they appeared to him at the time, and not as they appear to others afterwards. *Anderson v. New York & N. E. R. Co.*, 60 *Conn.* 293, 22 *Atl. Rep.* 566.

22. When company's negligence for the jury.*—On the question of the negligence of a railroad company by whose train a person was killed at a highway crossing where another railroad crossed the same highway near by, the rate of speed at which trains should be permitted to approach the crossing, the length of time before the passage of a train that warning should be given, and the kind of warning to be given, and the kind of gates or barriers to be used, are all matters for the consideration of the jury. *Marks v. Fitchburg R. Co.*, 155 *Mass.* 493, 29 *N. E. Rep.* 1148.

Where there is a conflict of evidence as to the question of the company's negligence in injuring a person at a crossing, the case should be submitted to the jury. So *held*, where plaintiff and his witnesses, some of whom listened for signals, testified that none were given; while on the other hand the train employés and other witnesses for the company testified that the signals were given. *Canpbell v. New York C. & H. R. R. Co.*, 3 *N. Y. Supp.* 694, 49 *Hun* 611, *mem.*, 19 *N. Y. S. R.* 659; *affirmed in* 121 *N. Y.* 669, *mem.*

Where a railroad company is sued for injuring a child while attempting to cross the track the question whether the engineer used reasonable diligence to avoid the injury after discovering the child is a question for the jury, and their verdict will not be reviewed by the court on appeal. *Swift v. Staten Island R. T. R. Co.*, 24 *N. Y. S. R.* 359, 52 *Hun* 614, 1 *Silv. Sup. Ct.* 375, 5 *N. Y. Supp.* 316; *affirmed in* 123 *N. Y.* 645, *mem.*, 3 *Silv. App.* 184, 25 *N. E. Rep.* 378, 33 *N. Y. S. R.* 604.

Where the action is to recover for injuries to a girl 15 years old, the youth of the person on the track, if it could be discerned by the engineer, might well affect his duty. *Swift v. Staten Island R. T. R. Co.*, 24 *N. Y. S. R.* 359, 52 *Hun* 614, 1 *Silv. Sup. Ct.* 375, 5 *N. Y. Supp.* 316; *affirmed in* 123 *N. Y.* 645, *mem.*, 3 *Silv. App.* 184, 25 *N. E. Rep.* 378, 33 *N. Y. S. R.* 604.

Where a party is injured at a crossing the liability of the company depends upon whether the company exercised the care that the law requires, and if it did not, whether its negligence caused the injury; and it is error to leave to the jury the specific questions of, whether the engineer

* See also *post*, 136, 183.

and flagman were negligent in not seeing the injured party, and whether the flagman was negligent in not giving him warning. *Austin v. Staten Island R. T. R. Co.*, 39 *N. Y. S. R.* 76, 14 *N. Y. Supp.* 923.

The defendant asked the court to instruct the jury "that those in charge of the train which collided with the plaintiff were not bound to stop the same in anticipation that plaintiff might drive upon the track," which the court refused. *Held*, properly refused, as invading the province of the jury and taking the question of negligence from them. *Pennsylvania Co. v. Frana*, 112 *Ill.* 398.

Plaintiff testified that she saw the train at a station about half a mile from the crossing and went upon the track to take some smaller children therefrom, in order to save them from danger. After she caught her foot she waved her hands as a signal to the approaching train, but no attempt was made to stop it until it was about 260 feet distant. The engineer did not succeed in stopping the train until the engine had passed over her foot, although he saw her at least 854 feet distant from the place of the accident. Another witness testified that the plaintiff did not leave the track after she stepped upon it. Defendant's witnesses, however, testified that plaintiff was playing on the track, and after being driven off by a warning signal came on it again immediately in front of the engine, which was stopped as quickly as possible. *Held*, that the question of the engineer's negligence was for the jury. *Spooner v. Delaware, L. & W. R. Co.*, 39 *Am. & Eng. R. Cas.* 599, 115 *N. Y.* 22, 21 *N. E. Rep.* 696, 23 *N. Y. S. R.* 554; *affirming* 41 *Hun* 643, 1 *N. Y. S. R.* 558.

23. Limitation of actions.—Plaintiff sued for injury caused to himself and his wagon by collision with defendants' train at a railway crossing owing to a neglect to sound the whistle or ring the bell on their approach, as required by the statute, and to improper construction of the railroad, being more above the level of the highway than the act allowed. *Held*, that the injury, if arising from either cause alleged, was sustained "by reason of the railway;" that it was not a case within the exception as to "continuation of damage," and that the action, having been brought more than six months from the accident, was therefore too late. *Browne v. Brockville & O. R. Co.*, 20

U. C. Q. B. 202.—FOLLOWED IN *May v. Ontario & Q. R. Co.*, 10 *Ont.* 70; *Kelly v. Ottawa St. R. Co.*, 3 *Ont. App.* 616. QUOTED IN *McArthur v. Northern & P. J. R. Co.*, 17 *Ont. App.* 86. REVIEWED IN *Anderson v. Canadian Pac. R. Co.*, 17 *Ont.* 747; *McCallum v. Grand Trunk R. Co.*, 30 *U. C. Q. B.* 122.

24. Liability where company does not own track.—Defendant is a Virginia railroad corporation, and had an agreement with a similar corporation in the District of Columbia, by which it ran its trains over the track of the latter into said district, said trains being in the charge of the servants and agents of defendant, except the conductor, who was in the employ of the company owning the track. *Held*, that defendant is liable for a personal injury produced by carelessness on the part of its agents in running cars on such track. *Mills v. Orange, A. & M. R. Co.*, 1 *MacArth. (D. C.)* 285.

25. A slave is not "stock."—The new rule of evidence prescribed by the Md. act of 1846, making railroads liable for injury to "stock, et cetera," does not apply to cases of killing or injuring negro slaves, it not being the design of the legislature to include such property in the terms "stock" and "et cetera" as used in that act. *Scaggs v. Baltimore & W. R. Co.*, 10 *Md.* 268.

II. DEFECTIVE CROSSINGS.*

26. Duty and liability of company, generally.†—It is the duty of a railroad corporation, both under the statute (ch. 140. Laws of 1850) and upon common law principles, to keep its road at a crossing in safe condition, so that a traveler upon the highway exercising ordinary care can pass over the same in safety. *Gale v. New York C. & H. R. R. Co.*, 76 *N. Y.* 594; *affirming* 53 *Hov. Pr.* 385, 13 *Hun* 1.—FOLLOWING *Cott v. Lewiston R. Co.*, 36 *N. Y.* 214; *People v. New York C. & H. R. R. Co.*, 74 *N. Y.* 302.—DISTINGUISHED IN *Egan v. Forty-second St., M. & St. N. A. R. Co.*, 4 *N. Y. Supp.* 530.

* Defective crossings at roads not made public by law. Injuries caused by, see note, 39 *Am. & Eng. R. Cas.* 606.

Crossings of highways not regularly laid out or opened, see note, 19 *Am. & Eng. R. Cas.* 239.

† See also *post*, 224, 331.

Negligence of company in obstructing a crossing, see 37 *Am. & Eng. R. Cas.* 469, *abstr.*

For a negligent breach of this duty it must answer in damages to one who exercises ordinary care and sustains an injury from the breach of duty by the company. But the presumption of negligence which prevails in cases where passengers are injured while on the trains of the carrier does not obtain where injury is received at a crossing. *Terre Haute & I. R. Co. v. Clem*, 42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 965, 7 L. R. A. 588.

If a railroad company by its servants negligently constructs a crossing over a public highway, and a person without fault is injured in his property while traveling on the crossing by reason of a defect in it, the company is liable in an action to such person. *Mann v. Central Vt. R. Co.*, 14 Am. & Eng. R. Cas. 620, 55 Vt. 484, 45 Am. Rep. 628.—REVIEWING *Hatch v. Vermont C. R. Co.*, 25 Vt. 49; *Batty v. Duxbury*, 23 Vt. 714.

The law does not, as a rule, require any one to exercise extraordinary care or vigilance, and this rule applies as to the amount of care that railroad companies shall exercise as to the safety of their crossings. *Terre Haute & I. R. Co. v. Clem*, 42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 965, 7 L. R. A. 588.

If a railroad knowingly permits a crossing to be out of repair, whereby one on the highway is injured, it is liable for the damages. *Pittsburg, Ft. W. & C. R. Co. v. Dunn*, 56 Pa. St. 280.

A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact or the defect existed a sufficient length of time to justify the presumption of notice. *Mann v. Chicago, R. I. & P. R. Co.*, 86 Mo. 347.

Where a company builds its track on a trestle over a highway and afterwards the county officials open a new road under the same trestle, if the new road be laid out because the company has negligently permitted the old road to get in bad condition, an injury received by a traveler on the new road is too remote a consequence of the company's negligence to sustain an action. *Hill v. Port Royal & W. C. R. Co.*, 39 Am. & Eng. R. Cas. 607, 31 So. Car. 393, 5 L. R. A. 349, 10 S. E. Rep. 91.

A railroad company is liable for injuries caused by a defectively constructed crossing at a road not made public by law if it maintains the crossing there, knowing that

such road is in common use by the public. *Missouri Pac. R. Co. v. Bridges*, 39 Am. & Eng. R. Cas. 604, 74 Tex. 520, 12 S. W. Rep. 210.—REVIEWING *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496.—REVIEWING *Gulf, C. & S. F. R. Co. v. Montgomery*, 85 Tex. 64.

Railroad companies are required to keep in good order, at their expense, the public roads or private ways established by law, where crossed by their several roads, and build suitable bridges and make proper excavations and embankments, according to the spirit of the road laws; but they are not bound to keep in good order and maintain or establish bridges, etc., wherever their roads happen to cross a path or unfrequented way. Such ways are not private ways in the sense or spirit of the road laws. In this case the path pursued by the party killed does not appear to have been a way established by law, or one to the use of which the deceased had any prescriptive title. *Berry v. Northeastern R. Co.*, 28 Am. & Eng. R. Cas. 575, 72 Ga. 137.

27. When liable over to municipality.—Independent of Me. Act of 1871, ch. 186, a municipality may recover against a railroad company such damages as it has been compelled to pay by reason of a defect in a street, caused by the negligence of the company in the construction or maintenance of its track thereon; and if the company has had notice of the suit against the municipality, and such suit was defended by the request of the company, the municipality may recover the costs it has been compelled to pay also. *Portland v. Atlantic & St. L. R. Co.*, 66 Me. 485.

The company of which defendant was receiver being empowered under its charter to build its railroad across highways, provided it restored them to their former state, to the acceptance of the selectmen or commissioners, constructed its railroad across a highway in the plaintiff town, but neglected to restore it and left it defective through failure to put railings along the approaches constituting a part of the crossing. After the charter had been granted and the railroad built, a statute was passed, making railroad companies liable to towns for damages resulting from insufficient crossings. In an action to recover the amount of a judgment which had been rendered against the plaintiff in favor of a traveler for injuries occasioned through want of said railings—held, that the com-

pany failed in its primary duty; that its liability became established by the facts that it failed to restore the highway as the charter provided, and that the crossing had never been accepted; and if the approaches extended beyond the surveyed limits of the railroad and railings were required, it was the duty of the company to build them. *Roxbury v. Central Vt. R. Co.*, 60 Vt. 121, 6 N. Eng. Rep. 534, 14 Atl. Rep. 92.

28. Company liable though town is also liable.—A railroad company which so constructs its track at the crossing of a highway as to render the highway dangerous or inconvenient to travelers thereon is liable for an injury sustained by a traveler upon the highway in consequence of the defect, although he might also have a remedy against the town which was bound to keep the highway in repair. *Gillett v. Western R. Corp.*, 8 Allen (Mass.) 560.

29. Defective crossings and approaches.*—(1) *Generally.*—It is the duty of a railroad company whose tracks cross a public highway to keep such crossing in a reasonably safe condition for the passage of wheeled vehicles, and where it carelessly and negligently permits the crossing to become unsafe and dangerous for travel it is liable for injury to a person using the crossing while in the exercise of ordinary care. *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 11 S. W. Rep. 310.

Whether the crossing has been constructed with care is a question for the jury. *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679.—REAFFIRMING AND APPROVING *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269.

Though the defect in a roadbed was not caused by any act of the company, yet if they knew of its existence, and that the street was made dangerous thereby, it was their duty to have it repaired; and neglecting to repair they were liable for the consequences of their negligence. *Oakland R. Co. v. Fielding*, 48 Pa. St. 320.

A railroad company crossing a public highway is liable for an injury occasioned to a traveler by a want of repair in the approaches to the crossing. And it makes no difference that the traveler knew of the want of repair; he had a right, notwith-

standing, to use the highway. *Maltby v. Chicago & W. M. R. Co.*, 13 Am. & Eng. R. Cas. 606, 52 Mich. 108, 17 N. W. Rep. 717.—FOLLOWED IN *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150.

Where a state requires railroad companies to provide railings for approaches to bridges over tracks or at grade crossings, the question of the company's negligence in not providing railings for some three months after a fill is completed is for the jury. *Kyne v. Wilmington & N. R. Co.*, (Del.) 14 Atl. Rep. 922.

A railroad company is not precluded from showing that an injury alleged to have been caused by its negligence in maintaining a defective highway crossing in fact resulted from other causes, including the plaintiff's negligence, by reason of a statute which provides that the neglect or refusal of a railroad company to keep highway crossings sufficient or safe renders it liable for injuries caused by reason thereof, without other proof than of such negligence and refusal. *McKelvy v. Burlington, C. R. & N. R. Co.*, 49 Am. & Eng. R. Cas. 477, 84 Iowa 455, 51 N. W. Rep. 172.

(2) *Permitting weeds, underbrush, or trees on right of way.*—It is negligence in a company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing; and for an injury that might have been avoided but for such obstruction, the company will be liable. *Indianapolis & St. L. R. Co. v. Smith*, 78 Ill. 112.—QUOTED IN *Terre Haute & P. R. Co. v. Barr*, 31 Ill. App. 57.—*Chicago & E. I. R. Co. v. Tilton*, 29 Ill. App. 95; *denying rehearing in 26 Ill. App. 362.* *Terre Haute & P. R. Co. v. Barr*, 31 Ill. App. 57.—QUOTING *Indianapolis & St. L. R. Co. v. Smith*, 78 Ill. 112.—*Moberly v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 518; *affirmed in 98 Mo. 183*, 11 S. W. Rep. 569.

If it is shown that certain bushes which grew from ten to twenty feet outside of the right of way were at the time of the accident bare of leaves, and in fact no obstruction to the view of the track, it is error for the court to instruct the jury that it is negligence for the company to suffer brush or tall weeds to grow upon its right of way so as to materially obstruct the view of approaching trains. *International & G. N. R. Co. v. Kuehn*, 35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484.

* See also *post*, 293-306.

Liability of company for injury to persons traveling on highway, caused by defective railroad crossings, see 55 AM. & ENG. R. CAS. 105, *abstr.*

30. — under Iowa statute.—Under the provisions of Code, § 1288, making railway companies liable to persons injured through the neglect of the former to properly construct and maintain good and sufficient and safe crossings and cattle-guards at all points where a railway track crosses a public highway, and providing that "in order for the person injured to recover it shall only be necessary for him to prove such neglect," a railroad company is not liable for injuries sustained at such crossing from causes other than its neglect to comply with the provisions of the statute. *McKelvy v. Burlington, C. R. & N. W. R. Co.*, 84 Iowa, 455, 51 N. W. Rep. 172.—RECONCILING *West v. Chicago & N. W. R. Co.*, 77 Iowa 654; *Engle v. Chicago, M. & St. P. R. Co.*, 77 Iowa 661.

31. — under Massachusetts statute.—When a highway crosses a railroad consisting of a single track, at grade, and there is a defective place in the sidewalk within the line of the railroad location, but several feet from the track, the town is liable for any injury resulting from the defect, if it can remedy it without interfering with the rights and duties of the company. *Noyes v. Gardner*, 147 Mass. 505, 18 N. E. Rep. 423.

In an action under Pub. St. ch. 112, § 212, for causing the death of the plaintiff's intestate at a crossing at grade of a highway in a town, by the railroad, evidence that, twelve years before the accident, the defendant's lessor, another corporation, had, in compliance with an oral application of the selectmen of the town, maintained a flagman at the crossing, is properly excluded; and the fact that the defendant covenanted in the lease to use the railroad in accordance with the laws of the commonwealth, and to maintain "the demised railroad properties," consisting of "tenements, tracks, depot grounds, stations, superstructures, and fixtures," in the same condition they were then in, does not enlarge the plaintiff's rights. *Tyler v. Old Colony R. Co.*, 157 Mass. 336, 32 N. E. Rep. 227.

A railroad corporation was authorized to construct its railroad across a highway, and in the progress of the work it became necessary from time to time to remove certain barriers which were placed by the corporation across the highway for the protection of travelers, but were adopted by the town in which the highway was situated; and in

consequence of the neglect of the workmen to replace the barriers at night, a traveler, in 1832, sustained an injury, and subsequently, under St. 1786, ch. 81, recovered double damages against the town. *Held*, that the railroad corporation was bound to cause the barriers to be replaced at night, although its charter contained no express provision on this point, as otherwise an accident might have happened before the town had notice, actual or constructive, and no one would have been liable for the damages. *Lowell v. Boston & L. R. Corp.*, 23 Pick. (Mass.) 24.—REVIEWED IN *Willard v. Newbury*, 22 Vt. 458.

After a double track was laid, some eight feet apart, a highway was laid out, crossing such tracks at grade. A person traveling on the highway was injured by reason of defects in the planking between the two tracks. Pub. St. ch. 112, § 124, makes it the duty of a company to "so guard and protect its rails by plank, timber, or otherwise as to secure a safe and easy passage across its road." *Held*: (1) that this provision applies as well to highways laid out after the location of the railroad as to those laid out before; (2) that it applies to the space between the two tracks, where planking is necessary to secure a safe and easy passage across the road. *Scanlan v. Boston*, 140 Mass. 84, 2 N. E. Rep. 787.

32. — under Missouri statute.—Under Mo. act of March 27, 1885, it is the duty of railroad companies to locate the planking in that particular part of a street that is graded and usually traveled over by wagons and vehicles; and it is the duty of the company not only to put down such planking as described in the statute, but to locate it on such part of the street or road; and it is also its duty to maintain the planking in a good and ordinarily safe condition. *Hogue v. Chicago & A. R. Co.*, 32 Fed. Rep. 365.

The company is liable for all injuries that may be sustained by a person directly, in consequence of a failure either to put down planking at crossings, in the first instance, of the dimensions and quality described in the statute, or by failure to locate it in that part of the roadway that is graded and usually traveled over, or by a failure to keep it in a safe condition after laid. *Hogue v. Chicago & A. R. Co.*, 32 Fed. Rep. 365.

33. — under South Carolina statute.—Gen. St. § 1535 provides that

the county commissioners of any county may lay out a highway across a railroad previously constructed after giving the railroad company due notice. In this case the commissioners, without giving any notice, changed the course of a highway so as to run it under a narrow span of a railway trestle. The plaintiff was injured by his buggy striking against the trestle, owing to the narrowness of the span. *Held*, that the company was not liable for damages. *Hill v. Port Royal & W. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 607, 31 *So. Car.* 393, 5 *L. R. A.* 349, 10 *S. E. Rep.* 91.

34. Raising track above street.—

A railway company is liable for injury to a carriage caused by the rails at a highway crossing being too high above the surface. *Oliver v. North Eastern R. Co.*, *L. R.* 9 *Q. B.* 409.

Proof that a railroad company had during the day raised its track above the highway, and had only thrown some loose dirt on either side, which would require carriage wheels crossing the track to make a rise of from six to ten inches, and that plaintiff undertook to drive across the following night, and that he was so hindered with his loaded wagon by reason of the condition of the track, that the company's locomotive, which approached without giving any signal, collided with his team before he could get off the track, is sufficient to show negligence and render the company liable. *Milwaukee & C. R. Co. v. Hunter*, 11 *Wis.* 160.

Under the above circumstances the jury would be warranted in finding plaintiff in the exercise of due care, though he was driving a colt which balked at the crossing, as the balking might be attributed to the bad condition of the crossing. *Milwaukee & C. R. Co. v. Hunter*, 11 *Wis.* 160.

35. Leaving obstruction on street at night without light.—Where, under a license from the city, dirt on a railroad crossing is piled upon the street by the railroad company until the city shall remove it, and is left there at night without a light having been placed thereon, in violation of a city ordinance, the railroad company is liable for injuries suffered in consequence of the absence of a light. *Lyon v. St. Louis, I. M. & S. R. Co.*, 6 *Mo. App.* 516.

36. Duty to restore crossing.*—

* See also CROSSING OF STREETS, ETC., 25, 26.

In an action to recover damages for personal injuries sustained at a crossing, it appeared that plaintiff drove along the road in the morning and noticed defendant's track-laying machine at a distance of 60 or 70 yards from the road. When he returned, three or four hours later, the track had been laid some three hundred yards beyond the point where it crossed the highway. No attempt had been made to put the crossing in order beyond laying a few loose planks between the rails, and perhaps one on each side on the end of the cross-ties. On each side of the roadbed there was an uncovered water-way or drain about a foot deep. The plaintiff testified that the crossing could have been put in proper shape in 15 or 20 minutes. *Held*, that the evidence was sufficient to justify the jury in finding that a reasonable time for restoring the crossing had elapsed when the injury occurred; and that, under the circumstances, plaintiff exercised due care in going upon the track without stopping to inspect it. *Dallas & G. R. Co. v. Able*, 37 *Am. & Eng. R. Cas.* 453, 72 *Tex.* 150, 9 *S. W. Rep.* 871.

In an action to recover damages for injuries caused by the failure of a railroad company to restore a public road within a reasonable time after it had constructed its track across it, an instruction that "if the railroad was so constructed that an ordinarily careful and prudent driver could not safely drive an ordinarily careful and safe team" across the railroad, the defendant was liable, is not open to the objection that it assumes that the plaintiff was a careful and prudent driver, and drove an ordinarily safe team. *Dallas & G. R. Co. v. Able*, 37 *Am. & Eng. R. Cas.* 453, 72 *Tex.* 150, 9 *S. W. Rep.* 871.

37. Diverting highway while building road.—Where a railroad company is authorized by its charter to divert the location of a highway when it is necessary in the construction of its road, the right must be exercised with due regard to the public safety; and the company will be liable for injuries sustained by travelers on the highway by reason of its negligence in not erecting proper barriers to guard them from driving into cuts or excavations made in the highway by the company, where such travelers are not in fault themselves. *Potter v. Bunnell*, 20 *Ohio St.* 150.—QUOTING *Veazie v. Penobscot R. Co.*, 49 *Me.* 119.—QUOTED IN *Pittsburg, C. & Y. R. Co. v.*

Moses, (Pa.) 24 Am. & Eng. R. Cas. 295, 2 Atl. Rep. 188.

Under Ohio Act of May 1, 1854, § 33, it is the duty of the company diverting a highway in the construction of its road to restore it to such condition as not to impair its former usefulness, and it is liable to one injured by reason of a failure to do so. But when the highway has been fully restored the company is not under any obligation to keep it in repair. *Pittsburgh, Ft. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421.

If, however, after such highway has been fully restored the company wrongfully encroaches upon it, or impairs its usefulness, it will be liable to one injured by reason of such encroachment or impairment. *Pittsburgh, Ft. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421.

38. Leaving improper space outside of rail for flange of wheel.—

Where a railroad company constructs a crossing over its track in a public street, leaving a space between the rail and the sidewalk for the flanges of the car wheels, and the exact dimensions of the space thus left, in point of width and depth, are shown by the evidence, it is a question of fact for the jury to determine, in the light of all the evidence, whether the crossing is so constructed as to be reasonably safe for persons passing over the street. *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. Rep. 729.

Even if the opening between the rails and the sidewalk, in which a child caught its foot and thereby was injured, was no wider than was reasonably necessary for the proper movement by the railway company of its trains, it then becomes a question of fact for the jury whether its unequal width and unnecessary depth did not render it unsafe for persons passing over it; and the fact that a person caught his foot in the opening in such manner as to be unable to extricate it is, of itself, some evidence that the opening was dangerous. *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. Rep. 729.

39. Planking crossing.—It is a question for the jury whether a railroad company is guilty of negligence in laying a plank upon a highway crossing about two and a half inches from the rail, with a straight edge, it appearing that the safer method is to round off the edge of the plank, allowing it to touch the rail at the

bottom. *Spooner v. Delaware, L. & W. R. Co.*, 39 Am. & Eng. R. Cas. 599, 115 N. Y. 22, 21 N. E. Rep. 696, 23 N. Y. S. R. 554; *affirming* 41 Hun 643, 1 N. Y. S. R. 558.

While plaintiff was driving his mare across the track of defendant's road at the intersection of two streets in the city of T. her foot caught between the planking and one of the rails, and she was injured. Upon the trial plaintiff's evidence was to the effect that there was over three and one fourth inches between the plank and the rail, while two and one quarter inches was all that was required for the passage of the flanges of the car wheels, and because of this the horse's hoof got into the open space and the toe-calk caught under the rail; that the plank was from one fourth to three eighths of an inch higher than the top of the rail; and that the crossing was constructed differently from others upon defendant's road and upon other railroads. Plaintiff was consulted on the ground that there was no evidence of negligence on the part of defendant. *Held*, error; that the question of negligence was for the jury. (Folger, C. J., Rapallo and Earl, JJ., dissenting.) *Payne v. Troy & B. R. Co.*, 6 Am. & Eng. R. Cas. 54, 83 N. Y. 572.

40. Throwing dirt on right of way.

—There is no rule of law that declares it to be negligence to permit the dirt taken from a cut in the construction of a railroad to be thrown upon the right of way, although it might obstruct the view, or weeds to grow with like effect, regardless of the point of crossing and the right to cross, or any duty to the person about to cross the track. *Atchison, T. & S. F. R. Co. v. Parsons*, 42 Ill. App. 93.

41. When company not liable for defects in unauthorized surface crossing.—Where a company constructs

its track on a trestle over a highway, and the county authorities subsequently open a new way under the trestle without complying with the statute relating to laying out of new ways and discontinuing old ones, and without giving the company notice, the company will not be liable for an injury received by reason of a defect in the new way. *Hill v. Port Royal & W. C. R. Co.*, 39 Am. & Eng. R. Cas. 607, 31 So. Car. 393, 5 L. R. A. 349, 10 S. E. Rep. 91.

After a railroad had constructed its track on a trestle over a highway the county authorities opened a new highway under the

trestle and for a considerable distance, and running at a different angle. The plaintiff was injured while driving on the new way some sixty-five or seventy yards from the trestle; but the statute relating to the opening of new ways and the discontinuance of old ones was not complied with. *Held*, that this was not a "slight alteration," within the meaning of the statutes, that might be made by the county authorities without a compliance with the law. *Hill v. Port Royal & W. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 607, 31 *So. Car.* 393, 5 *L. R. A.* 349, 10 *S. E. Rep.* 91.

42. When turnpike company liable.—Where a railroad and turnpike company have their routes located, by the requirements of their charters, over and across the same ground, but the railroad's right accrues first by priority of its charter, though both are constructed at the same time, the turnpike company is responsible for injuries sustained by its travelers occasioned by the want of railings and other safeguards at the crossing of the railroad, as in such case it is the duty of the turnpike and not the railroad to provide the same. *Zuccarello v. Nashville & C. R. Co.*, 3 *Bagt. (Tenn.)* 364.

43. Duty to keep crossing safe—When for jury.—Whether it is the duty of the company or of their engineer to see to and keep in safe condition a crossing or other unsafe point on a railroad, is a question of fact for the jury. *Indianapolis & C. R. Co. v. Love*, 10 *Ind.* 554.

The jury may properly consider whether a railroad company should not, apart from any statutory requirement, have set up at a crossing special safeguards at the point where an injury took place, if at that point there were several tracks running side by side, and little opportunity to see a coming train and much noise and confusion. *Staal v. Grand Rapids & I. R. Co.*, 57 *Mich.* 239, 23 *N. W. Rep.* 795.

44. Admissibility of evidence to show condition of track.*—Where the suit is to recover damages for an injury occasioned by a defective railroad crossing it is competent to prove that the condition of the crossing is the same at the time of the trial as at the time of the injury, but it is not competent to prove why no change was

made in its condition. *Pennsylvania Co. v. Frund*, 4 *Ind. App.* 469, 30 *N. E. Rep.* 1116.

III. LIABILITY AS DEPENDENT UPON MAINTAINING GATES OR SIGNS; FLAGMEN; WATCHMEN.

1. Gates.

45. Duty to maintain.—In the absence of any statute requiring railroad companies to maintain gates, lights, or a flagman at ordinary highway crossings negligence cannot be predicated upon a failure to do so, so as to make the company liable for an injury to a traveler on the highway. *Case v. New York C. & H. R. R. Co.*, 75 *Hun* 527, 27 *N. Y. Supp.* 496, 57 *N. Y. S. R.* 653.—*QUOTING* *Weber v. New York C. & H. R. R. Co.*, 58 *N. Y.* 451; *Beisiegel v. New York C. R. Co.*, 40 *N. Y.* 9; *Grippen v. New York C. R. Co.*, 40 *N. Y.* 34; *Cumming v. Brooklyn City R. Co.*, 104 *N. Y.* 669; *Houghkirk v. Delaware & H. Canal Co.*, 92 *N. Y.* 219.

Railroads are not required to maintain gates at all crossings, but only where there is a peculiar hazard. So where a company is sued for injuring a child at a grade crossing, at an unfrequented portion of the borders of a city, and there is no evidence as to the amount of travel over the track, nor of its being peculiarly dangerous, except a bank on one side which obstructed the view of a train until it was within thirty to sixty feet of the crossing, and a remark of the engineer that "it was a bad place," the evidence is insufficient to show negligence in failing to maintain a gate. *Valance v. Boston & A. R. Co.*, 55 *Fed. Rep.* 364.—*FOLLOWING* *Commonwealth v. Boston & W. R. Corp.*, 101 *Mass.* 201; *Grand Trunk R. Co. v. Ives*, 144 *U. S.* 408, 12 *Sup. Ct. Rep.* 679.

The provisions of the 5 & 6 Vict. c. 55, § 9, as to making and maintaining gates where a railway crosses a road on a level, do not apply to a railway belonging to private owners, and not constructed under parliamentary powers, nor used for the conveyance of passengers. *Matson v. Baird*, 3 *App. Cas.* 1082, 3 *Ry. & C. T. Cas.* xvii.

Evidence that twenty trains on a railroad and about as many vehicles on a highway daily passed over a place where the railroad crossed the highway at grade, but was in full view from the highway at any point within 150 feet of the crossing, and where

* See also *post*, 345.

no gate or flagman had ever been required by the public authorities—*held*, to be insufficient to warrant a finding that the railroad corporation was guilty of negligence in omitting to provide there any such safeguard. *Commonwealth v. Boston & W. R. Corp.*, 101 Mass. 201.—DISTINGUISHING *Commonwealth v. Fitchburg R. Co.*, 10 Allen (Mass.) 189.—APPROVED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237. FOLLOWED IN *Vallance v. Boston & A. R. Co.*, 55 Fed. Rep. 364.

46. An open gate is an invitation to cross.*—Where the gate shutting a railway off from travel is open, it is an invitation to the traveling public to come on, and an intimation to them that they may do so safely. *Conway v. Philadelphia, W. & B. R. Co.*, 17 Phila. (Pa.) 71. *Lindeman v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 837, 46 Hun 679.—QUOTING *Wanless v. North Eastern R. Co.*, L. R. 7 H. L. Cas. 12, L. R. 6 Q. B. 481.—*Palmer v. New York C. & H. R. R. Co.*, 112 N. Y. 234.

The fact that gates at a crossing are open is an invitation to a person to cross, and if he is thereby put off his guard and injured by a train which he did not see, owing to his attention being attracted to another train, there is evidence of negligence on the part of the company. *North Eastern R. Co. v. Wanless*, 43 L. J. Q. B. 185, L. R. 7 H. L. Cas. 12, 22 W. R. 561, 30 L. T. 275; *affirming* L. R. 6 Q. B. 481.

Where a crossing gate is partially open and the gatekeeper is absent, a traveler is impliedly invited to cross a track, and if he is struck and killed by a train the company is guilty of negligence. *Stapley v. London, B. & S. C. R. Co.*, 4 H. & C. 93, L. R. 1 Ex. 21, 11 Jur. N. S. 954, 35 L. J. Ex. 7, 14 W. R. 132, 13 L. T. 406.

Where a statute prohibits a railroad company from running a train across a highway in a populous part of the town at a speed greater than a certain specified rate, unless the parties operating the railroad maintain a flagman or a gate at the crossing, the fact that such a gate has been left open and unattended gives persons traveling across the line the right to expect that a train will not pass the crossing at a speed greater than

the statutory rate, besides being evidence that a train is not presently due or expected. *State v. Boston & M. R. Co.*, 35 Am. & Eng. R. Cas. 356, 80 Me. 430, 15 Atl. Rep. 36.

When gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties. *Evans v. Lake Shore & M. S. R. Co.*, 88 Mich. 442, 50 N. W. Rep. 386.

Hence an open gate, with the gateman in charge, is notice of a clear track and safe crossing; and, in the absence of other circumstances, when the gates are open and the gatemen present it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass onto the tracks through the open gates without stopping to listen, though the view of the tracks on either side of the crossing is obstructed; nor, in such case, is their failure, when at a distance of 25 feet from the track, to look for locomotives 150 feet or more from the crossing, negligence, though they could have been seen. *Cleveland, C., C. & I. R. Co. v. Schneider*, 35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678, 17 N. E. Rep. 321.—DISTINGUISHING *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 678.

47. Illustrations.—In an action for killing a person at a crossing, where gates were maintained, it appeared that the gates were broken Saturday evening and chained up, from that time until Monday morning, when the accident happened. There was no reason to suppose that the deceased knew that the gates were out of order. *Held*, that the deceased might presume that the way was safe. *Lindeman v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 837, 46 Hun 679.

In an action for killing a person at a crossing where the track crossed the street diagonally, the proof showed that the company maintained a gate, but that the flagman opened it and went away before the accident; that the view of an approaching train was obstructed, and that the train doing the killing approached without giving signals, and that a flagman gave a safety signal. *Held*, sufficient evidence to sustain

* See also *post*, 54, 214.

Effect of gates standing open at crossings, see note, 39 AM. & ENG. R. CAS. 637.

a verdict of negligently killing. *Fitzgerald v. Long Island R. Co.*, 21 N. Y. S. R. 942, 3 N. Y. Supp. 230, 50 Hun 605, mem.; affirmed in 117 N. Y. 653, mem., 22 N. E. Rep. 1133, 27 N. Y. S. R. 980.

48. Duty to keep closed when trains are passing.—When gatemen are maintained at such crossings it is their duty to observe the tracks, and know when, on account of trains or engines thereon, it becomes dangerous for persons to cross, and, when it is so, to close the gates and keep them closed, to prevent persons from going upon the tracks, so long as the danger continues; and when the tracks are clear, or persons may cross without danger from passing cars and locomotives, then to open the gates and keep them open, to enable persons to cross, so long as it is safe for them to do so, but no longer. *Cleveland, C., C. & I. R. Co. v. Schneider*, 35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678, 17 N. E. Rep. 321. *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. Rep. 15.

A gateman in charge of a safety gate at a highway crossing is bound to so operate the gate as to avoid injuring passers-by, if, by the exercise of ordinary care, he can do this. Negligence on his part in this regard is the negligence of the railroad company. *Fenney v. Long Island R. Co.*, 39 Am. & Eng. R. Cas. 639, 116 N. Y. 375, 22 N. E. Rep. 402, 26 N. Y. S. R. 729, 5 L. R. A. 544; affirming 42 Hun 657, 5 N. Y. S. R. 63.

It is the duty of the gate-keeper at a level crossing, not merely to open it when required for the passage of horses and vehicles, but to exercise reasonable caution and discretion in doing so, so as to protect travelers from passing trains. *Lunt v. London & N. W. R. Co.*, L. R. 1 Q. B. 277, 12 Jur. N. S. 409, 35 L. J. Q. B. 105, 14 W. R. 497, 14 L. T. 225.

It is negligence for a railway company to leave a crossing gate opened, whereby a person attempts to cross the track and is knocked down and injured by a train which he did not see, although it might have been seen from some distance. *Wantless v. North Eastern R. Co.*, 25 L. T. 103.

Under 5 & 6 Vict. c. 55, § 9, a railway company must keep the gates at the ends of grade crossings closed against all persons or cattle upon the highway. If it fails to perform this duty and injury arises, it is liable to an action for damages. *Faw-*

cett v. York & N. M. R. Co., 16 Q. B. 610, 15 Jur. 173, 20 L. J. Q. B. 222.

49. Negligence of gate-keeper.—In an action for killing a man at a grade crossing, the evidence showed, among other things, that the deceased approached the crossing in the dusk of the evening, and just before he reached the track the gate-keeper began to close the gate, swung his lantern, and shouted to the intestate to stop; that he did so, but immediately the gate-keeper shouted to him to hurry up, whereupon he again started his horse, but was struck by an engine before he got across the track. Held, sufficient evidence of negligence to warrant a finding for the plaintiff. *Bayley v. Eastern R. Co.*, 125 Mass. 62.

50. Permitting stranger to open.—It may be as negligent in a company to permit strangers to open its gates after they are closed as to fail to close them. So held, where plaintiff's intestate was killed at a crossing where gates were maintained and had been closed, but where one of them had been lifted by a woman who wished to cross just before the deceased approached the crossing. *Haywood v. New York C. & H. R. R. Co.*, 35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177; affirmed in 128 N. Y. 596, mem., 38 N. Y. S. R. 1011.—DISTINGUISHING *Heaney v. Long Island R. Co.*, 112 N. Y. 126, 20 N. Y. S. R. 296.

It cannot be held as a matter of law that permitting a gate at a crossing to be opened by a stranger and to remain open long enough for a traveler on the highway to pass through, is not such an act of negligence by the company as to submit the question of negligence to the jury, where the action is for an injury to the person so passing through. *Haywood v. New York C. & H. R. R. Co.*, 35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177; affirmed in 128 N. Y. 596, mem., 38 N. Y. S. R. 1011.—QUOTING *Grippen v. New York C. R. Co.*, 40 N. Y. 47.

51. Liability where common gate is maintained over tracks of several roads.—In an action for personal injuries, it appeared that the tracks of the A., the B., and the C. railroads crossed a street at grade; that gates were operated by a gateman, and that they were the only gates on the whole crossing, and were used when any train passed on any of the roads. Plaintiff was struck by a moving train on the tracks of the C. railroad, and the negligence of the

gatemanager in raising the gate before the passage of the train was the negligence relied upon by the plaintiff to sustain his action. The gateman was employed by the A. company, which company the plaintiff sued. There was no express contract between the companies as to the gateman, and no implied contract, unless one arose from the fact that the A. company employed the gateman and paid him, and the other companies repaid the A. company five eighths of his wages. *Held*, that the presiding justice erred in directing a verdict for the defendant on the ground that the action should have been brought against the C. company. *Brow v. Boston & A. R. Co.*, 157 *Mass.* 399, 32 *N. E. Rep.* 362.

52. — where one company uses another's track.—Persons owning a private railroad, but running their cars on the track of another company by consent, are to be deemed proprietors of such track, within the meaning of N. H. Gen. St. ch. 148, § 7, so far as regards their rights and liabilities for injuries at crossings. *Hall v. Brown*, 54 *N. H.* 495, 11 *Am. Ry. Rep.* 231.—*REVIEWED IN* *Turner v. Cross*, 83 *Tex.* 218.

A railroad company which, in operating the road with the company owning the same, under an agreement to pay the latter a specified sum yearly, in excess of the amount to which it is entitled out of the joint earnings, for the use of its tracks and the cost of switching, uses the tracks at a crossing, where gates and gatemen are maintained, is bound to the same care in the use thereof as the company owning the road, and should anticipate the reasonable effect of the gates, and the gatemen's conduct, in their management, on persons approaching the crossing, or about to cross, and operate the road at that place with due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under these circumstances. And if, while so using the tracks of the road, it accepts the services of the gatemen employed by the company owning the road, instead of employing gatemen of its own, they become, for the time being, its servants, for whose negligence it is responsible; and if it does not accept their services, its duty is to place competent gatemen at such crossing, and it is responsible for its omission to do so. *Cleveland, C., C. & I. R. Co. v. Schneider*, 35 *Am. & Eng. R.*

Cas. 334, 45 *Ohio St.* 678, 17 *N. E. Rep.* 321.

53. Liability where road is in hands of a receiver.—Where a road is in the exclusive control of a receiver the company is not liable for the negligence of the employes of the receiver in injuring a person at a highway crossing. *Ohio & M. R. Co. v. Davis*, 23 *Ind.* 553.—*APPLYING* *Weyant v. New York & H. R. Co.*, 3 *Duer* (N. Y.) 360. *DISTINGUISHING* *McKinney v. Ohio & M. R. Co.*, 22 *Ind.* 99. *EXPLAINING* *Ohio & M. R. Co. v. Fitch*, 20 *Ind.* 498.—*FOLLOWED IN* *Bell v. Indianapolis, C. & L. R. Co.*, 53 *Ind.* 57; *Davis v. Duncan*, 17 *Am. & Eng. R. Cas.* 295, 19 *Fed. Rep.* 477. *QUOTED IN* *Brockert v. Central Iowa R. Co.*, 82 *Iowa* 369. *REVIEWED IN* *White v. Keokuk & D. M. R. Co.*, 52 *Iowa* 97; *Ohio & M. R. Co. v. Anderson*, 10 *Ill. App.* 313.

54. How far party may rely on gates.*—One about to drive across a track on a city street where the company maintains a gate and a watchman has a right to rely on them, and if he receives no warning and is injured by an engine in attempting to cross the track the company is liable. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 27 *Fed. Rep.* 159.

Where a party is killed in driving upon a track where gates are maintained and a flagman stationed, the facts of the absence of the flagman and of the gates being opened are to be considered by the jury as affecting his conduct, and to what extent is for the determination of the jury. *Palmer v. New York C. & H. R. R. Co.*, 112 *N. Y.* 234, 19 *N. E. Rep.* 678.

The raising of a gate is a substantial assurance of safety to a person about to cross the track, and as significant as if the gateman had beckoned him to go on. *Oldenburg v. New York C. & H. R. R. Co.*, 124 *N. Y.* 414, 26 *N. E. Rep.* 1021.

An action was for killing plaintiff's intestate at a crossing where a gate was maintained, between eight and nine o'clock in the evening, but the evidence showed that the gate was not operated after seven o'clock in the evening. *Held*, that if the deceased knew the time at which the gate ceased to be operated he was not entitled to rely upon it for any protection. *Rainey v. New York C. & H. R. R. Co.*, 23 *N. Y. Supp.* 80, 68 *Hun* 495.

* See also *ante*, 46.

55. Less vigilance required where gates are maintained.*—A traveler approaching a railroad crossing guarded by gates is not required to exercise the same vigilance in looking and listening as when the approaches are not so guarded. *Kane v. New York, N. H. & H. R. Co.*, 132 N. Y. 160, 30 N. E. Rep. 256, 43 N. Y. S. R. 494; affirming 56 Hun 648, 31 N. Y. S. R. 741, 9 N. Y. Supp. 879.

The degree of care that a person is required to exercise in approaching a grade crossing will depend upon the facts of the case. Thus where a flagman gives a signal of safety by raising the gates he may take it as an assurance of safety and go ahead. *Oldenburg v. New York C. & H. R. R. Co.*, 124 N. Y. 414, 26 N. E. Rep. 1021.

56. Violation of city ordinance.—A person cannot recover damages against a railroad company for personal injuries because of its failure to maintain gates at a street crossing, in compliance with the requirements of an ordinance, where the absence of the gates has no causal connection with the injury. *Jennings v. St. Louis, I. M. & S. R. Co.*, 99 Mo. 394, 11 S. W. Rep. 999.

A city ordinance required defendant company to maintain gates at its grade crossings and to attend them at all times when trains were passing. It was sued for killing plaintiff's intestate between eight and nine o'clock in the evening, and the proof showed that the gates were attended from seven o'clock in the morning until seven o'clock in the evening, but not from that time until the next morning. Held, that proof of the violation of the ordinance did not establish the cause of action against the company, but was evidence bearing on the question of negligence. *Rainey v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 80, 68 Hun 495.

57. Rights of person on private way covered by gate.—Where a public highway and a private road both cross a railway track diagonally converging at such track, where a gate is placed by the company, serving both roads, a traveler on the private road, only available by means of such gate, is placed in the same position with respect to the gate-keeper as if he were using the public road. *Lunt v. London & N. W. R. Co.*, L. R. 1 Q. B. 277, 12

Jur. N. S. 409, 35 L. J. Q. B. 105, 14 W. R. 497, 14 L. T. 225.

58. Sufficiency of gate for jury.—Whether or not a gate provided by a railway company at a crossing is reasonably sufficient is a question for the jury, and it is error for the court to instruct them that the plaintiff cannot recover in an action for damages growing out of the company's negligence in the construction and maintenance of a gate. *McKenly v. Chicago, R. I. & P. R. Co.*, 43 Iowa 641, 14 Am. Ry. Rep. 495.

Nor would the instruction be justified even if it appeared that plaintiff himself supposed the gate to be sufficient, and this were embodied in the instruction. *McKenly v. Chicago, R. I. & P. R. Co.*, 43 Iowa 641, 14 Am. Ry. Rep. 495.

59. Duty to maintain, a question of law.—In an action for an injury at a crossing it was a misdirection for the judge to leave to the jury, as evidence of negligence on the part of the company, its omission to keep a gate-keeper and its failure to exercise its statutory power to make a new road and discontinue the level crossing. *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258, 18 W. R. 456, 22 L. T. 382.

2. Signs.

60. Duty to maintain, independent of statute.—In an action against a railroad company for negligence in running over one at a street crossing, evidence that the company had no sign over the crossing to warn persons approaching of its presence is proper, although there be no statute or ordinance requiring the company to have such a sign. It is for the jury to say whether the omission to have such a sign is negligence; and it is for them to say whether it contributed to the injury, even where it appears that the person injured was familiar with the crossing. *Shaber v. St. Paul, M. & M. R. Co.*, 2 Am. & Eng. R. Cas. 185, 28 Minn. 103, 9 N. W. Rep. 575. *Heddes v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. Rep. 115.

61. Effect of failure to erect, under statutes.*—The failure to erect a caution-board at railroad crossings, as required by the statute, does not necessarily make the railroad company responsible for damages

* See also *post*, 280.

* See also *post*, 267.

Liability of company for failing to erect sign-boards, see note, 23 AM. & ENG. R. CAS. 329.

occasioned by a collision with one of its trains at the crossing. *Haas v. Grand Rapids & I. R. Co.*, 8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216.

The caution-board is for the purpose of a notification to those who are passing along the road; and where a party is familiar with the crossing and has frequently been over it and had it in mind on the occasion in question as he approached it, he cannot be said to have been injured by the failure to set up the caution. *Haas v. Grand Rapids & I. R. Co.*, 8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216.

Such failure does not make the company liable to one injured, where the absence of the sign-board is not the cause of the injury. *Field v. Chicago, B. & Q. R. Co.*, 8 Am. & Eng. R. Cas. 425, 4 McCrary (U. S.) 573, 14 Fed. Rep. 332.

The intention of such a statute is not to create an absolute liability on the part of the company, but to make a failure to provide sign-boards at such places conclusive evidence of negligence. *Field v. Chicago, B. & Q. R. Co.*, 8 Am. & Eng. R. Cas. 425, 4 McCrary (U. S.) 573, 14 Fed. Rep. 332. *Payne v. Chicago, R. I. & P. R. Co.*, 44 Iowa 236. *Dodge v. Burlington, C. R. & M. R. Co.*, 34 Iowa 276, 5 Am. Ry. Rep. 507.—DISAPPROVING *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9. DISTINGUISHING *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.—APPROVED IN *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313. DISTINGUISHED AND FOLLOWED IN *Correll v. Burlington, C. R. & M. R. Co.*, 38 Iowa 120. FOLLOWED IN *Carlin v. Chicago, R. I. & P. R. Co.*, 37 Iowa 316; *Haines v. Illinois C. R. Co.*, 41 Iowa 227.

The omission will not render the company liable for injuries inflicted on one who knew, or might have known by the exercise of ordinary care, of the crossing place in time to have avoided injury from a passing train. *Gulf, C. & S. F. R. Co. v. Greenlee*, 23 Am. & Eng. R. Cas. 322, 62 Tex. 344.—QUOTING *Houston & T. C. R. Co. v. Wilson*, 60 Tex. 144.

62. What roads statute applies to.

—The Tex. statute requiring railroads to erect at all points where their roads shall cross public roads a warning sign applies to all roads that are traveled on horseback and in vehicles which were so used at the time of the construction of a railroad. A

3 D. R. D.—31.

road, however, which is opened across a railroad track after the construction of the railroad and without being established as a public road under the law would impose upon the railroad company no obligation to perform the requirements of the statute. *International & G. N. R. Co. v. Jordan*, 1 Tex. App. (Civ. Cas.) 494.

3. Flagmen.

63. Generally.—It is not negligence in a company to omit to station a flagman at a crossing unless such precaution is necessary; and it is therefore error to instruct the jury that they may find such failure is negligence if they believe it was a reasonable precaution to have such flagman. *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.

In a suit for personal injuries at a crossing it is error to instruct the jury that if the view of the track was obstructed by the act of the company it is not enough to show that the bell was rung or the whistle sounded; that it was the duty of the train employes also to have slowed up as they approached the crossing, and to have seen that the track was clear; and that, in order to have been assured that the track was clear, it was the duty of the company to have stationed a flagman or watchman, as such instruction invades the province of the jury in determining whether there was negligence, and as establishing the principle that it was the duty of the company in all cases to provide a flagman. *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98, 22 Pac. Rep. 480.

Where defendant asks, and the court gives at its request, instructions based upon the duty to have a flagman stationed at the place where an injury is inflicted, the company will be estopped from denying that it was its duty to have such flagman at such place, and the concession thus made will justify an instruction on the subject. *Lake Shore & M. S. R. Co. v. Johnson*, 135 Ill. 641, 26 N. E. Rep. 510; affirming 35 Ill. App. 430.

Where one injured at a crossing of a steam and a horse railroad sues both companies, the horse-car company cannot complain of the exclusion from the jury of an ordinance of the city requiring steam companies to have a flagman at the crossing. Even if the company had notice of the ordinance, or was required to take

notice, its negligence would not excuse the negligence of the horse-car company. *Central Pass. R. Co. v. Kuhn*, 32 *Am. & Eng. R. Cas.* 16, 86 *Ky.* 578, 6 *S. W. Rep.* 441.

A company was charged with negligence in not stationing a flagman at a crossing where the injury occurred. *Held*, that it was not error to refuse to instruct the jury that the fact that it did not appear that an accident had occurred at the precise place at any previous time must be taken as conclusive proof of the sufficiency of the precaution provided by the company. *Quill v. New York C. & H. R. R. Co.*, 16 *Daly (N. Y.)* 313, 32 *N. Y. S. R.* 612, 11 *N. Y. Supp.* 80; *affirmed in* 126 *N. Y.* 629, *mem.*, 36 *N. Y. S. R.* 1012.

64. At common law.—The common law does not require the stationing of a flagman at every street or road crossing, where a jury may be of the opinion that the travel is so great that ordinary prudence requires it. *Beisiegel v. New York C. R. Co.*, 40 *N. Y.* 9.—FOLLOWED IN *Chicago & A. R. Co. v. Jacobs*, 63 *Ill.* 178; *McGrath v. New York C. & H. R. R. Co.*, 59 *N. Y.* 468. QUOTED IN *Toledo, W. & W. R. Co. v. Shuckman*, 50 *Ind.* 42. RECONCILED IN *Pennsylvania R. Co. v. Matthews*, 36 *N. J. L.* 531. REVIEWED IN *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335; *Welsch v. Hannibal & St. J. R. Co.*, 6 *Am. & Eng. R. Cas.* 75, 72 *Mo.* 451, 37 *Am. Rep.* 440; *Coyle v. Long Island R. Co.*, 33 *Hun (N. Y.)* 37.

Neither the common law nor the statute requires railroad companies to station flagmen at crossings. All that is required, beyond the statutory signals, is such care in running trains as will prevent injury to others in the exercise of their rights, if proper care is observed by them. The company may employ men to keep persons off its track at crossings when trains are passing, and if it does this, it would be safe for them to run at greater speed, or in other respects different from what would be otherwise presumable; but this is a matter to be determined by the company, and is not imposed as a legal duty. *Beisiegel v. New York C. R. Co.*, 40 *N. Y.* 9.—DISTINGUISHED IN *Gonzales v. New York & H. R. Co.*, 39 *How. Pr.* 407. QUOTED IN *Crawford v. Delaware, L. & W. R. Co.*, 22 *J. & S.* 262. REFERRED TO IN *Weber v. New York C. & H. R. R. Co.*, 58 *N. Y.* 451. REVIEWED IN *McGrath v. New York C. & H. R. R. Co.*, 63 *N. Y.* 522.

65. As a rule, flagmen not required.*—There is no rule of law requiring a railroad company to keep a flagman at the crossing of a public street by its track to give to passers-by notice of the approach of trains. *Ernst v. Hudson River R. Co.*, 39 *N. Y.* 61, 36 *How. Pr.* 84.—FOLLOWED IN *Warner v. New York C. R. Co.*, 44 *N. Y.* 465.—*State (Delaware, L. & W. R. Co., pros.) v. East Orange*, 41 *N. J. L.* 127.

Its sole duty to travelers upon the highway is to run and manage its trains with proper care, so as not to injure them in the exercise of their lawful rights. *Heaney v. Long Island R. Co.*, 9 *N. Y. S. R.* 707.—APPLYING *McGrath v. New York C. & H. R. R. Co.*, 63 *N. Y.* 522.

The only outward signals required to be given are the bell and whistle, provided for by the statute. *Culhane v. New York C. & H. R. R. Co.*, 60 *N. Y.* 133, 10 *Am. Ky. Rep.* 142.—QUOTED IN *Shufelt v. Flint & P. M. R. Co.*, 96 *Mich.* 327.

And it is error, in a personal injury case, to allow the introduction of evidence as to the absence of a flagman at the crossing where the injury occurred. *Sutherland v. New York C. & H. R. R. Co.*, 9 *J. & S. (N. Y.)* 17.

So an instruction that in effect tells the jury that a company is guilty of negligence in all cases for failing to station a flagman at highway crossings, and that the company is liable if the injury for which plaintiff sues would not have occurred had there been a flagman, is erroneous. *Carraher v. San Francisco Bridge Co.*, 81 *Cal.* 98, 22 *Pac. Rep.* 480.

Although it is not enough in all cases to absolve a railroad corporation from the charge of negligence in the running of its trains, or in the use and occupation of its tracks at a crossing, that the statutory signals are given, but circumstances may require other precautions to be taken, it is only required to take such precautions as have respect to the moving of the trains and the use of the road. It is not called upon to do any act outside of or disconnected with its actual operations. The posting of flagmen, placing gates or other

* Duty of company to keep flagman at crossing to give warning of approaching trains, see notes, 2 *AM. & ENG. R. CAS.* 182; 19 *Id.* 259; 45 *Id.* 145; 3 *L. R. A.* 594. See also 39 *AM. & ENG. R. CAS.* 644. *abstr.*

obstructions, or the giving special and personal notice to travelers at crossings is not required of it, and the omission thereof does not charge it with negligence. *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451.—APPLYING *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Mackay v. New York C. R. Co.*, 35 N. Y. 75. REFERRING TO *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9; *Grippen v. New York C. R. Co.*, 40 N. Y. 34.—APPLIED IN *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680. DISTINGUISHED IN *Nary v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630. QUOTED IN *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37; *Crawford v. Delaware, L. & W. R. Co.*, 22 J. & S. (N. Y.) 262; *Buck v. Manhattan R. Co.*, 15 Daly (N. Y.) 276, 6 N. Y. Supp. 524, 25 N. Y. S. R. 590. REVIEWED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522.

But this obligation may become due by reason of such company constructing its road so as to make the crossing or use of such highways unnecessarily dangerous. *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531, 12 Am. Ry. Rep. 482.—FOLLOWING *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258. RECONCILING *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9. REVIEWING *Richardson v. New York C. R. Co.*, 45 N. Y. 846.—APPROVED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237. FOLLOWED IN *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. L. 525; *New York, L. E. & W. R. Co. v. Randel*, 23 Am. & Eng. R. Cas. 308, 47 N. J. L. 144. QUOTED IN *New York, L. E. & W. R. Co. v. Leaman*, 54 N. J. L. 202; *Cleveland, C. & I. R. Co. v. Schneider*, 35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678.

In the absence of a custom of prudent railroads to station flagmen at crossings, a company is not bound to do so, however dangerous the crossing may be. *Welsch v. Hannibal & St. J. R. Co.*, 6 Am. & Eng. R. Cas. 75, 72 Mo. 451, 37 Am. Rep. 440.—DISTINGUISHING *Kinney v. Crocker*, 18 Wis. 74. REVIEWING *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.—APPROVED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

The want of a flagman at a crossing, where there is no evidence of other negli-

gence on the part of the company in injuring persons about to drive across the track, and where every other precaution was taken to stop the train to avoid the injury, will not render the company liable. *Schwartz v. Hudson River R. Co.*, 4 Robt. (N. Y.) 347.

66. On country roads.—The law does not impose the obligation upon a railway company to station persons at every crossing of a public road to warn travelers of approaching trains. *State v. Philadelphia, W. & B. R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253.—DISTINGUISHING *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258; *Bilbee v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 584.—*Maryland C. R. Co. v. Neubeur*, 19 Am. & Eng. R. Cas. 261, 62 Md. 391.

A railroad company is not, as matter of law, under obligation to station a flagman at a road crossing in the country because of the approach to it being partially concealed by embankments or otherwise. *Haas v. Grand Rapids & I. R. Co.*, 8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216.—APPROVED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237. QUOTED IN *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.

It is not negligence in a company to fail to station a flagman at a crossing at a very sparsely settled place, where there are not more than half a dozen houses and only a flag-station is maintained, and where an approaching train could be seen for half a mile before reaching the crossing. *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

67. In cities.—A company is not required by law to station a flagman at every street or road crossing where, in the opinion of a jury, the travel is such that ordinary prudence requires it; and it is error to instruct the jury that a company may be found guilty of negligence solely on the ground of an omission to keep a flagman at a crossing of a city street. *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.—DISAPPROVING *Kinney v. Crocker*, 18 Wis. 74. DISTINGUISHING *Brown v. New York C. R. Co.*, 34 N. Y. 404; *Bradley v. Boston & M. R. Co.*, 2 Cush. (Mass.) 539; *Johnson v. Hudson River R. Co.*, 6 Duer (N. Y.) 633. FOLLOWING *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 13.—APPROVED IN *Semel v. New York, N. H. & H. R. Co.*, 9 Daly (N. Y.) 321. FOLLOWED IN *Dyer v. Erie R. Co.*, 71 N. Y. 228. QUOTED IN *Buck v.*

Manhattan R. Co., 15 Daly (N. Y.) 276, 6 N. Y. Supp. 524, 25 N. Y. S. R. 590.

Whether the failure of a railway company to keep a flagman on duty at a street crossing in a city, over which its road passes, at a given hour in the day constitutes negligence, is a question to be determined from a consideration of all the circumstances of the particular case. *Annaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa 267, 47 N. W. Rep. 68.

The knowledge of a traveler over a railroad at a street crossing that no flagman is stationed there at the time, and his dependence, for that reason, upon his own sight and hearing to discover the approach of trains, will not excuse the railroad company for its negligence in not keeping a flagman stationed at the crossing at that hour. *Annaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa 267, 47 N. W. Rep. 68.

Where a railroad company uses the tracks of its road across a generally traveled public street in a populous town or city for its convenience in the switching of trains, cars, and locomotives, and the crossing is thereby rendered exceptionally dangerous, it is bound to exercise care proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing, and should, in the exercise of such care, as a reasonable precaution for their safety and means of preserving the legitimate uses of the street, maintain flagmen, or gates and gatemen, at such crossing, or adopt other equally adequate measures for that purpose. *Cleveland, C. C. & J. R. Co. v. Schneider*, 35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678, 17 N. E. Rep. 321. —QUOTING *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531. —APPLIED IN *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

It is the duty of railroad companies to exercise the utmost care and diligence in running trains over city streets, and to use all precautions that the highest prudence would suggest in passing such crossings to avoid injuries; and a company may be liable for a failure to keep a flagman at a crossing, though it did give warning by ringing a bell and by stationing a man on the train to wave to persons, if the jury believe that the stationing of a flagman would have prevented the injury. *Kinney v. Crocker*, 18 Wis. 74. —DISAPPROVED IN *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.

DISTINGUISHED IN Welsch v. Hannibal & St. J. R. Co., 6 Am. & Eng. R. Cas. 75, 72 Mo. 451, 37 Am. Rep. 440.

Where a person driving a team in a city on a very cold and blustering day, being muffled up to protect himself from the severity of the cold, while driving across a track near a public elevator was struck by a car being propelled by an engine in the rear, and injured, and there was no one stationed on the car or on the ground to give warning, and it appeared, if there had been, the injury might have been avoided—*held*, that as the injury was the result of negligence on the part of the company it was liable in damages. *Illinois C. R. Co. v. Ebert*, 74 Ill. 399. —*DISTINGUISHED IN Lake Shore & M. S. R. Co. v. Clerens*, 5 Ill. App. 77.

68. In a city at night.—It was negligence of the most flagrant character in a railroad company not to have some one to give notice of the approach of trains at a point near a large city where its road crossed a public thoroughfare, and where street-cars crossed its track many times during the day and until a late hour in the evening. A flagman during the day merely was not sufficient; there should have been a flagman there at 9 o'clock at night. *Central Pass. R. Co. v. Kuhn*, 32 Am. & Eng. R. Cas. 16, 86 Ky. 578, 6 S. W. Rep. 441. —QUOTED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408. REVIEWED IN *Markham v. Houston D. Nav. Co.*, 73 Tex. 247, 11 S. W. Rep. 131.

69. Where there is extraordinary danger.—Ordinarily the absence of a flagman at a street crossing is no evidence of negligence on the part of the company; and to make it so the plaintiff must show that the circumstances of the crossing are such that common prudence would dictate that the company should place a flagman there, or his equivalent. Before the jury can find negligence in its failing to do so it must appear that the danger at the crossing was exceptional—something rendering ordinary care on the part of persons crossing the track insufficient protection against injury. *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594.

70. But practice may bind company to maintain.—The company, for their own convenience, may elect to place a flagman at certain crossings and, by estab-

lishing a practice of that kind, they may make a law binding upon themselves. *Ernst v. Hudson River R. Co.*, 39 N. Y. 61, 36 How. Pr. 84.

Where by such voluntary and continued practice it has become notoriously public that a flagman is placed at such crossing to give notice of the approach of trains, then to withdraw such flagman without notice may become an act of negligence on the part of the company for which they would be liable. *Ernst v. Hudson River R. Co.*, 39 N. Y. 61, 36 How. Pr. 84. *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 3 Am. & Eng. R. Cas. 502, 78 Ind. 373, 41 Am. Rep. 580.

71. Under Michigan statute—Duty of railroad commissioners.—It is not the law of Michigan that at every road or street crossing in a village or city a railroad company is bound to place a flagman. *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594.

Where the situation of a crossing reasonably requires the company to provide flagmen or gates, or other adequate provisions to prevent accidents, it is the duty of the company to provide them whether required by statute or not; and the fact that the Michigan statutes charge the railway commissioners with the duty of determining the necessity of flagmen does not relieve a company from providing them if circumstances demand it. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.—EXPLAINING *Battishill v. Humphreys*, 64 Mich. 494; *Guggenheim v. Lake Shore & M. S. R. Co.*, 66 Mich. 150; *Freeman v. Duluth, S. S. & A. R. Co.*, 74 Mich. 86.

Where a state statute empowers the railway commissioners to decide upon the necessity of stationing flagmen at crossings, it must appear that a crossing is more than ordinarily hazardous to justify a jury in finding the company negligent in not providing flagmen when not ordered by the commissioners. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.

The duty of keeping a watchman or flagman at street or road crossings is regulated under a statute by a railroad commissioner; but when a railroad company obstructs its track so that those approaching cannot see a coming train, and the signals required by statute are not sufficient to warn the traveler, some additional warning must be given; and there are cases where a flagman

would be necessary to acquit the company of negligence. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. Cas. 89, 66 Mich. 150, 9 West. Rep. 903, 33 N. W. Rep. 161.—APPROVED IN *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594; *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237. EXPLAINED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.

The statute charges the railroad commissioner with the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railroad, and his absence is of itself no evidence of negligence upon the part of the railroad company, but it must appear that the circumstances of the crossing are such that common prudence would dictate that the company should place a flagman or his equivalent at such crossing. *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594.—APPROVING *Guggenheim v. Lake Shore & M. S. R. Co.*, 66 Mich. 150. EXPLAINING *Battishill v. Humphreys*, 64 Mich. 511.—EXPLAINED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.—*Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.—EXPLAINED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594.

72. Duty to maintain, may exist independent of statute or ordinance.*

—A failure of a railroad company to station a flagman at a crossing is not negligence *per se*. It is not a statutory duty and not made by law a negligent act like many statutory requirements. *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.

An action against a company cannot be predicated directly on a failure to keep a flagman at a crossing and an injury resulting therefrom; but it may be based upon the failure of the company to approach the crossing with due care and caution, and a failure to keep a flagman, or any other omission may be shown by way of specifications of the cause of such failure. And if, from all the circumstances of the case, it

* Duty of company to give signals and keep flagmen at crossings. Discharge of these duties may not relieve it of negligence, see note, 37 AM. REP. 443.

appears that the doing of any particular thing is necessary to secure the safety of persons crossing the track, then the company is required to do that thing. *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.—FOLLOWING AND QUOTING *Chicago & I. R. Co. v. Lane*, 130 Ill. 116; *Chicago, B. & Q. R. Co. v. Perkins*, 125 Ill. 127. QUOTING *Heddles v. Chicago & N. W. R. Co.*, 74 Wis. 239; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401; *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219.

Where the action is for negligently injuring a person at a grade crossing, the jury may consider the failure of the company to station a flagman or to have a gate at the crossing as tending to show negligence, although it has never been requested to do so by the town selectmen nor by the county commissioners, under Mass. Act of 1874, ch. 372, § 126. *Eaton v. Fitchburg R. Co.*, 2 Am. & Eng. R. Cas. 183, 129 Mass. 364.

The passage of two trains in opposite directions along contiguous tracks, in a populous city, so as to meet at or near a crossing properly used by foot passengers, without the presence of a flagman and without lessening their speed—held, to justify a jury in determining that the railway company was guilty of culpable negligence, although flagmen were kept at the places designated in a city ordinance, and the speed did not exceed what was authorized for one train by the ordinance. *New Jersey R. & T. Co. v. West*, 32 N. J. L. 91.

73. Absence of, may be shown as affecting question of negligence.—The law does not require flagmen to be stationed at crossings, yet where a company is sued for an injury at a crossing it is proper to prove that no flagman was stationed there, for the purpose of showing the exact condition of affairs at the time of the accident. *Reid v. New York, N. H. & H. R. Co.*, 17 N. Y. Supp. 801, 44 N. Y. S. R. 688, 63 Hun 630. *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. Rep. 513; affirming 30 Ill. App. 437.

The absence of a flagman or other person at a street crossing to give warning of danger may be shown as an item of evidence to be considered by the jury in connection with all the other evidence upon the question of the negligence of a railroad company in moving its trains or cars over such crossing. *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. Rep. 496. *Hoye v. Chicago & N.*

W. R. Co., 67 Wis. 1, 29 N. W. Rep. 646.—QUOTED IN *Schilling v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 60, 71 Wis. 255; *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.—*Hart v. Chicago, R. I. & P. R. Co.*, 56 Iowa 166, 7 N. W. Rep. 9, 9 N. W. Rep. 116.—DISTINGUISHING *Favor v. Boston & L. R. Corp.*, 114 Mass. 350. REVIEWING *Norton v. Eastern R. Co.*, 113 Mass. 366.

The presence or absence of a flagman is as much a part of the description of the transaction as any other circumstances; and it is proper to instruct the jury that they cannot infer negligence from the absence of the flagman, but that they have a right to consider the absence of a flagman as one of the surrounding circumstances. *Brown v. Rome, W. & O. R. Co.*, 1 N. Y. Supp. 286, 48 Hun 619, mem., 16 N. Y. S. R. 456; affirmed in 121 N. Y. 669, mem.

The absence of a flagman, in connection with proof of the condition of things in respect to the population, travel, and otherwise, in that particular locality, would shed light upon the question of the care and caution on the part of the defendant in running its trains that the safety of the public might reasonably require. *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. Rep. 513; affirming 30 Ill. App. 437.—QUOTED AND FOLLOWED IN *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.

The court charged that while there was no statute or ordinance requiring the company to maintain a gate or flagman at the crossing in question, yet if it appeared from the evidence that these precautions were necessary for the safety of travelers, and would have prevented the injury, then the failure to provide them was a fact authorizing the jury to find defendant guilty of negligence. Held, that the charge was erroneous, the question not being whether there should have been a flagman stationed at the crossing, but whether in view of his presence or absence the train was moved with prudence or negligence. *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.—APPROVING *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 406; *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St. 412; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Welsch v. Hannibal & St. J. R. Co.*, 72 Mo. 451; *Lesan v. Maine C. R. Co.*, 77 Me. 85; Com-

monwealth v. Boston & W. R. Corp., 101 Mass. 201; Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150, 33 N. W. Rep. 167. DISTINGUISHING Burns v. North Chicago Rolling Mill Co., 65 Wis. 315. QUOTING Hoye v. Chicago & N. W. R. Co., 67 Wis. 14; McGrath v. New York C. & H. R. R. Co., 63 N. Y. 522.

74. When required by ordinance.—The N. J. act approved March 10, 1863 (Pamph. L. p. 327, § 4), authorizing the township of East Orange to pass ordinances to compel any railroad company to station and maintain flagmen wherever such railroad may cross any streets or highways in said township, is a valid exercise of legislative power, as a police regulation for the safety of the public and passengers on the trains. *State (Delaware, L. & W. R. Co., pros.) v. East Orange*, 41 N. J. L. 127.—QUOTING *People ex rel. v. Boston & A. R. Co.*, 70 N. Y. 569.

Such ordinance, when passed, is a judicial act imposing pecuniary burden and loss on the railroad company, and is subject to review in the supreme court, which will determine whether the power conferred has been exercised in a legal and reasonable manner. *State (Delaware, L. & W. R. Co., pros.) v. East Orange*, 41 N. J. L. 127.

The failure of a railroad company to keep a flagman at a street crossing to give danger signals, as required by ordinance, is negligence *per se*. *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. Rep. 817.

A statute provided that defendant company might operate its road on a certain avenue in a city "subject to such rules and regulations as to rate of speed and public safety as the common council should prescribe." That body directed a fence on either side of the track with openings at street crossings, and directed flagmen to be stationed at certain places. Plaintiff's intestate was killed in attempting to cross the track at a place where no flagman was required by the ordinance. *Held*, that a failure to station a flagman at the place of the accident was not negligence. *Heaney v. Long Island R. Co.*, 37 Am. & Eng. R. Cas. 529, 112 N. Y. 122, 19 N. E. Rep. 422, 20 N. Y. S. R. 296; reversing 9 N. Y. S. R. 707.

75. Duty to maintain, is a question for jury.—As a rule the question whether ordinary care requires a company to keep a flagman at a crossing that is es-

pecially dangerous is for the jury, and the omission to station flagmen at such crossings may be taken into account as evidence of negligence, although in some cases it has been held that it is a question of law. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.—QUOTING *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578. REVIEWING *Chicago, B. & Q. R. Co. v. Perkins*, 125 Ill. 127; *Thompson v. New York C. & H. R. R. Co.*, 110 N. Y. 636; *Louisville & N. R. Co. v. Commonwealth*, 13 Bush (Ky.) 388; *Weber v. New York C. R. Co.*, 58 N. Y. 451.—*Webb v. Portland & K. R. Co.*, 57 Me. 117.

In the absence of a statute requiring flagmen or gates, the question whether a company should provide them will depend upon circumstances, such as the amount of business, the amount of travel over the street or highway, and the obstructions that may surround the intersection of the street or highway with the track, and where the ringing a bell or sounding a whistle may not be sufficient. *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172; affirmed in 51 Fed. Rep. 174.

There may be extreme cases where a judge is justified in giving an absolute direction upon the question of negligence in failing to station a flagman at a crossing, but generally it is a question for the jury. Even though the facts are undisputed, if they are of such a nature or pertain to such a matter that different intelligent and honest minds might differ in judgment upon them, the question should be left to the jury. *Lesan v. Maine C. R. Co.*, 23 Am. & Eng. R. Cas. 245, 77 Me. 85.

The cars by which the deceased was struck were being moved by their own momentum at the time after a "kick" from an engine, with no person upon them to control their movement or give warning of their approach, and there was no flagman at the crossing. *Held*, that the court properly submitted to the jury the question whether under all the circumstances of the case the defendant was negligent because of these facts. *Tierney v. Chicago & N. W. R. Co.*, 84 Iowa 641, 51 N. W. Rep. 175.

76. — not for the jury.—While evidence of the absence of a flagman at a crossing is admissible to show all the circumstances of the case, yet it is error to instruct the jury that they may find the company negligent if they further find that the circumstances made it the duty of the company

to station a flagman at the place to warn persons. *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37.—QUOTING *Grippen v. New York C. R. Co.*, 40 N. Y. 46; *Weber v. New York C. R. Co.*, 58 N. Y. 458; *McGrath v. New York C. & H. R. R. Co.*, 59 N. Y. 468; *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219. REVIEWING *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.—*Crawford v. Delaware, L. & W. R. Co.*, 23 J. & S. (N. Y.) 50. *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; reversing 28 Hun 407.—APPLYING *Grippen v. New York C. R. Co.*, 40 N. Y. 41. FOLLOWING *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 528.—DISTINGUISHED IN *Nary v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630. QUOTED IN *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287; *Whittaker v. New York & H. R. R. Co.*, 19 J. & S. (N. Y.) 287; *Friess v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 391; *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37; *Winchell v. Abbot*, 77 Wis. 371. REVIEWED IN *Shepard v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 816, 18 N. Y. Supp. 665.

The court charged that while there was no statute or ordinance requiring the company to maintain a gate or flagman at the crossing in question, yet if it appeared from the evidence that one of these precautions was necessary for the safety of travelers, and would have prevented the injury, then the failure to provide it was a fact authorizing the jury to find defendant guilty of negligence. *Held*, that the charge was erroneous, the question not being whether there should have been a flagman stationed at the crossing, but whether, in view of his presence or absence, the train was moved with prudence or negligence. *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.—FOLLOWED IN *Winchell v. Abbot*, 77 Wis. 371.

77. Liability of company for negligence of flagman.—(1) *General rules.*

—As a general rule a railroad company is not bound to keep a flagman at the intersections of its road with public highways; but where, by reason of the extraordinary danger arising from the location of the track, a flagman is required, or the company relies on the presence of a flagman to negative negligence on their part in the running of trains, whether the conduct of the flagman was proper or not is a question depending on the circumstances of each

case. *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. L. 525, 13 Am. Ry. Rep. 75.

Although it is not negligence for a company to fail to keep a flagman at a crossing, yet if one is employed, his failure to perform the usual and ordinary functions of the place may be sufficient to charge the company. Thus where a party is approaching the crossing and fails to hear the bell, a failure of the flagman to give warning is sufficient to charge the company, if such failure solely produced the injury. *Kissenger v. New York & H. R. Co.*, 56 N. Y. 538, 6 Am. Ry. Rep. 154; affirming 4 J. & S. 572.—QUOTED IN *Pennsylvania R. Co. v. State*, 19 Am. & Eng. R. Cas. 326, 61 Md. 108. REVIEWED IN *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680.—*Dolan v. Delaware & H. Canal Co.*, 71 N. Y. 285. *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680.—REVIEWING *Kissenger v. New York & H. R. Co.*, 56 N. Y. 538; *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417.

Where a company places a flagman at a crossing to warn persons of danger, it is liable to one who is induced to undertake to cross by a safety signal given by the flagman, and is injured in attempting to do so by reason of carelessly giving the signal when there was real danger. *Sweeney v. Old Colony & N. R. Co.*, 10 Allen (Mass.) 368.—REVIEWING *Hardcastle v. South Yorkshire R. Co.*, 4 H. & N. 67; *Binks v. South Yorkshire R. Co.*, 32 L. J. Q. B. (N. S.) 26.—APPROVED IN *Moore v. Wabash, St. L. & P. R. Co.*, 84 Mo. 481. DISTINGUISHED IN *Ferguson v. Virginia & T. R. Co.*, 13 Nev. 184; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222. FOLLOWED IN *Murphy v. Boston & A. R. Co.*, 14 Am. & Eng. R. Cas. 675, 133 Mass. 121. QUOTED IN *Woolwine v. Chesapeake & O. R. Co.*, 50 Am. & Eng. R. Cas. 37, 36 W. Va. 329, 15 S. E. Rep. 81; *Union S. Y. & T. Co. v. Rourke*, 10 Ill. App. 474; *Lary v. Cleveland, C., C. & I. R. Co.*, 3 Am. & Eng. R. Cas. 498, 78 Ind. 323, 41 Am. Rep. 572; *Baltimore & O. R. Co. v. Rose*, 27 Am. & Eng. R. Cas. 125, 65 Md. 485; *Baltimore & Y. Turnpike Road v. Cason*, 72 Md. 377; *Keefe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *Pittsburg, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364. REVIEWED IN *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am.

Rep. 667.—*Pennsylvania Co. v. Sloan*, 35 *Am. & Eng. R. Cas.* 440, 125 *Ill. 72*, 17 *N. E. Rep.* 37; *affirming* 24 *Ill. App.* 48. *Chicago, R. I. & P. R. Co. v. Clough*, 134 *Ill.* 586, 25 *N. E. Rep.* 664, 29 *N. E. Rep.* 184; *affirming* 33 *Ill. App.* 129.

In such case a charge that the rate of speed at which plaintiff approached and drove upon the track—a slow trot—of itself constituted contributory negligence, is properly refused. *Richardson v. New York C. & H. R. R. Co.*, 40 *N. Y. S. R.* 616, 61 *Hun* 624, 15 *N. Y. Supp.* 868; *affirmed in* 133 *N. Y.* 563, *mem.*, 30 *N. E. Rep.* 1148, 44 *N. Y. S. R.* 930.

(2) *Illustrations.*—A count in a declaration for a personal injury at a highway crossing alleged an obstruction of the view from the highway by cars and buildings, and that the flagman of the company, well knowing the near approach of a train, recklessly, negligently, and wilfully beckoned to the plaintiff to drive upon the tracks, etc. There was proof on the trial, not only that the flagman beckoned the plaintiff to cross over the tracks, but that he did this negligently and recklessly, when he knew the train was coming. *Held*, that there was sufficient evidence to authorize an instruction based upon the negligence charged in the count. *Chicago, R. I. & P. R. Co. v. Clough*, 134 *Ill.* 586, 25 *N. E. Rep.* 664, 29 *N. E. Rep.* 184; *affirming* 33 *Ill. App.* 129.

An instruction that if the jury believe from the evidence that the place where the damages complained of were sustained was at a point on a public street, and that defendant regularly kept a flagman to warn passers of approaching trains during all hours of the day, and at the hour when the damages complained of were sustained, and that flagging by such flagman at said point was a necessary precaution for the proper and safe operation of the road there, and that such flagman was absent, or neglected and failed to give timely warning, and that by due attention to his duties he could have done so, and that the damages complained of were occasioned by such absence or neglect of his duties, then you must find for the plaintiff and assess his damages at such sum as he is shown by the evidence to have sustained by reason of the injuries complained of—*held*, fatally defective in that it wholly fails to submit to the jury the question whether or not the driver of plaintiff's team was in the exercise of ordinary or

due care to avoid the injury. *Lake Shore & M. S. R. Co. v. Pauly*, 20 *Ill. App.* 658.

Two railroad tracks controlled by the same company crossed a highway near each other, one on a bridge and the other on a level. A flagman for the latter track had for years been in the habit of warning travelers upon the other. In so doing his signals once misled a person so that he advanced at the wrong time and was injured. The company defended on the ground that the flagman was not acting in the line of his employment. *Held*, that this was for the jury. *Peck v. Michigan C. R. Co.*, 19 *Am. & Eng. R. Cas.* 257, 57 *Mich.* 3, 23 *N. W. Rep.* 466.

In an action for the personal injury of one who was driving across the track about dark, plaintiff testified that as she approached the crossing the flagman waved his lantern, which she took as a signal to cross, and upon which she relied. Another witness testified that he crossed almost at the same moment in the opposite direction and was signaled by the flagman to cross, and that he barely escaped a collision. There was other evidence tending to show that the train was running at an improper speed, considering the place. All of this evidence was contradicted by the company. *Held*, that the question of negligence was properly submitted to the jury. *Richardson v. New York C. & H. R. R. Co.*, 40 *N. Y. S. R.* 616, 61 *Hun* 624, 15 *N. Y. Supp.* 868; *affirmed in* 133 *N. Y.* 563, *mem.*, 30 *N. E. Rep.* 1148, 44 *N. Y. S. R.* 930.

The evidence tending to show, among other things, that after a street in a city had been blocked for ten or fifteen minutes by defendants' train, and a number of teams, including the plaintiff's, had gathered, waiting to cross, the train was backed off the street and the engine became hidden from the plaintiff by a building; that the defendants' flagman at once signaled to plaintiff to cross, but before he could pass the tracks the engine returned into the street, blowing off steam and making a great noise; and that plaintiff's horses were frightened thereby and ran away, causing the injuries complained of—*held*, to sustain a finding by the jury that defendants' servants were guilty of negligence. *Kalbus v. Abbot*, 77 *Wis.* 621, 46 *N. W. Rep.* 810.

78. Withdrawal or absence of flagman.—The withdrawal of a flagman from a highway crossing where he is usually kept

is negligence. *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312, 27 N. W. Rep. 43.—APPROVING *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622; *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 523.

It is the duty of a flagman at a public street crossing in a populous city which is much used by the public to know of the approach of trains and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty. The absence of such flagman from his post may excuse one cognizant of his duty from gross negligence in failing to stop before attempting to cross and look both ways to see if a train is approaching. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855.—QUOTED IN *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

Plaintiff's testator approached a crossing where it was the habit to maintain a flagman, but he was absent at the time and no signals were given at the crossing of the approaching train. He looked for trains, but the view being somewhat obstructed, failed to see the approaching train. The train was running rapidly and at an unusual hour. Held, that a nonsuit was improperly granted. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.

70. When public may presume that track is clear.*—Where a flagman is stationed at a crossing, whose duty it is to signal the approach of trains, in the absence of a signal the public may presume that the tracks are clear. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; affirming 33 Ill. App. 129.

Though one about to cross a railroad crossing where a flagman is stationed sees, or could see, the train on the track moving toward him, yet if he is signaled by the flagman to cross, he has a right to presume from the request of the flagman to come on that the train would not move over the crossing while he was in the act of diligently complying with the request. *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.

80. Where one company runs over another's track.—Where the law does not make it the duty to station a flagman at a crossing, one company running its cars over the track of another company is not liable for an injury at a crossing where no flagman was at the time, though it was the habit of the company owning the track to keep a flagman there. *McGrath v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 243.—APPLYING *Parker v. Rensselaer & S. R. Co.*, 16 Barb. (N. Y.) 315.

81. Care with which trains must be run where no flagman is stationed—Backing trains.—It is especially the duty of the train-hands in passing over a street crossing where no flagman is employed to keep a vigilant lookout for persons or vehicles on the track; and where there is an unobstructed view of this track for two miles before reaching the street crossing, it cannot be said that the jury are not warranted in finding negligence in this respect. *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.

The fact that the engine of the train was backing, tender foremost, hauling the train behind the engine, is evidence of negligence on the part of the defendant. *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.

Where a train has just passed a crossing and is to be immediately backed down over it again it is the duty of the company to have some one in a position to prevent persons from attempting to pass over the crossing in the mean time, or to signal the train to stop if there is danger of a collision. *Duane v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394.

82. Negligence in erecting watch-house.—The erection of a flagman's watch-house near a railroad track at a crossing so as to prevent a view of approaching trains is not negligence *per se*. *Central R. Co. v. Feller*, 84 Pa. St. 226, 18 Am. Ry. Rep. 369.

83. Application to compel, under New York act—Necessary averments.—In a proceeding under N. Y. Act of 1892, ch. 676, § 33, to compel a railroad company to erect gates or to station a flagman at a highway crossing, the application which designates the petitioners as "highway commissioners" instead of "commissioners of

* See ante, 54; post, 120.

highways," as designated in the statute, is sufficient, where it appears that the former is the designation generally given them in popular use. *In re Highway Com'rs*, 25 N. Y. Supp. 231, 72 Hun 575.

The above statute provides that the supreme court or the county court may compel a railroad company to erect gates or station a flagman at highway crossings "upon the application of the local authorities." *Held*, that the commissioners of highways are local authorities within the meaning of the statute. *In re Highway Com'rs*, 25 N. Y. Supp. 231, 72 Hun 575.

The above statute only provides that a crossing where such gate is to be erected or flagman stationed shall be one at grade, and therefore it is not necessary that an application under it shall show that the crossing is dangerous. *In re Highway Com'rs*, 25 N. Y. Supp. 231, 72 Hun 575.

84. Evidence of failure to station.—Where the action is to recover for personal injuries at a street crossing, evidence that no signals were given on the train, and that no flagman was stationed at the street when the accident occurred, is properly admitted. *Friess v. New York C. & H. R. R. Co.*, 51 N. Y. S. R. 391, 67 Hun 205, 22 N. Y. Supp. 104.

Where plaintiff sues for an injury at a crossing, he may give in evidence the fact of a failure to station a flagman at the crossing without having alleged it in his complaint. *Lesan v. Maine C. R. Co.*, 23 Am. & Eng. R. Cas. 245, 77 Me. 85.—APPROVED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

In a suit for personal injury at a street crossing where there is much travel evidence for plaintiff that the company had, to the plaintiff's knowledge, kept a watchman at the crossing to give signals of danger until a short time before the accident, when, without the plaintiff's knowledge, it withdrew him, and that, as the plaintiff approached the crossing, he was careful to look for such signals and saw none, is admissible. *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 3 Am. & Eng. R. Cas. 502, 78 Ind. 373, 41 Am. Rep. 580.—QUOTING *Casey v. New York C. & H. R. R. Co.*, 78 N. Y. 518. REVIEWING *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522.—QUOTED IN *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

4. Watchmen.

85. Duty to employ.*—While the non-employment of a watchman at a street crossing by a railway company may not be imputed as negligence, yet it casts upon the company the duty of observing additional care in operating its trains across the street to prevent accidents. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306.

Where an accident occurs on a public thoroughfare in a city, it is for the jury to determine whether the presence of a watchman, or other precautions not taken by the company, were necessary for the public safety. *Bolinger v. St. Paul & D. R. Co.*, 29 Am. & Eng. R. Cas. 408, 36 Minn. 418, 31 N. W. Rep. 856.

The omission of a railway company to place a watchman at grade crossings is not always negligence; each case depends on the circumstances. *Stubble v. London & N. W. R. Co.*, 4 H. & C. 83, L. R. 1 Ex. 13, 11 Jur. N. S. 954, 35 L. J. Ex. 3, 14 W. R. 133, 13 L. T. 376.

Where a person is killed at a level crossing not provided with an attendant and where too trains pass daily, there is evidence of negligence on the part of the company. *Bilbee v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 584, 11 Jur. N. S. 745, 34 L. J. C. P. 182, 13 W. R. 779, 13 L. T. 146.—CONSIDERED IN *Stubble v. London & N. W. R. Co.*, L. R. 1 Ex. 13, 35 L. J. Ex. 3, 11 Jur. N. S. 954, 13 L. T. 376, 14 W. R. 133, 4 H. & C. 83.

86. When required by statute or ordinance—Validity of.—A law requiring a certain railroad company to keep a watchman at a highway crossing does not unjustly discriminate against the company; neither does such law constitute partial legislation. *Kentucky C. R. Co. v. Commonwealth*, (Ky.) 18 S. W. Rep. 368.

A municipal corporation has not the power, by ordinance, to compel a railroad company to maintain at a street crossing within the corporate limits a watchman, for the purpose of giving warning to passers-by of the approach of trains. *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 10 West. Rep. 463, 12 N. E. Rep. 445.—REVIEWED IN *South Covington & C. St. R. Co. v. Berry*,

* Failure to keep watchman at crossing contributing to injury, see 45 AM. & ENG. R. CAS. 147, *abstr.*

50 Am. & Eng. R. Cas. 434, 93 Ky. 43, 18 S. W. Rep. 1026.

Where a city ordinance requires a watchman to be stationed at a crossing, a failure to do so is negligence *per se*; still it will not render the company liable for an accident unless it was the proximate cause of the injury. *Pennsylvania Co. v. Hensil*, 6 Am. & Eng. R. Cas. 79, 70 Ind. 569, 36 Am. Rep. 188.—FOLLOWED IN *Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513.

The object of the city ordinance in requiring railroads to station a watchman at street crossings used by them is to prevent travelers from going on the crossing when trains are approaching, and not to give warning of danger when it is too late to avoid it. *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, 16 S. W. Rep. 381.

Though an action for negligence in injuring plaintiff by the management of a train is not based on a city ordinance requiring the stationing of a watchman at a certain crossing and prescribing his duties, and said ordinance furnished no cause of action, still, the existence of such ordinance was a fact bearing upon the conduct of the managers of the train, and is proper evidence tending to support the general allegation of negligence. *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.—APPLYING *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 119; *Riley v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 385; *Nutter v. Chicago, R. I. & P. R. Co.*, 22 Mo. App. 328; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. Rep. 843. QUOTING *Judd v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 56.

87. Duty of.—It is part of the duty of a watchman at a public crossing to exercise ordinary care in warning persons on or near the crossing of any approach of danger from passing trains, and this is so although the ordinance prescribing the watchman only requires the presence of one at the crossing "who shall display at the cars in the daytime a red flag and at night a red light." *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 93, 13 S. W. Rep. 893.

88. Negligence of.—The failure of a watchman stationed at the intersection of a railroad with a city street to attend to his duties, and to warn a person attempting to cross of the peril from an approaching train, when he might have discovered it by proper attention, is negligence, for which

the railroad company is liable. *Louisville & N. R. Co. v. Webb*, 49 Am. & Eng. R. Cas. 427, 90 Ala. 185, 8 So. Rep. 518.

A watchman or lookout on a train moving slowly, with bell ringing, may presume when he sees a man walking soberly on or near the track that the latter has observed it, and, unless something indicates the contrary, that he will step aside so as to avoid injury. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 31 Am. & Eng. R. Cas. 138, 112 Ind. 166, 11 West. Rep. 328, 13 N. E. Rep. 659.—QUOTING *Pakalinsky v. New York C. & H. R. R. Co.*, 82 N. Y. 424.

In an action against a steam-railroad company by one who, while a passenger in a street-car, was injured by reason of the car being run into at a railroad crossing by a passenger train, the plaintiff is entitled to recover when it appears that the defendant's watchman at the crossing was negligent in failing to give the street-car driver timely notice of the approach of the train, even though the driver was guilty of negligence which contributed to the accident. *Woodiey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 542.

A person was crossing a street in a city after nightfall in which there were four railroad tracks upon which trains were passing at short intervals at all hours of the day, and just as he was stepping upon the farthest track in the direction he was going he was struck by an approaching train and injured to such an extent that he soon afterward died. The company employed a watchman whose duty it was to warn persons crossing the tracks of danger from approaching trains, and, in view of the character of the thoroughfare, such a precaution was proper and necessary. But at the time of the accident the watchman was not present attending to his duty, and the train was running at a much higher rate of speed than was allowed by an ordinance of the city, and it was a question whether a bell was rung or a whistle sounded upon the engine. *Held*, under the circumstances, an omission of any one of the duties mentioned would constitute gross negligence on the part of the company. *St. Louis, V. & T. H. R. Co. v. Dunn*, 78 Ill. 197.—REVIEWED IN *Mobile & O. R. Co. v. Davis*, 42 Am. & Eng. R. Cas. 70, 130 Ill. 146.

89. Leaving gate open unattended, where watchman has been sta-

tioned.*—Where at a public crossing a railroad company has been in the habit of keeping a watchman to open and close a gate at the approach of trains, it is a question for the jury whether the company is not chargeable with negligence in leaving the gate open and fastened back and without a watchman. *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St. 405.—APPROVED IN *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

90. Evidence—Impeaching watchman.—Evidence that the company's watchman at the crossing had admitted, on the night of the accident, that the rear section of the train was going at about fifteen miles an hour was admissible to impeach his credibility where, upon his cross-examination, he denied making such a statement. *Delaware, L. & W. R. Co. v. Converse*, 49 Am. & Eng. R. Cas. 323, 139 U. S. 469, 11 Sup. Ct. Rep. 569.

IV. LIABILITY AS DEPENDENT UPON DUTY TO USE SIGNALS; LOOKOUTS.

1. Signals.†

a. In the Absence of a Statute.

91. At common law.—In the absence of any statutory provision upon the subject no legal obligation rests upon a railroad corporation to blow its whistle in approaching a public crossing with one of its trains. *Brown v. Milwaukee & St. P. R. Co.*, 22 Minn. 165, 19 Am. Ry. Rep. 298. *Spencer v. Illinois C. R. Co.*, 29 Iowa 55.—QUOTED IN *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41; *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340.

Where a statute prescribes certain signals to be given by trains, the common law does not require others that may be more effective, under the maxim that every one must use his own property so as not to injure that of another. *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.—QUOTING *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.—QUOTED IN *Crawford v. Delaware, L. & W. R. Co.*, 13 N. Y. S. R. 298.

The failure to ring a bell or to sound a whistle as a train approaches a crossing of

a public road, may be given in evidence in a common law action against the company, based upon negligence, without being specially pleaded. *Schneider v. Missouri Pac. R. Co.*, 75 Mo. 295.—FOLLOWING *Goodwin v. Chicago, R. I. & P. R. Co.*, 75 Mo. 73.

92. Where danger is great or ordinary care requires a signal.—Independently of statute it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger. *Chicago & A. R. Co. v. Dillon*, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570, 15 N. E. Rep. 181, 13 West. Rep. 286; affirming 24 Ill. App. 203. *Pennsylvania Co. v. Krick*, 47 Ind. 368. *Texas & P. R. Co. v. Anderson*, 7 Tex. App. (Civ. Cas.) 161. *Winstanley v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856.—DISTINGUISHING *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis. 216.—FOLLOWED IN *Winchell v. Abbot*, 77 Wis. 371.

The absence of a statute requiring the ringing of a bell or the sounding of a whistle in approaching highway crossings, will not excuse the company for a failure to do so under all circumstances. Where the view of approaching trains is obstructed, or it is impossible or very difficult to hear them, and in similar cases, it is clearly the duty of the company to give such signals, although not required by statute. *Arts v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153, 5 Am. Ry. Rep. 469.—FOLLOWED IN *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa 45; *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523. REVIEWED IN *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340.

Whether in a given case ordinary care requires the giving of such signals is a question for the jury. *Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76.

93. At city crossings.—It may be negligence for a railroad company not to sound the whistle of a locomotive before it crosses a private way in a city, or not to place at the crossing of such way a sign with the warning, "Look out for the cars," although there is no express provision of law requiring those things to be done in such a place. *Winstanley v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856.

A railroad company is responsible in damages for injuries sustained by a person who is run over by one of its engines at one

* Duties of watchman at crossing. Mere presence not sufficient, see 45 AM. & ENG. R. CAS. 147, *abstr.*

† Failure to ring bell at crossing, see CABLE RAILWAYS, 146.

of its crossings on the street of a city, when it is shown that the engine was being driven at a rate of speed unusual in a depot yard, and beyond the limits of speed allowed under its own regulations, and that no signal by either whistle or bell was given of the approach of the engine. *Ketchum v. Texas & P. R. Co.*, 38 La. Ann. 777.—DISTINGUISHING *Childs v. New Orleans City R. Co.*, 33 La. Ann. 154; *Lott v. New Orleans City & L. R. Co.*, 37 La. Ann. 337.

94. On much-used village streets.

—To run a locomotive and train of cars, which cannot be readily stopped, at a high rate of speed, and without any signal by bell, whistle, or otherwise, across a much-traveled public street in a village, where the crossing is dangerous to travelers by reason of obstructions concealing the approach of trains, no excuse appearing for the omission to give signal of its approach, is negligence, although there exists no statutory requirement respecting the giving of such signals. *Loucks v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 305, 31 Minn. 526, 18 N. W. Rep. 651.—DISTINGUISHING *Shaber v. St. Paul, M. & M. R. Co.*, 28 Minn. 103.

95. On public highway.—In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross, as at the intersection of a mill road or a farm road frequently used, is evidence of negligence to be submitted to the jury. *Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472, 13 S. E. Rep. 884.

96. Where it has been the custom to give warning.—There is no law making it obligatory upon railroads to give any warning, except at public crossings, yet they may make a law for themselves. If a company establish a uniform practice to give a signal at a crossing, although private, but frequently used, and such practice is notorious, such conduct justifies the expectation of those having occasion to cross, that such warning will be given, and a failure to give it is a proper fact for the jury to consider in passing upon the question of the defendant's negligence. *Nash v. New York C. & H. R. R. Co.*, 15 N. Y. S. R. 879, 48 Hun 618, 1 N. Y. Supp. 269.

Where a railway company had erected a

whistle-post at a proper distance from a crossing to give warning of the approach of its trains, and it appeared the public were accustomed to act on the supposition that a signal would be given at that point—held, to be negligence on the part of the company if its engineer failed to give such proper signal on the arrival of the train at that place. *Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472, 13 S. E. Rep. 884.

Where a person is killed at a crossing the court may assume from the frequent use of the crossing by the deceased that he was familiar with the custom of the company to give occasional signals when trains approached the station; that being so, an omission of the custom at the time of the accident may have lulled him into security and induced him to advance after looking and listening for trains. *Vandewater v. New York & N. E. R. Co.*, 74 Hun 32, 26 N. Y. Supp. 397, 56 N. Y. S. R. 208.

97. — or the view is obstructed.—Where the view of an approaching train is obstructed, though the company is not required by statute to sound a whistle or ring a bell when its train approaches a highway, yet where such appliances are available, a failure to use them is negligence. *Hermans v. New York C. & H. R. R. Co.*, 17 N. Y. Supp. 319, 63 Hun 625, 43 N. Y. S. R. 900; affirmed in 137 N. Y. 558, mem., 33 N. E. Rep. 337, 50 N. Y. S. R. 932. *Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472, 13 S. E. Rep. 884.

Where an approaching engine is concealed from the view of persons approaching a highway crossing, at a place of much travel, regardless of the statute, the duty of the company to operate its train at a moderate rate of speed, and to give the usual signals of its approach, is more imperative than at a place of less danger. *Chicago & A. R. Co. v. Dillon*, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570, 15 N. E. Rep. 181, 13 West. Rep. 286; affirming 24 Ill. App. 203.

98. When negligence.—In the absence of a statute imposing upon a railroad company the duty of ringing bells or blowing whistles upon locomotives approaching a crossing, the failure to give such signals is not, as matter of law, negligence. *Vandewater v. New York & N. E. R. Co.*, 135 N. Y. 583, 32 N. E. Rep. 137, 49 N. Y. S. R. 55; reversing 63 Hun 186, 43 N. Y. S. R. 420, 17 N. Y. Supp. 652.

Unless the omission occasions a collision. *Galena & C. U. R. Co. v. Dill*, 22 Ill. 265.—APPROVED IN *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340. DISTINGUISHED IN *St. Louis, J. & C. R. Co. v. Terhune*, 50 Ill. 151. FOLLOWED IN *Indianapolis & St. L. R. Co. v. Blackman*, 63 Ill. 117; *Chicago & A. R. Co. v. Logue*, 47 Ill. App. 292.

When the safety of persons or property demands that signals be given at crossings, the failure to give them, in the absence of a statute requiring such alarms, would be negligence. *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa 45, 9 Am. Ry. Rep. 75.—FOLLOWING *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153; *Jackson v. Chicago & N. W. R. Co.*, 36 Iowa 451.

b. Under Statutes.*

99. Constitutionality of statutes.—It is within the power of the legislature to enact laws regulating the running of railroad trains across public highways and declaring the omission of prescribed signals to be negligence. *Kaminitsky v. Northeastern R. Co.*, 25 So. Car. 53.—APPROVING *People ex rel. v. Boston & A. R. Co.*, 70 N. Y. 570; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407.

If section 5478, Mansf. Ark. Dig., which provides a penalty for failure of a railway company to signal at a highway crossing, is unconstitutional in so far as it awards a part of the penalty to an informer, instead of awarding the entire penalty to the school fund, its remaining provisions are legally separable and will stand. *St. Louis, A. & T. R. Co. v. State*, 56 Ark. 166, 19 S. W. Rep. 572.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. State*, 55 Ark. 200.

Kan. Gen. St. 206, § 60, is unconstitutional for the same reason. *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1.

Ind. act of March 29, 1879, requiring all railroads in the state to blow a whistle when approaching a turnpike or other highway crossing, is constitutional and valid. *Pittsburgh, C. & St. L. R. Co. v. Brown*, 67 Ind. 45.

Sections of So. Car. Gen. St. requiring a railroad engine to carry a bell of a certain make and to give certain signals at a road

crossing (§ 1483), and holding the company liable for all damages caused by the collision if a failure to give such signals contributed to the injury, unless the person injured was guilty of gross or wilful negligence which contributed to the injury or was acting in violation of law (§ 1529), are not unconstitutional. *Kaminitsky v. Northeastern R. Co.*, 25 So. Car. 53.—DISTINGUISHED IN *Whilton v. Richmond & D. R. Co.*, 57 Fed. Rep. 551.

100. Nature of statutes — Police regulation.—The right to require existing railroads to give signals in approaching highway crossings grows out of the police power of the state, and such laws are valid though such precautions were not required when the company was chartered. *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575; affirming 28 Ill. App. 73. *Pittsburgh, C. & St. L. R. Co. v. Brown*, 67 Ind. 45. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. Rep. 790.

A charter confers upon a company certain privileges, but in the exercise of those privileges it is just as much subject to the general police laws of the state, such as laws requiring signals at highway crossings, as are individuals. *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548.

101. General effect of statutes.—The effect of N. Y. Act of 1850, p. 232, § 39, requiring trains to give signals on approaching highway crossings, is only to render the company liable for all damages sustained by individuals by reason of a failure to give such signals; and proof that signals were not given will not of itself entitle a plaintiff to recover unless he further shows that such failure caused the injury. *Stevens v. Oswego & S. R. Co.*, 18 N. Y. 422.

Such a statute superadds a duty upon the railroad company the disregard of which, however, would impose no greater or other liability than would follow from the disregard of a common law duty in respect to the care in running a train. The mere omission to ring the bell would not of itself render the company liable for damages. *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.—QUOTED IN *International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301.

The meaning of the statute is that the failure to ring the bell is negligence, and if by reason thereof the person injured was not aware of the approach of the train, and

* Railway warnings and signals, see notes, 23 Am. & Eng. R. Cas. 249; 35 Id. 349.
See also 55 Am. & Eng. R. Cas. 190, abstr.

the injury resulting from this negligence was the proximate cause, then defendant is liable. *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.

102. Object and purpose of the statutes.—The purpose of the statutory signals is not merely to give notice that a railroad track crosses the highway, but also to warn travelers on the highway of the approach of trains. Where one train is run so close behind another as to make the statutory signals unavailing as a means of warning travelers, the railroad company is guilty of negligence. *Chicago & E. I. R. Co. v. Boggs*, 23 Am. & Eng. R. Cas. 282, 101 Ind. 522, 51 Am. Rep. 761.

The provisions of the N. Y. Railroad Act of 1854, ch. 282, § 7, requiring certain signals to be given upon railroad trains approaching highway crossings, was intended not only to protect persons lawfully using a highway from danger of collision at crossings, but also from danger arising from the fright of horses by passing trains. *Voak v. Northern C. R. Co.*, 75 N. Y. 320.—FOLLOWING *People v. New York C. R. Co.*, 25 Barb. 199; *Harty v. Central R. Co.*, 42 N. Y. 471.

Such also was the purpose of Wis. Rev. St. § 1809. *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 Am. & Eng. R. Cas. 16, 62 Wis. 178, 22 N. W. Rep. 147, 51 Am. Rep. 718.—CRITICISING *East Tenn., V. & G. R. Co. v. Feathers*, 10 Lea (Tenn.) 103. DISTINGUISHING *Holmes v. Central R. & B. Co.*, 37 Ga. 593; *Elwood v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 808; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401. QUOTING *People v. New York C. R. Co.*, 25 Barb. (N. Y.) 199. REVIEWING AND QUOTING *Harty v. Central R. Co.*, 42 N. Y. 468.

Where a person sees an engine upon a railroad and knows in time to avoid an injury that it is approaching a crossing, the railroad company is not chargeable with negligence in not ringing the bell upon the engine or because of the absence of a flagman usually, but not necessarily, stationed at the crossing, or the absence of a light upon the engine in the night-time; as the sole object of ringing the bell or of keeping a flagman or of having a light, so far as travelers upon a highway are concerned, is to notify them of the approach of trains. *Pakalinsky v. New York C. & H. R. R. Co.*, 2 Am. & Eng. R. Cas. 251, 82 N. Y. 424.

The purpose of giving warning before a

railroad train or locomotive comes to a crossing is not only to prevent persons from driving on the track in front of it, but also to give notice to travelers upon the highway, so that they may not approach within dangerous proximity to the train. *Quigley v. Delaware & H. Canal Co.*, 142 Pa. St. 388, 21 Atl. Rep. 827.

Whilst the statutory signals to be given at road crossings are intended as a warning to those crossing the track, and the failure to give them as to such persons only is negligence *per se*, the failure may be considered in proving negligence on the part of the company as to other parties lawfully on the railway. *International & G. N. R. Co. v. Gray*, 27 Am. & Eng. R. Cas. 318, 65 Tex. 32.

One of the chief purposes of the statute in imposing duties on railway companies in running their trains across a public road was to protect human life. That policy attaches to the crossing of every road which is in fact public and where the extent of travel makes it the duty of the owners of railway trains to look after the safety of those using the road as a highway. *Missouri Pac. R. Co. v. Lee*, 35 Am. & Eng. R. Cas. 364, 70 Tex. 496, 7 S. W. Rep. 857.—REVIEWED IN *Missouri Pac. R. Co. v. Bridges*, 39 Am. & Eng. R. Cas. 604, 74 Tex. 520.

The statutory requirement of blowing the whistle or ringing the bell sixty rods before reaching a crossing is intended to warn persons who are about to use the crossing in passing over the public road, and not for the purpose of preventing dumb animals from going upon the crossing. *Toudy v. Norfolk & W. R. Co.*, 38 W. Va. 694, 18 S. E. Rep. 896.

103. To what railroads statutes apply.—Ill. Gen. Railroad Act of March 5, 1849, providing, among other things, that a signal shall be given either by bell or whistle by each locomotive approaching highway crossings, applies to companies created before the passage of such law; and a failure to give such signals is *prima-facie* negligence. *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548.—QUOTED IN *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140.

The act of 1849 applies to all railroads in the state not specially exempted by their charters; as well to those chartered since the passage of the act as to those receiving their charters before that time. *Western Union R. Co. v. Fulton*, 64 Ill. 271.—FOL-

LOWING Indianapolis & St. L. R. Co. v. Blackman, 63 Ill. 117.

The charter of the Illinois Central railroad company fixed its duty as to the giving of signals of trains approaching highway crossings. Afterward a general law was passed on the subject of such signals, prescribing different duties in that regard, and the new rule was made applicable to all railroads. The legislature had the power to impose these new duties upon all railroads, whether incorporated before or afterward. The right to impose such duties grows out of the police power. *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575; *affirming* 28 Ill. App. 73.

In an action against a railroad corporation to recover the statutory penalty for failing to give the statutory signals at a public road crossing, it is sufficient to allege that defendant "has been operating and running" the railroad in question. Whether defendant had been operating such railroad as owner, lessee, or otherwise, the requirement of "owner," under the statute, has been fulfilled. *State v. St. Joseph, St. L. & S. F. R. Co.*, 46 Mo. App. 466.

A dummy-line, over which trains are drawn by a small steam-engine for transportation of passengers only, whether operated within or without the limits of a municipality is a railroad, within the meaning of the statutes prescribing certain precautions for prevention of accidents on railroads. *Katsenberger v. Lawo*, 50 Am. & Eng. R. Cas. 443, 90 Tenn. 35, 16 S. W. Rep. 611.

104. To what persons they apply, generally.*—The duty of railroad companies to ring a bell or sound a whistle on a train approaching a highway crossing is intended for the benefit or protection of travelers upon the public highways and passengers upon the passing trains, and the place indicated is the intersection of a railroad with a public highway. *Williams v. Chicago & A. R. Co.*, 135 Ill. 491, 26 N. E. Rep. 661; *affirming* 32 Ill. App. 339.

The requirement of Mo. Rev. St. § 806, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for

the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway. The statute does not require that these warnings shall be continued until the train has passed the crossing, but only until the engine has passed. *Bell v. Hannibal & St. J. R. Co.*, 4 Am. & Eng. R. Cas. 580, 72 Mo. 50.—DISTINGUISHED IN *Pope v. Kansas City Cable R. Co.*, 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891. REVIEWED IN *Frick v. St. Louis, K. C. & N. R. Co.*, 8 Am. & Eng. R. Cas. 280, 75 Mo. 595; *Long v. St. Louis, K. & N. W. R. Co.*, 23 Mo. App. 178.

While Mo. Rev. St. 1889, § 2608, requiring a railroad approaching a public road or street to give the statutory signals, are intended to give warning only to persons crossing or attempting to cross the railroad over a public highway, yet it does not follow that no other signals than the statutory ones are ever required. *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 20 S. W. Rep. 439.

Vt. Gen. St. ch. 28, § 55, relating to signals at highway crossings, applies both to persons approaching or in the act of passing the crossing, as well as to persons who are lawfully at or near a crossing, if so situated as to be subject to accident or injury by passing trains. *Wakefield v. Connecticut & P. R. Co.*, 37 Vt. 330.—DISAPPROVED IN *Louisville, E. & St. L. Con. R. Co. v. Lee*, 47 Ill. App. 384. REVIEWED IN *Grey v. Mobile Trade Co.*, 55 Ala. 387.

Consol. St. of Canada, ch. 66, § 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of the train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision or by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. *Grand Trunk R. Co. v. Rosenberger*, 19 Am. & Eng. R. Cas. 8, 9 Can. Sup. Ct. 311; *affirming* 8 Ont. App. 482, which *affirms* 32 U. C. C. P. 349.

105. Persons walking along track.—The statute requiring a bell to be rung or a whistle sounded on trains before reaching highway crossings was intended to protect

* For whose benefit signals upon trains approaching crossings are required, see note, 17 L. R. A. 354.

Statutory provisions as to signals relate only to safety of persons at crossings, see note, 15 Am. & Eng. R. Cas. 459.

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persons crossing the track, and has no reference to persons injured while walking on the track. *Chicago & E. I. R. Co. v. McKnight*, 16 Ill. App. 596. *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 211.—REVIEWING *Ricketts v. East & W. I. D. & B. J. R. Co.*, 12 C. B. 159, 74 E. C. L. 160.—APPROVED IN *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; *Le May v. Canadian Pac. R. Co.*, 17 Ont. App. 293. EXPLAINED IN *Burnham v. New York, P. & B. R. Co.*, 17 R. I. 544.

The statutory diligence required touching the use of the bell or whistle, and touching checking of trains on approaching public crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it; yet relatively to the latter as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury. *Central R. & B. Co. v. Raiford*, 37 Am. & Eng. R. Cas. 481, 82 Ga. 400, 9 S. E. Rep. 169.—FOLLOWED IN *Georgia R. & B. Co. v. Daniel*, 89 Ga. 463.

It would not be appropriate in such a case to instruct the jury, without proper explanation and qualification, that "the requirements of blowing the whistle, ringing the bell, and checking the speed are not for the protection of persons using the track as a thoroughfare in its length and not in crossing it." *Georgia R. & B. Co. v. Daniel*, 89 Ga. 463, 15 S. E. Rep. 538.—FOLLOWING *Central R. & B. Co. v. Raiford*, 82 Ga. 400.

106. — or parallel with it.—A statutory regulation requiring locomotives to ring the bell at crossings does not apply in favor of persons not injured in crossing the railroad, but while riding parallel to it. *East Tenn., V. & G. R. Co. v. Feathers*, 15 Am. & Eng. R. Cas. 446, 10 Lea (Tenn.) 103.—CRITICISED IN *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 Am. & Eng. R. Cas. 16, 62 Wis. 178. REVIEWED IN *Randall v. Richmond & D. R. Co.*, 42 Am. & Eng. R. Cas. 603, 104 N. Car. 410.—*Louisville, E. & St. L. Con. R. Co. v. Lee*, 47 Ill. App. 384.—DISAPPROVING *Wakefield v. Connecticut & P. R. R. Co.*, 37 Vt. 330; *Ransom v. Chicago, St. P., M. & O. R. Co.*, 62 Wis. 178. FOLLOWING *Williams v. Chicago & A. R. Co.*, 32 Ill. App. 339.

107. Persons who know that the train is approaching, or that no signal will be given.—If a traveler on the highway sees or has notice of an approach-

ing train in time to avoid a collision upon the crossing, the object of ringing a bell or sounding a whistle is subserved, and the failure to perform such acts, or either of them, cannot be held to be the cause of an injury resulting from a collision, under such circumstances. *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102. *Atchison, T. & S. F. R. Co. v. Walz*, 40 Kan. 433, 19 Pac. Rep. 787. *State v. Baltimore & O. R. Co.*, 35 Am. & Eng. R. Cas. 412, 69 Md. 339, 14 Atl. Rep. 688, 12 Cent. Rep. 890. *Telfer v. Northern R. Co.*, 30 N. J. L. 188. *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.—FOLLOWING *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.—*Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep. 862.—QUOTING *International & G. N. R. Co. v. Graves*, 59 Tex. 332.

So held, where a person waiting for a night train saw a headlight, and was told that the train was coming, and who was struck by a rapidly moving engine in attempting to cross the track to the station, it proving to be a freight train passing the station without stopping, and without giving the usual signals, the evidence showing that freight and passenger trains could be distinguished at night on their approach by the difference in the sound of their whistles and the places at which they blew. *McDonald v. International & G. N. R. Co.*, (Tex. Civ. App.) 20 S. W. Rep. 847; reversed in 55 Am. & Eng. R. Cas. 280, 86 Tex. 1, 22 S. W. Rep. 939; former appeal, 42 Am. & Eng. R. Cas. 211, 75 Tex. 41, 12 S. W. Rep. 860.

Defendant company erected a pole with a bell on it at the side of a crossing, and on either side, and 1700 feet away on the track, it placed annunciators connected with the bell by wires, causing the bell to ring when trains passed; but it proved a failure, and for nearly two years had been abandoned, though the post and bell remained. Plaintiff's intestate, who was killed at the crossing, passed it daily, and knew that the apparatus was out of order. Held, that allowing the pole and bell to remain was not evidence of negligence as to the intestate; neither was it negligence in failing to keep it in order as to him, and it was therefore error to submit such questions to the jury. *Wellenhoffer v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 111, 21 N. Y. Supp. 866, 66 Hun 634, mem.

108. Persons suddenly coming on

track-Trespassers.*—It is the duty of an engineer in charge of a train moving, or about to move, to give timely warning of its approach to a crossing or other place where the public have a right to go, and it is no less his duty to use all necessary means consistent with the safety of those on the train to prevent injury to a person on the track in front of a train after his peril is discovered; and this duty the company owes even to a trespasser on the track, who may recover for an injury wantonly or intentionally inflicted on him. *Shelby v. Cincinnati, N. O. & T. P. R. Co.*, 85 Ky. 224, 3 S. W. Rep. 157.—FOLLOWING Kentucky C. R. Co. v. Gastineau, 83 Ky. 119.—APPLIED IN *McDermott v. Kentucky C. R. Co.*, (Ky.) 54 Am. & Eng. R. Cas. 121, 20 S. W. Rep. 380. FOLLOWED AND QUOTED IN *Louisville & N. R. Co. v. Potts*, 92 Ky. 30.

The New Jersey statute requiring signals to be given for a specified distance before trains reach highway crossings, and requiring warning signals at such places, does not apply to persons walking upon the track between where the signal is required to be given and the crossing, and a company cannot be charged with negligence in failing to give such warning to them. *Harty v. Central R. Co.*, 42 N. Y. 468.—QUOTING *People v. New York C. R. Co.*, 25 Barb. 199.—APPROVED IN *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478. FOLLOWED IN *Voak v. Northern C. R. Co.*, 75 N. Y. 320. QUOTED AND REVIEWED IN *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 Am. & Eng. R. Cas. 16, 62 Wis. 178, 51 Am. Rep. 718.

Independent of statutes, it is the duty of railroads to give warning to persons who may be seen walking on the track, though not at crossings; but where a person is walking on one track and a train is approaching on another parallel track, signals are not required; and if he suddenly steps to the other track so near to the engine that no effort would save him, the company is not chargeable with negligence in failing to give a signal. *Harty v. Central R. Co.*, 42 N. Y. 468.—APPROVED IN *Le May v. Canadian Pac. R. Co.*, 17 Ont. App. 293.

Plaintiff was injured in crossing a railroad

* Trespasser cannot complain of omission of precautions required at crossings or for safety of passengers, see note, 45 AM. & ENG. R. CAS. 36. See also 35 *Id.* 327, *abstr.*

track within the corporate limits of a city. Proceedings had been taken to lay out a street across the track at the point, and awards had been made to all owners of the land, except the railroad company; and some work had been done in grading the street, and people were in the habit of passing. *Held*, that plaintiff had no right to go upon the track at such a place, and in the absence of any license or acquiescence by the company the fact that other persons were in the habit of crossing there would not cast any additional duty upon the company as to the management of its trains. *Matze v. New York C. & H. R. R. Co.*, 1 Hun (N. Y.) 417, 3 T. & C. 513.

Even if there was evidence from which a license might be inferred, and the plaintiff was not a trespasser, such license created no legal right, and imposed no duty on the company, except the general duty not to intentionally wrong or injure persons crossing. *Matze v. New York C. & H. R. R. Co.*, 3 T. & C. (N. Y.) 513, 1 Hun 417.

In an action against a railroad for injuries to the plaintiff whilst crossing the road, the jury did not find that he was crossing on his lawful business. *Held*, that there was not sufficient in the finding on which to enter judgment, for unless he was a traveler he was unlawfully on the track of the road. *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. St. 250.—DISTINGUISHED IN *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

109. To what trains they apply—Trains starting within prescribed distance of crossing.—The requirement of the statute that a bell shall be rung or whistle sounded upon a locomotive on approaching a highway crossing, for the distance of eighty rods from such crossing and until the crossing is reached, applies in cases where the cars begin to move within the eighty rods, as well as to cases where the point of starting is more than eighty rods distant. *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. Rep. 510; affirming 35 Ill. App. 430.

Ind. Rev. St. 1881, § 4020, providing what signals shall be given when a locomotive engine approaches a highway crossing, is not applicable by its terms to a train of cars without an engine. Those in charge of such a train, however, will not be relieved from the obligation to take such other proper precaution as the circumstances re-

quire to avoid injury. *Ohio & M. R. Co. v. McDoneld*, 5 Ind. App. 108, 31 N. E. Rep. 836.

The statutory precautions for prevention of accidents on railroads apply indifferently to all trains impelled by steam power, whether they are moving backward or forward, or by means of an engine placed in front or rear, or at an intermediate point in the train. But as these precautions can be complied with only when a train is moving forward by means of an engine in its front, the railway company's liability for injuries inflicted when a train is moving backward, or by means of an engine placed elsewhere than in front, is absolute. *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 271, 16 S. W. Rep. 613.

On the trial of an action for damages for negligently injuring the plaintiff at a public crossing the court correctly instructed that it was the duty of the servants of the company to ring the bell or blow the whistle eighty rods before coming to the crossing. The engine causing the injury had not gone eighty rods from the crossing before returning to it on occasion of the injury. The court also correctly instructed that if the distance to which the engine went past the crossing was less than eighty rods, then it was the duty of said servants, etc., to ring the bell, etc., while the engine was in motion within eighty rods of the crossing. *Texas & P. R. Co. v. Bailey*, 83 Tex. 19, 18 S. W. Rep. 481.

Under Wis. Rev. St. § 1809, providing that before crossing any highway the whistle of a locomotive shall be blown eighty rods from such crossing, a locomotive may lawfully turn back and recross a highway before going eighty rods beyond it. *Cahoon v. Chicago & N. W. R. Co.*, 85 Wis. 570, 55 N. W. Rep. 900.

A highway crossed the defendants' line at right angles; their passenger station lay adjacent to the highway on the east and their shunting ground and yard adjacent to it on the west. The shunting-yard was less than eighty rods from the highway, and eight tracks crossed the highway, with intervals of a few feet between them. The defendants in shunting a train of flat-cars drew them from the east end to the west end of the yard, and after a pause backed them easterly. After backing for some distance the engine uncoupled from the train of cars, switched upon another track

to the south, and the train and engine both continued to back down on different tracks to the highway, at a speed of about six miles an hour. At the time the plaintiff was proceeding along the highway from south to north, and was about to cross the tracks. The flat-cars had reached the highway and were passing over it. The plaintiff, while watching these in front of her, did not see or hear the engine coming down on the other track, and was struck by a tender and injured. There was no lookout man on the tender and there was contradictory evidence as to the ringing of the bell at all, though, at most, it was not rung until the engine had run some distance toward the highway, and the whistle was not blown. The jury found that the accident was caused by the negligence of the defendants, and that the negligence consisted in not ringing the bell in time. *Held*, that there was sufficient in the general facts of the case to justify a verdict in favor of the plaintiff; and that whether section 256 of the railway act 1888 applied or not, under the circumstances of this case, the defendants did not object to its application by the trial judge; and the jury having, on contradictory evidence, found negligence against them in not ringing the bell, in passing over the distance from the starting point to the crossing, the verdict should not be interfered with. (Burton, J. A., dissenting.) *Hollinger v. Canadian Pac. R. Co.*, 55 Am. & Eng. R. Cas. 269, 20 Ont. App. 244; *dismissing appeal from 55 Am. & Eng. R. Cas. 192, 21 Ont. 705.*

110. Trains on side-tracks—Wild trains.—A statute requiring signals by trains to be given eighty rods before reaching a highway crossing applies to trains running upon a side-track by reason of the main track being obstructed by a standing train. *Brown v. Griffin*, 71 Tex. 654, 9 S. W. Rep. 546.

It is negligence to run an unscheduled train at an extraordinary speed across a public highway without signaling its approach by bell and whistle. *Roberts v. Alexandrian & F. R. Co.*, 83 Va. 312, 2 S. E. Rep. 518.

In an action for the death of a person who was struck and killed on his farm crossing, by a wild engine running on defendant's road, it appeared that just before reaching the crossing the railroad track passed through a cut, and that there was a

curve in the track; that the engine was running from 35 to 60 miles an hour; that no whistles were blown except two or three short ones about the instant the crash was heard; that the notice required by defendant's rules to be given of the passing of a wild engine by the last preceding train carrying a red flag was disregarded; that the deceased had no notice of the wild engine being run; that no regular train was due at that point for some time; that defendant's rules required wild engines not to be run over crossings over 15 miles an hour unless a red flag had been sent out on the preceding train. *Held*, that from this evidence the jury might legitimately infer and find that defendant failed to exercise due care, and that the want of it produced the injury resulting in the death of deceased. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 *Am. & Eng. R. Cas.* 163, 20 *Atl. Rep.* 976.

111. Public highways, and what are deemed such.*—A place, not on a public road, where a railroad company was in the habit of stopping its trains for the sole purpose of taking on or putting off passengers who had notified those in charge of the trains to do so, and when such trains would also stop at other places for this purpose, is not a "regular depot or crossing," within the meaning of Ala. Code, § 1699, requiring the bell to be rung or the whistle blown within a quarter of a mile of a depot or crossing. *Cook v. Central R. & B. Co.*, 67 *Ala.* 533.

An action against a railway company for an injury by a passing train at an intersection of an avenue used by the public, on the ground of a failure to give the usual warning by bell or whistle, is not a statutory action, although there may be references in the declaration to the statutory duty, and the company cannot escape liability for the injury on the ground that the avenue is not a public highway, in the sense of that term as used in the statute, requiring such warning before crossing public highways. *Chicago & A. R. Co. v. Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill. 570*, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286; *affirming* 24 *Ill. App.* 203.

In a statutory action to recover the penalty for a failure to ring a bell or sound a whistle before reaching a public highway crossing, the question whether the avenue

crossed is such a highway might become a material one to a right of recovery. *Chicago & A. R. Co. v. Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill. 570*, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286; *affirming* 24 *Ill. App.* 203.

Where the evidence tends to show that the public road had been traveled and worked from ten to fifteen years, it is a sufficient showing of a "traveled public road" named in the statute requiring signals at public crossings. *State v. St. Joseph, St. L. & S. F. R. Co.*, 46 *Mo. App.* 466.

Although a highway crossing a railroad track has been regularly laid out, yet until it has been actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation named in, and as required by, the act of 1853 (ch. 62, Laws of 1853), the duty imposed by the general railroad act, as amended in 1854 (§ 7, ch. 282, Laws of 1854), of ringing a bell or sounding a whistle upon a train approaching the crossing does not attach; the highway is not "a traveled public road or street" within the meaning of said last-mentioned act. *Cordell v. New York C. & H. R. R. Co.*, 64 *N. Y.* 535; *reversing* 6 *Hun* 461.

To bring a case within the requirements of the New York statute requiring a bell to be rung or a whistle blown upon every engine approaching "any traveled public road or street," the road or street must be both public and traveled, and it does not include an alley which is not traveled nor capable of being traveled. *Byrne v. New York C. & H. R. R. Co.*, 94 *N. Y.* 12; *reversing* 28 *Hun* 438. — FOLLOWING *Cordell v. New York C. & H. R. R. Co.*, 64 *N. Y.* 535.

Where there has been such a user of a road by the public for twenty years as would justify a record of it as a public highway, and it has either been kept in repair or taken in charge of by the public authorities, the fact that they have failed to perform their duty to record it does not change the mandate of the statute that it shall be deemed a public highway. *Lewis v. New York, L. E. & W. R. Co.*, 123 *N. Y.* 496, 26 *N. E. Rep.* 357, 34 *N. Y. S. R.* 373; *affirming* 52 *Hun* 614, 1 *Silo. Sup. Ct.* 393, 24 *N. Y. S. R.* 435, 5 *N. Y. Supp.* 313. — DISTINGUISHING *Barry v. New York C. & H. R. R. Co.*, 92 *N. Y.* 289; *Byrne v. New York C. & H. R. R. Co.*, 104 *N. Y.* 362.

The fact that a street has been discontinued by resolutions of the commissioners

* See also *ante*, 6.

of highways, but not practically closed, the discontinuance being conditional upon the railroad company opening another road and preparing it for travel, does not relieve the company from the statutory duty of giving warning on approaching such crossing. *Rodrian v. New York, N. H. & H. R. Co.*, 28 N. Y. S. R. 625, 7 N. Y. Supp. 811.

The right of a court to regulate signals where highways cross railroads, as given by the General Railroad Act of 1890, § 33, extends to a crossing where the railroad track is two feet below grade, though the statute uses the expression "where railroads pass over a highway at grade." *In re Highway Com'rs of Islip*, 74 Hun (N. Y.) 48, 26 N. Y. Supp. 385, 56 N. Y. S. R. 148.

Where the evidence showed that a road intersected by a railroad was traveled by the public, and had been worked and repaired by the authorities having charge of highways in that district—*held, prima-facie* evidence that it was a public highway, legally established, and was sufficient to require a railroad company, when sued for injury caused by a neglect to ring a bell or sound a whistle when approaching the same, to show that it was not legally established, in order to excuse itself from liability for neglect of this duty. *Illinois C. R. Co. v. Benton*, 69 Ill. 174.

112. When statutes apply to streets.—The duties required of railroad companies by the provisions of Ga. Code, §§ 706, 707, apply to streets as well as public and private road crossings. *Western & A. R. Co. v. Atlanta*, 19 Am. & Eng. R. Cas. 233, 74 Ga. 774.

Under Ill. act of March 5, 1874 (Rev. St. ch. 131, § 1), which declares that "the word 'highway,' 'road,' or 'street' may include any road laid out by authority * * * of any town or county," the word "highway," as used in the statute (Rev. St. 1889, ch. 114, § 68) requiring signals to be given before crossing "any public highway," includes a public street in an incorporated town. *Mobile & O. R. Co. v. Davis*, 42 Am. & Eng. R. Cas. 70, 130 Ill. 146, 22 N. E. Rep. 850; *reversing* 31 Ill. App. 490, 24 Ill. App. 250.—*REVIEWING* St. Louis, V. & T. H. R. Co. v. Dunn, 78 Ill. 197.

The Wisconsin statute requiring all trains to cause a bell to be rung before crossing any of the streets of an incorporated city, and limiting the rate of speed of trains therein applies to all streets actually traveled

within the city limits, though only streets by user, but not to those that are merely laid out in plats or adopted by the city authorities. *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.—*FOLLOWED IN* *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.

113. — when not.—The statute requiring signals at crossings does not apply to street crossings within the limits of the city; and a failure to give such signals does not establish negligence, but is only a circumstance tending to show negligence. *Bleye v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46 Hun 675, *mem.*; *affirmed* in 113 N. Y. 626, *mem.*, 20 N. E. Rep. 877, 22 N. Y. S. R. 993. *Missouri Pac. R. Co. v. Pierce*, 19 Am. & Eng. R. Cas. 318, 33 Kan. 61, 5 Pac. Rep. 378. *Louisville, N. O. & T. R. Co. v. French*, 69 Miss. 121, 12 So. Rep. 338.

The New York statute requiring signals to be given at highway crossings, but excepting therefrom crossings in cities, is not intended to prohibit the sounding of a whistle in a city. The statute can only be construed to mean that there is no duty enjoined upon companies to give signals within cities. *Mayer v. New York C. & H. R. R. Co.*, 29 N. Y. S. R. 183, 8 N. Y. Supp. 461, 55 Hun 608, *mem.*; *affirmed* in 132 N. Y. 579, *mem.*, 43 N. Y. S. R. 965.

114. Must give signals though forbidden by ordinance.—Railway companies are not excused from strict compliance with the statutory precautions for prevention of accidents when operating their trains within the limits of a city, although the giving of the signals—as, e.g., the blowing of the whistle—is forbidden and declared a misdemeanor by ordinance of the municipality. *Katsenberger v. Lawo*, 50 Am. & Eng. R. Cas. 443, 90 Tenn. 235, 16 S. W. Rep. 611.

They must comply strictly with all statutory precautions for the prevention of accidents on railroads, even while operating their trains over tracks laid, by lawful permission, in the streets of a populous city. *Katsenberger v. Lawo*, 50 Am. & Eng. R. Cas. 443, 90 Tenn. 235, 16 S. W. Rep. 611.

115. Private crossings.*—Railroad companies are not bound to give the statutory signals on approaching the crossing

* See also *ante*, § 5.

At what crossings train signals are required, including private crossings, see note, 16 L. R. A. 119.

of private ways where they have not been accustomed so to do. *Johnson v. Louisville & N. R. Co.*, (Ky.) 13 *Am. & Eng. R. Cas.* 623. *Locke v. First Div. St. P. & P. R. Co.*, 15 *Minn.* 350 (*Gil.* 283). *Maxey v. Missouri Pac. R. Co.*, 113 *Mo.* 1, 20 *S. W. Rep.* 654.

There is no statute in Maryland which imposes upon a railroad the duty to give signals of the approach of its trains to private roads or farm crossings. *Annapolis & B. S. L. R. Co. v. Pumphrey*, 42 *Am. & Eng. R. Cas.* 599, 72 *Md.* 82, 19 *Atl. Rep.* 8.

The provision of Ga. Code, § 708, requiring a blow-post to be erected four hundred yards from the centre of each road crossing, on each side, and a signal to be given whenever a locomotive arrives at the post, only applies to public roads, and not to private ways. *Georgia R. Co. v. Cox*, 61 *Ga.* 455.

A mere track crossing, on a road or way on a railway company's own grounds, for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within section 104 of C. S. C. c. 66, so as to subject the company to the requirements of that section, of ringing the bell or sounding the whistle when approaching such crossing. *Bennett v. Grand Trunk R. Co.*, 13 *Am. & Eng. R. Cas.* 627, 3 *Ont.* 446.

Plaintiff, while lawfully placing logs on skidways on defendant's unfenced right of way along its track for transportation by defendant, was injured by one of defendant's logging trains while attempting to cross the track with a load of logs at a crossing made over the track for that purpose by a contractor for whom plaintiff was working. There was a highway crossing about three quarters of a mile from the place of the accident. The negligence averred was the failure of defendant to ring the engine bell and blow the whistle at the private crossing, and also to give the statutory signals before reaching the highway crossing. *Held*: (1) the failure to give the signals at a private crossing is not negligence as matter of law; (2) the failure to sound the whistle and ring the bell, as required by 3 *How. Mich. St.* § 3375, before reaching a highway crossing, is such a neglect of duty as would, in the absence of contributory negligence on the part of the plaintiff, entitle him to recover, if such neglect was the direct and proximate cause of

the injury. *Sanborn v. Detroit, B. C. & A. R. Co.*, 50 *Am. & Eng. R. Cas.* 114, 91 *Mich.* 538, 52 *N. W. Rep.* 153.—DISTINGUISHING *Ransom v. Chicago, St. P., M. & O. R. Co.*, 62 *Wis.* 178; *Norton v. Eastern R. Co.*, 113 *Mass.* 366; *Pollock v. Eastern R. Co.*, 124 *Mass.* 158; *Palmer v. St. Paul & D. R. Co.*, 38 *Minn.* 415; *Cosgrove v. New York C. & H. R. R. Co.*, 87 *N. Y.* 88; *Voak v. Northern C. R. Co.*, 75 *N. Y.* 320; *Haas v. Grand Rapids & I. R. Co.*, 47 *Mich.* 402; *Chicago & N. E. R. Co. v. Miller*, 46 *Mich.* 532; *Klanowski v. Grand Trunk R. Co.*, 57 *Mich.* 525; *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 *Mich.* 400. NOT FOLLOWING *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 92 *Ky.* 345, 18 *S. W. Rep.* 2.

116. Private crossings much used

—*License*.—Where the public for a long time have crossed the track at a point not in a traveled highway, the railroad acquiescing, this amounts to a license and imposes a duty upon it to exercise reasonable care in running its trains. What precaution should be taken in any special case is a question for the jury. *Byrne v. New York C. & H. R. R. Co.*, 104 *N. Y.* 362, 10 *N. E. Rep.* 539, 5 *N. Y. S. R.* 722, 58 *Am. Rep.* 512; *affirming* 36 *Hun* 647, *mem.*—APPROVING *Nicholson v. Erie R. Co.*, 41 *N. Y.* 525; *Sutton v. New York C. & H. R. R. Co.*, 66 *N. Y.* 243. FOLLOWING *Barry v. New York C. & H. R. R. Co.*, 92 *N. Y.* 289. REVIEWING *Larmore v. Crown Point Iron Co.*, 101 *N. Y.* 391.—DISTINGUISHED IN *Lewis v. New York, L. E. & W. R. Co.*, 123 *N. Y.* 496. QUOTED IN *St. Louis, A. & T. R. Co. v. Crosnoe*, 37 *Am. & Eng. R. Cas.* 313, 72 *Tex.* 79, 10 *S. W. Rep.* 342; *Winslow v. Boston & A. R. Co.*, 11 *N. Y. S. R.* 831; *Troy v. Cape Fear & Y. V. R. Co.*, 34 *Am. & Eng. R. Cas.* 13, 99 *N. Car.* 298, 6 *S. E. Rep.* 77, 6 *Am. St. Rep.* 521.

Plaintiff was injured while attempting to cross a track at a place which was not a public crossing, but it was at a place where plaintiff and a number of persons employed by the road were often called upon to pass from one side of the road to the other. *Held*, that plaintiff and others thus passing could not be regarded as trespassers, and that proper and reasonable warnings of the approach of trains should have been given.

* Duties of railroad companies at crossings by custom and license, see notes, 14 *AM. & ENG. R. CAS.* 681; 32 *Id.* 55.

Owens v. Pennsylvania R. Co., 41 *Fed. Rep.* 187.

A railroad crossed a city street almost at grade and about forty feet beyond crossed a private way much used by the public, of which the railroad employes had notice. *Held*, that the statute requiring signals to be given eighty rods from highway crossings applies to the private way under such circumstances. *Cranston v. New York C. & H. R. R. Co.*, 32 *N. Y. S. R.* 592, 11 *N. Y. Supp.* 215, 57 *Hun* 590, *mem.*; *affirmed* in 125 *N. Y. 724, mem.*, 35 *N. Y. S. R.* 994.

While plaintiff was passing over the track of the railway operated in connection with the defendant's mines he was knocked down by a locomotive and crippled for life. At the point where plaintiff was injured there were four tracks, including sidings, between the workmen's houses and the works, which the men were obliged to cross twice a day and over which children frequently crossed to carry food to men working in the pit. The crossing had been so used for sixteen years, and at the time of the accident was used as a road for horses and carts. The common practice was to blow a whistle when engines were moving about, but on this occasion no whistle was blown and the view of the track was obstructed by box-cars. The instant plaintiff passed the box-cars he was warned of his danger, but he was struck by the engine before he had time to escape. *Held*, that the damage was the direct result of the negligence of the servants of defendant company, for which the company were liable, and that there was no evidence of negligence on the part of plaintiff. *Keith v. Intercolonial C. Min. Co.*, 18 *Nov. Sc.* 226.—*DISTINGUISHING* *Davey v. London & S. W. R. Co.*, 11 *Q. B. D.* 213.

117. At places where it has been the custom to give.—Where those engaged in the construction or operation of railways have been accustomed to give warning of approaching danger, and thereby induce the public to act upon the presumption that the usual signal will be given and it is not given, whereby one who relied upon it was injured, the latter was entitled to recover damages. *Blackwell v. Lynchburg & D. R. Co.*, 111 *N. Car.* 151, 16 *S. E. Rep.* 12.

In an action to recover damages for alleged negligence causing the death of plaintiff's intestate who, while crossing de-

fendant's tracks at a farm crossing, was struck and killed by a locomotive moving at a very high rate of speed, plaintiff gave evidence tending to show that no bell was rung or whistle blown for a highway crossing two thousand feet from the farm crossing or when the engine passed a depot sixteen hundred feet therefrom, and that it was the custom of enginemen or firemen to give either one or other of these signals at both those places. The court charged that it was the duty of defendant to blow the whistle or sound the bell eighty rods before reaching the highway and continue it at intervals until the crossing was passed, and that if it did not do this and the accident at the farm crossing was occasioned by that omission the jury might find a verdict of negligence, the same as if said provisions of the railroad act had not been repealed. *Held*, error. *Vandewater v. New York & N. E. R. Co.*, 135 *N. Y.* 583, 32 *N. E. Rep.* 636, 49 *N. Y. S. R.* 55; *reversing* 63 *Hun* 186, 43 *N. Y. S. R.* 420, 17 *N. Y. Supp.* 652.

118. When statute does not apply.

—The statutory provision which requires the conductor or engineer of a moving locomotive or train of cars to blow the whistle or ring the bell on approaching a public road crossing (Code Ala. § 1144) is intended for the protection of persons who are approaching or crossing the track of the road, and has no application to the case of a brakeman who sues for damages on account of personal injuries sustained by being struck by a low overhead bridge while on the top of a car in the discharge of his duties. *Louisville & N. R. Co. v. Hall*, 48 *Am. & Eng. R. Cas.* 170, 91 *Ala.* 112, 8 *So. Rep.* 371.

The statute requiring a bell of thirty pounds' weight to be rung eighty rods from a street crossing has no application to a street where no travel passes over the track except upon a viaduct above and over the tracks. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 *Ill.* 416, 18 *N. E. Rep.* 799; *affirming* 27 *Ill. App.* 22.

The law which requires a railroad engine to give signals when about to cross a highway was not intended for the protection of persons or cattle that happened to be at or near the crossing without intending to pass over. *Neely v. Charlotte, C. & A. R. Co.*, 33 *So. Car.* 136, 11 *S. E. Rep.* 636.

The statute requires a train to give warning before crossing a highway or street or

traveled place, and upon failure to do so imposes a liability for injuries done by a collision at such crossing. *Held*, that this statute has no application to a case where a man was killed by a moving train while he was standing up in a depot yard looking at some work being done there, as the yard was not a traveled place and as the man was not crossing or intending to cross the railroad track. *Hale v. Columbia & G. R. Co.*, 34 So. Car. 292, 13 S. E. Rep. 537.

Tex. Rev. St. art. 4232, requiring signals to be given at railroad crossings, does not apply to a train starting at a point where two railroads cross each other. *Houston & T. C. R. Co. v. Brin*, 77 Tex. 174, 13 S. W. Rep. 886.

Tex. Rev. St. art. 4232, declaring it negligence *per se* for an engineer to fail to sound a whistle or ring a bell on approaching a crossing, and declaring railroads liable for all damages sustained by reason of such failure, only gives a right of action for injuries which do not cause death. *Galveston, H. & S. A. R. Co. v. Cook*, (Tex.) 16 S. W. Rep. 1038.

119. Mutual care to be observed.*

—The obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and no greater degree of care is required of one than of the other. The preference given to the train of the right of way does not impose upon one driving on the highway the whole duty of avoiding a collision. *Continental Imp. Co. v. Stead*, 95 U. S. 161.—APPLIED IN *Northern Pac. R. Co. v. Holmes*, 3 Wash. T. 543, 18 Pac. Rep. 76. APPROVED IN *Brown v. Texas & P. R. Co.*, 42 La. Ann. 350. DISTINGUISHED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354. QUOTED IN *Louisville & N. R. Co. v. Crawford*, 89 Ala. 240; *Lesan v. Maine C. R. Co.*, 23 Am. & Eng. R. Cas. 245, 77 Me. 85; *Louisville, C. & L. R. Co. v. Goetz*, 14 Am. & Eng. R. Cas. 627, 79 Ky. 442, 42 Am. Rep. 227; *Martin v. New York C. & H. R. R. Co.*, 27 Hun (N. Y.) 532, mem.; *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454; *Indianapolis & V. R. Co. v. McLin*, 82 Ind. 435; *Johnson v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 232; *Schofield v. Chicago, M. & St. P. R. Co.*, 2 McCrary (U. S.) 268. RECONCILED IN *Zimmerman v.*

Hannibal & St. J. R. Co., 2 Am. & Eng. R. Cas. 191, 71 Mo. 476. REVIEWED IN *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.—*Olsen v. Oregon S. L. & U. N. R. Co.*, 9 Utah 129, 33 Pac. Rep. 623.

Persons traveling on a highway have a legal right to pass over railroads at crossings and to require due care on the part of those managing trains to avoid collisions, but these mutual rights have respect to other relative rights. The train has the preference of the right of way, rendered necessary from the momentum of the train and the necessities of railroad travel; but it must give due warning of its approach. *Continental Imp. Co. v. Stead*, 95 U. S. 161.

Railroad companies are bound, in crossing public highways, to so regulate the speed of trains, and to give such signals, as to apprise persons of their approach; and those having charge of the trains must keep a lookout so as to foresee, and as far as possible to prevent, injury to persons lawfully upon the highway; and it is equally the duty of persons when crossing the track to be on their guard and to see that they are not incurring danger. *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.—FOLLOWING *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499.—*Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. St. 610, 6 Atl. Rep. 238.

Where it is well known to the servants of a railway company and a person injured at a road crossing, that such place is unusually hazardous, it is the duty of both parties to use more care than at ordinary crossings where the danger is not so great. In such case the servants of the company should ring the bell and sound the whistle to the full extent of the statutory requirement. *Wabash, St. L. & P. R. Co. v. Wallace*, 19 Am. & Eng. R. Cas. 359, 110 Ill. 114.

120. When person may assume that track is clear.*—One approaching a railroad crossing has a right to presume that the railroad will obey the law in notifying him of the approach of its train by ringing its bell or sounding its whistle when within a quarter of a mile of the crossing. *Petty v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 618, 88 Mo. 306.

And on the other hand the company has the right to act upon the supposition that he will take all reasonable care to hear

* See also *ante*, 8; *post*, 196.

Concurrent duties of traveler and company at highway crossings, see note, 3 L. R. A. 743.

* See *ante*, 79.

them and give heed to their warning. *Stepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229.

A foot passenger on the public highway, who is not aware of the vicinity of a moving train, is at liberty to assume that none is approaching, when no flag is displayed and no whistle or bell is sounded. *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622; *reversing* 33 Barb. 429.—DISTINGUISHING *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. 221; *Mackey v. New York C. R. Co.*, 27 Barb. 528; *Sheffield v. Rochester & S. R. Co.*, 21 Barb. 339; *Stevens v. Oswego & S. R. Co.*, 18 N. Y. 422; *Wilds v. Hudson River R. Co.*, 24 N. Y. 435. FOLLOWING *Ernst v. Hudson River R. Co.*, 35 N. Y. 9. REVIEWING *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Johnson v. Hudson River R. Co.*, 20 N. Y. 66; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227.—DISAPPROVED IN *Dodge v. Burlington, C. R. & M. R. Co.*, 34 Iowa 276. DISTINGUISHED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358. QUOTED IN *Mynning v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 565, 64 Mich. 93.

121. — and not be bound to same diligence.—The omission of railroad employes to ring a bell or blow a whistle, as required by statute, is an assurance of safety to one on the highway, and has an important bearing upon the conduct of a traveler who is injured at a crossing, and is material in estimating the amount of care required. *Rodrian v. New York, N. H. & H. R. Co.*, 28 N. Y. S. R. 625, 7 N. Y. Supp. 811.

In such a case he need not be on the alert for danger or exercise the same care that might otherwise be required. *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622; *reversing* 33 Barb. 429. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61, 3 Abb. Pr. N. S. 82; *reversing* 32 Barb. 159.—REVIEWING *Gordon v. Grand St. & N. R. Co.*, 40 Barb. 550; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 213.—FOLLOWED IN *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622. QUOTED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

When by reason of an omission or neglect to sound the whistle or ring the bell of a locomotive as it is approaching a dangerous crossing the vigilance of a traveler upon the wagon road is allayed, and he is led into

a position or situation in which his life is jeopardized and finally lost, his lack of vigilance cannot be held to amount to culpable or concurring negligence as a matter of law. *Hendrickson v. Great Northern R. Co.*, 49 Minn. 245, 51 N. W. Rep. 1044.

122. Duty to give timely warning, generally.*—It is the duty of a railway company whose line crosses a public road at a level crossing to take reasonable precautions to give timely warning to persons using the crossing of the approach of trains. *Gray v. North Eastern R. Co.*, 48 L. T. 904, 4 Ry. & C. T. Cas. xv. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22. *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill. 235. *State v. Union R. Co.*, 42 Am. & Eng. R. Cas. 167, 70 Md. 69, 18 Atl. Rep. 1032. *Dyer v. Erie R. Co.*, 71 N. Y. 228. *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St. 405.

But what would be such notice under the circumstances of the case is a matter to be left to the jury. *Johnson v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 232.—QUOTING *Continental Imp. Co. v. Stead*, 95 U. S. 164.

An instruction requiring not only that warnings of the approach of trains should be given in the usual and customary manner, but also in such manner as ordinary care and diligence require, and that if the warnings are given in the customary manner alone the company will be relieved from liability—is substantially correct. *Georgia Pac. R. Co. v. Freeman*, 83 Ga. 583, 10 S. E. Rep. 277.

Railroad companies cannot excuse a failure to give the statutory signals when approaching a highway crossing on the ground that persons traveling on the latter have other means of informing themselves of the time that trains will pass. *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.

Where a railroad company covers a public street in a populous city with a network of tracks, it must observe unusual care and take extra precautions to avoid injury to persons lawfully passing along such street.

* As to amount of care company must exercise to avoid injuring persons at crossings, see notes, 6 AM. & ENG. R. CAS. 123; 26 AM. REP. 207; 9 L. R. A. 157; 11 Id. 385.

Duty of engineer when person is seen crossing railroad track, see note, 3 L. R. A. 683.

Various state statutes construed respecting duty of railway companies to give signals on approaching highway crossings, see note, 9 L. R. A. 158.

In such case one attempting to cross along the street will have the right to believe that a train of cars will not be allowed to cross the street where he is standing without giving him a warning by bell, or whistle, or flagman. *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. Rep. 510; *affirming* 35 Ill. App. 430.

The rule which imposes the obligation of care and prudence on the part of a company, and measures its liability to others liable to receive injuries from moving cars and engines, does not call for the performance of any act outside of or not connected with the actual operation of the road. *Blayle v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46 Hun 675, *mem.*; *affirmed in* 113 N. Y. 626, *mem.*, 20 N. E. Rep. 877, 22 N. Y. S. R. 993.

An instruction for plaintiff told the jury "that while a passing train, from its force and momentum, will have the preference in passing first, yet those in charge of it are bound to give reasonable warning, so that a person about to cross with a team and wagon may stop and allow the train to pass, and such warning must be reasonable and timely, so far as the circumstances will reasonably admit." The only negligence charged to which the instruction applied was a failure to ring a bell or sound a whistle. *Held*, that if the instruction was based upon a statutory duty, it declared a higher duty than the statute imposed, and if based on the common law duty to give reasonable warning of the approach of the train, it was broader than the averment in the declaration. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; *reversing* 31 Ill. App. 563.

123. But after giving, speed need not be checked.—Where a railroad train has given a proper warning signal as it approaches an ordinary grade crossing in the open country, it is not required to slow up or stop until a traveler, who has had an opportunity to hear and see the train, has passed the crossing. *Newhard v. Pennsylvania R. Co.*, 55 Am. & Eng. R. Cas. 258, 153 Pa. St. 417, 26 Atl. Rep. 105.—**QUOTING** *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Warner v. New York C. R. Co.*, 44 N. Y. 465; *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135.

The engine driver seeing a person so approaching has a right to expect he will stop, according to the known custom, until the

train passes. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

124. Kind of signals.—There is no statute in Kentucky designating the character of signal necessary to be given, and therefore the company must give such signals as are usual and customary. It was immaterial whether the crossing was on the land of the company or not. *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338.

Under the New York statute railroad companies are only required to place a bell on the locomotive and ring it in approaching highway crossings; and it is error to instruct the jury that the bell "should be rung under such circumstances as that it may be heard and give the requisite notice, otherwise the object of the requirement is not complied with." *Grippen v. New York C. R. Co.*, 40 N. Y. 34.—**REVIEWING** *Bilbee v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 584; *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 13.—**APPLIED IN** *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370. **QUOTED IN** *Solen v. Virginia & T. R. Co.*, 13 Nev. 106; *Heaney v. Long Island R. Co.*, 112 N. Y. 122, 19 N. E. Rep. 422, 20 N. Y. S. R. 296; *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37; *Haywood v. New York C. & H. R. R. Co.*, 35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177; *Semel v. New York, N. H. & H. R. Co.*, 9 Daly (N. Y.) 321. **REFERRED TO IN** *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451. **REVIEWED IN** *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522; *Shepard v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 816, 18 N. Y. Supp. 665.

The law does not require that any particular signal shall be given so long as the obligation to warn persons who may be passing of the approach of the train is performed in a reasonable manner; but if that obligation is not performed, or if the corporation is negligent in the performance of that duty, there can be no doubt as to its liability. *Crawford v. Delaware, L. & W. R. Co.*, 13 N. Y. S. R. 298.—**QUOTING** *Beisiegel v. New York C. R. Co.*, 40 N. Y. 13; *Weber v. New York C. R. Co.*, 58 N. Y. 458; *Dyer v. Erie R. Co.*, 71 N. Y. 230.

125. Sufficiency of signals.—The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers-by. *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. (U. S.) 282.

The real question is, Was the whistle sounded, and in a proper manner, and substantially at the place fixed by law and where it would be likely to be heard by those for whose benefit it is required? *Andrews v. New York & N. E. R. Co.*, 60 Conn. 293, 22 Atl. Rep. 566.

A train passing upon one of several tracks is not of itself a warning of the approach of another train or engine on another track. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346.

Where the engineer sounds the whistle and rings the bell, and runs the train at a reasonable speed in approaching a crossing, he exercises reasonable and ordinary care, which is all the law requires. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

A railroad company will not be exonerated from liability when its servants in charge of a train failed to give the proper signals for a crossing which the train was approaching, but did give a signal for a second crossing before reaching the first one, which signal was given at a point much nearer to the latter crossing than the signal required for that crossing, and the traveler who was upon the highway stopped and looked and listened, and approached slowly, and continued to look and listen, seeing or hearing nothing until his horses were in such close proximity to the train that they became frightened at the train, or at the sounding of the whistle for the second crossing, and he was injured in consequence thereof. As between the railroad company and the approaching traveler it induced him to approach to within an unsafe proximity to the crossing by the failure to give the lawful signals, and the train was not lawfully there as against the traveler without having first given the signal required by law before coming upon the crossing. *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. Rep. 178.

When a train approaches a crossing at the rate of thirty miles an hour, the blowing of the whistle three hundred yards from the crossing is not a sufficient warning. *Louisville, C. & L. R. Co. v. Goetz*, 14 Am. & Eng. R. Cas. 627, 79 Ky. 442, 42 Am. Rep. 227.

An instruction that railroad companies are required to ring a bell or blow a whistle within eighty rods of a crossing, and thence

continuously until the crossing is reached, "so as to apprise persons of their approach," is erroneous in requiring a higher duty than the statute imposes. *Peoria, P. & J. R. Co. v. Siltman*, 67 Ill. 72.

An instruction will not be a ground for reversal because it requires the whistle to be sounded at exactly eighty rods from the crossing, where there was no evidence showing a compliance with the law as to whistling, and the instruction properly authorized a recovery on the issue (on which there was conflicting evidence) of failure to ring the bell. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837.

Where the action is for negligently killing a person at a crossing, an instruction that if the signals were not given for the entire distance required by law it would not necessarily render the company liable, if the bell was rung or whistle sounded for such a distance from the place of the accident as fully and fairly to give the deceased timely and sufficient warning that the train was approaching, in time to prevent him from crossing or attempting to cross the track, is correct. *Cook v. New York C. R. Co.*, 5 Lans. (N. Y.) 401. — FOLLOWING *Havens v. Erie R. Co.*, 41 N. Y. 296.

In a suit for a personal injury received at a crossing in a city, the plaintiff being without negligence on his part, it appeared that the plaintiff was struck and run over by a switch-engine which had come around the curve, and was running at a rapid speed, and that neither the engineer nor fireman saw the plaintiff until after the accident; that a boy, not an employé, was occupying the fireman's place, and had charge of the bell-rope, and, if the bell was rung at all, it was done by the boy by way of amusement; and that the engineer and fireman were laughing and talking, instead of watching to guard against injury. *Held*, that the facts tended strongly to show that the engine was not properly managed, and warranted the jury in finding negligence on the part of the company. *Chicago & N. W. R. Co. v. Ryan*, 70 Ill. 211.

126. Signals not required beyond crossing.—The duty of ringing or whistling at a street crossing ceases as soon as the locomotive has passed the crossing. (Mo. R. S. § 806.) *Zimmerman v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191, 71 Mo. 476.

Where a train has run beyond a crossing and has stopped for wood and water, the statute does not require it to give a signal of its starting up again. The statute only enjoins the ringing of a bell or the sounding of a whistle when the cars are approaching a crossing. *Wilson v. Rochester & S. R. Co.*, 16 Barb. (N. Y.) 167.

127. Distance from crossing at which to give signals, how ascertained.—The eighty rods from the crossing, at which point the law requires the blowing of the whistle, may be eighty rods in a direct line, instead of the curved line of the track. The purpose of the statute ought not to be sacrificed to its letter. *Andrews v. New York & N. E. R. Co.*, 60 Conn. 293, 22 Atl. Rep. 566.

128. Under Massachusetts and New Jersey statutes.—The declaration alleged that the defendant's road crossed a certain highway in a city at grade; that on a day named, while the plaintiff was crossing the track on said highway, and in the exercise of due care, he was struck by one of the defendant's engines "through the negligence and carelessness of the defendant, who carelessly omitted to give any signal while approaching said highway with said locomotive, or warning the plaintiff by ringing a bell or blowing a whistle, or by a flagman or otherwise, that it was dangerous or unsafe then to cross, by reason of the approach of said locomotive." *Held*, that the declaration set out a good cause of action against the defendant at common law, but did not sufficiently state a cause of action under Mass. St. of 1874, ch. 372, § 164; and that, under the declaration, the plaintiff could not recover, unless he was using due care when hurt. *Fuller v. Boston & A. R. Co.*, 14 Am. & Eng. R. Cas. 695, 133 Mass. 491.

The ninth section of the New Jersey "Act respecting railroads and canals" (Rev. p. 910) provides that every railroad company shall cause to be placed upon some part of every locomotive engine used by any such company a bell of a weight of not less than thirty pounds, or a steam whistle which can be heard distinctly at a distance of at least three hundred yards, and shall cause such a bell to be rung or steam whistle to be blown at a distance of at least three hundred yards from highway crossings until such crossings are passed. *New York, L. E. & W. R. Co. v. Leaman*, 54 N. J. L. 202,

23 Atl. Rep. 691.—QUOTING *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531.

129. Particular instructions considered.—While negligence, as a general rule, is a question for the jury, yet where the statute makes a certain act, having a material bearing on the case, imperative upon the agents of a railroad company, the court may instruct the jury that proper diligence required such act. Thus, in a suit for damages to a dray by a train, at a street crossing in a city, the negligence of defendant's agents being in question, there was no error in charging that proper diligence required the tolling of the locomotive bell in approaching a crossing. *Atlanta & W. P. R. Co. v. Wyly*, 8 Am. & Eng. R. Cas. 262, 65 Ga. 120.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

Under Ind. Rev. St. 1881, § 4020, requiring railroad companies to have upon their locomotives whistles and bells, such as "are now in use or may hereafter be used" by well-managed railroads, an instruction was not misleading that was put in the language of the statute, though it would have been in better form had it omitted the words "or may be hereafter used." *Cleveland, C., C. & I. R. Co. v. Asbury*, 120 Ind. 289, 22 N. E. Rep. 140.

In an action to recover for a personal injury, at a public crossing of a street, the court instructed the jury, for the plaintiff, that railroad companies, in operating their trains and engines, must be held, in crossing public highways and thoroughfares, so to regulate the speed of their trains, and to give such signals to persons crossing, that all may be apprised of the danger of crossing the railroad track, and that they should keep a lookout, so as to see, and as far as possible prevent injury to others exercising their legal rights, and that for an injury resulting from a failure of any such duties they are liable, provided the person injured has used all reasonable precautions to avoid injury. The failure to give signals of danger to persons crossing the track, or to keep a lookout to avoid injury as far as possible, was not charged in the declaration. *Held*, that it was error to give the instruction. *Wabash, St. L. & P. R. Co. v. Coble*, 113 Ill. 115.—DISTINGUISHED IN *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 327. REVIEWED IN *Chicago, B. & Q. R. Co. v. Dickson*, 143 Ill. 368.

The court charged in substance that from a point the proper distance from the crossing until the locomotive reached the crossing, it was defendant's duty either to ring a bell or blow a whistle, and do it continuously so as to give warning. To this portion of the charge defendant's counsel excepted generally. *Held*, untenable; that the charge was substantially correct, but even if the court erred in using the word "continuously," a portion of the charge being correct, a general exception could not be sustained; that if any qualification was proper and desired it should have been suggested. *Smedis v. Brooklyn & R. B. R. Co.*, 8 *Am. & Eng. R. Cas.* 445, 88 *N. Y.* 13; *affirming* 23 *Hun* 279.—FOLLOWING *Doyle v. New York E. & E. Infirmary*, 80 *N. Y.* 634.

When an accident occurred in the company's yard, the following charge was substantially correct: "It is the duty of the engineer to keep a lookout ahead, but not behind, and if he rang the bell or sounded the whistle at the crossing of the street, and there was nothing on the track ahead, he was not required to continue ringing the bell and sounding the whistle. If the plaintiff was on the track where he could be seen, all possible means should have been used to stop the train, but if the plaintiff was concealed, it was not negligence to omit to sound the whistle or ring the bell." *Moran v. Nashville & C. R. Co.*, 2 *Baxt. (Tenn.)* 379.

The court charged the jury that it was the duty of the company to blow the whistle at short intervals all the way from the depot to a crossing. *Held*, no error, the statute providing for ringing the bell "at intervals" within the city limits. *Louisville & N. R. Co. v. Gardner*, 1 *Lea (Tenn.)* 688.

130. Failure to give, is negligence.*—It is the imperative duty of those in charge of a railroad train to give timely and sufficient warning of its approach to the crossing of a public road, and a failure to perform this duty is negligence, the degree of which depends upon the facts and circumstances of each case, to be determined by the jury. *Esbridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 *Am. & Eng. R. Cas.* 176, 89 *Ky.* 367, 12 *S. W. Rep.* 580. *Padu-*

cah & M. R. Co. v. Hoehl, 12 *Bush (Ky.)* 41, 18 *Am. Ry. Rep.* 338.—QUOTING *Spencer v. Illinois C. R. Co.*, 29 *Iowa* 60. REVIEWING *Philadelphia & T. R. Co. v. Hagan*, 47 *Pa. St.* 246.—*Cincinnati, H. & I. R. Co. v. Butler*, 23 *Am. & Eng. R. Cas.* 262, 103 *Ind.* 31, 2 *N. E. Rep.* 138. *Petty v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 618, 88 *Mo.* 306. *Remwick v. New York C. R. Co.*, 36 *N. Y.* 132, 34 *How. Pr.* 91. *Murray v. South Carolina R. Co.*, 10 *Rich. (So. Car.)* 227.

But this does not excuse a traveler on a highway crossing a railroad track from the exercise of such reasonable care and caution as the law requires, to ascertain whether a train is approaching the crossing. *Beyel v. Newport News & M. V. R. Co.*, 34 *W. Va.* 538, 12 *S. E. Rep.* 532.—QUOTED IN *Butcher v. West Virginia & P. R. Co.*, 37 *W. Va.* 180.

A failure to ring the bell or sound the whistle does not raise a presumption that this was the cause of the injury. The omission of these signals is no more, and no less negligence, than the neglect of any other duty. It is neither gross negligence, nor culpable negligence, nor any other degree of negligence. It is simply and only negligence. *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335.

In Iowa cities the whistle is not required to be used, but the bell must commence to ring sixty rods from a crossing and continue until the crossing is reached, and a failure to do so is negligence. *Lapsley v. Union Pac. R. Co.*, 50 *Fed. Rep.* 172; *affirmed in* 51 *Fed. Rep.* 174.

The failure of a railroad company to sound the locomotive whistle three times, at least eighty rods from the point where the railroad crosses any public road or street which lies outside of a city or village, is negligence; but such negligence is not attributable to the railway company in a case where the injury complained of was done at a street crossing within the limits of a city. *Missouri Pac. R. Co. v. Pierce*, 19 *Am. & Eng. R. Cas.* 318, 33 *Kan.* 61, 5 *Pac. Rep.* 378. *Clark v. Missouri Pac. R. Co.*, 35 *Kan.* 350, 11 *Pac. Rep.* 134.

The failure of servants of a railroad company to give the statutory signals at a crossing, when running at a high rate of speed, and not upon the regular time for the train, is to be considered in deciding whether such company was guilty of negligence, and

* Negligence of company in not giving signals, see note, 49 *AM. & ENG. R. CAS.* 473.

whether a person injured at the crossing used due care in attempting to cross. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 35 *Am. & Eng. R. Cas.* 346, 22 *Neb.* 475, 35 *N. W. Rep.* 235.

If the servants of a railroad company, having in their charge one of its engines and trains running within the corporate limits of a city in this state (W. Va.), to and over a public wharf therein, shall fail or neglect to give notice at least sixty rods before its approach to such wharf by ringing the bell or blowing the whistle of the locomotive for a sufficient time to give notice of its approach thereto, such failure or neglect is of itself negligence on the part of such railroad company. *Nuzum v. Pittsburg, C. & St. L. R. Co.*, 30 *W. Va.* 228, 4 *S. E. Rep.* 242.

If such company permit a train of its cars to be moved at that place, without having some of its servants in position to give warning of its approach, and to control its movements, these facts are of themselves acts of negligence. *Nuzum v. Pittsburg, C. & St. L. R. Co.*, 30 *W. Va.* 228, 4 *S. E. Rep.* 242.

131. — and renders the company liable.*—Where those in charge of a train approach a railroad crossing without giving the statutory signals, they are guilty of such negligence as renders the company liable to one who, without concurring negligence, is injured while attempting to cross the track. *Baltimore & O. & C. R. Co. v. Walborn*, 127 *Ind.* 142, 26 *N. E. Rep.* 207. *Hughes v. Chicago, St. P. & K. C. R. Co.*, (Iowa) 55 *N. W. Rep.* 470. *Chicago & N. E. R. Co. v. Miller*, 6 *Am. & Eng. R. Cas.* 89, 46 *Mich.* 532, 9 *N. W. Rep.* 841.—DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 *Mich.* 538.—*Johnson v. Chicago, R. I. & P. R. Co.*, 77 *Mo.* 546.—DISTINGUISHED IN *Hixson v. St. Louis, H. & K. R. Co.*, 80 *Mo.* 335. QUOTED IN *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 98 *Mo.* 183, 17 *Mo. App.* 518.—*Gratiot v. Missouri Pac. R. Co.*, 55 *Am. & Eng. R. Cas.* 108, 116 *Mo.* 450, 21 *S. W. Rep.* 1094.—DISTINGUISHING *Louisville & N. R. Co. v. Webb*, 90 *Ala.* 185, 8 *So. Rep.* 518; *Baltimore & O. R. Co. v. Mali*, 28 *Am. & Eng. R. Cas.* 628, 66 *Md.* 53; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 *Mo.* 476; *Taylor v. Missouri Pac. R. Co.*, 86 *Mo.* 457; *Kelley*

v. Hannibal & St. J. R. Co., 75 *Mo.* 138; *Fox v. Missouri Pac. R. Co.*, 85 *Mo.* 679; *Chicago, R. I. & P. R. Co. v. Houston*, 95 *U. S.* 697; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 *U. S.* 615; *Baltimore & O. R. Co. v. Hobbs*, (Md.) 19 *Am. & Eng. R. Cas.* 337; *Mynning v. Detroit, L. & N. R. Co.*, 28 *Am. & Eng. R. Cas.* 667, 64 *Mich.* 93; *Harris v. Minneapolis & St. L. R. Co.*, 37 *Minn.* 47, 33 *N. W. Rep.* 12; *Brown v. Milwaukee & St. P. R. Co.*, 22 *Minn.* 165; *State v. Baltimore & P. R. Co.*, 58 *Md.* 482; *Hixson v. St. Louis, H. & K. R. Co.*, 80 *Mo.* 335; *Turner v. Hannibal & St. J. R. Co.*, 74 *Mo.* 603; *Henze v. St. Louis, K. C. & N. R. Co.*, 71 *Mo.* 636; *Terre Haute & I. R. Co. v. Clark*, 73 *Ind.* 168; *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 *N. Y.* 198; *Union Pac. R. Co. v. Adams*, 33 *Kan.* 427; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 *Iowa* 624; *Pence v. Chicago, R. I. & P. R. Co.*, 63 *Iowa* 746; *Tully v. Fitchburg R. Co.*, 134 *Mass.* 499; *Powell v. Missouri Pac. R. Co.*, 76 *Mo.* 80; *Abbott v. Chicago, M. & St. P. R. Co.*, 30 *Minn.* 482; *Haas v. Grand Rapids & I. R. Co.*, 47 *Mich.* 401; *Kelly v. Pennsylvania R. Co.*, (Pa.) 8 *Atl. Rep.* 856; *Merkle v. New York, L. E. & W. R. Co.*, 49 *N. J. L.* 473; *Houston & T. C. R. Co. v. Richards*, 59 *Tex.* 373; *Pennsylvania Co. v. Morel*, 40 *Ohio St.* 338; *Rogstad v. St. Paul, M. & M. R. Co.*, 31 *Minn.* 208; *Flemming v. Western Pac. R. Co.*, 49 *Cal.* 253; *Cleveland, C. C. & I. R. Co. v. Elliott*, 28 *Ohio St.* 340; *Woodard v. New York, L. E. & W. R. Co.*, 106 *N. Y.* 369; *Yancey v. Wabash, St. L. & P. R. Co.*, 93 *Mo.* 433; *Butts v. St. Louis, I. M. & S. R. Co.*, 98 *Mo.* 272.—*Beiseigel v. New York C. R. Co.*, 34 *N. Y.* 622; *reversing* 33 *Barb.* 429.—APPROVED IN *Burns v. North Chicago Rolling Mill Co.*, 65 *Wis.* 312. REVIEWED IN *Zimmer v. New York C. & H. R. R. Co.*, 7 *Hun (N. Y.)* 552.—*Ernst v. Hudson River R. Co.*, 35 *N. Y.* 9, 32 *How. Pr.* 61, 3 *Abb. Pr. N. S.* 82; *reversing* 32 *Barb.* 159.—DISAPPROVING *Ernst v. Hudson River R. Co.*, 24 *How. Pr.* 97.—APPROVED IN *Burns v. North Chicago Rolling Mill Co.*, 65 *Wis.* 312. DISAPPROVED IN *Dodge v. Burlington, C. R. & M. R. Co.*, 34 *Iowa* 276. EXPLAINED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 *N. Y.* 358.—*Hoye v. Chicago & N. W. R. Co.*, 19 *Am. & Eng. R. Cas.* 347, 62 *Wis.* 666, 23 *N. W. Rep.* 14.

Railway companies are liable for all damages caused by their omission to ring a bell

* Liability of company for failing to give statutory signals, see notes, 19 *AM. & ENG. R. CAS.* 20; 32 *Id.* 6; see also 55 *Id.* 265, *abstr.*

or sound a whistle, as required by section 5478 of Mansf. Ark. Dig. *St. Louis, I. M. & S. R. Co. v. Hendricks*, 53 Ark. 201, 13 S. W. Rep. 699.

Defendant is liable for an injury done to the person or property of another at a public crossing on its road by the running of its engine and cars, resulting from the negligence of its agents and servants to blow the whistle of the engine or locomotive, as required by Ga. Code, § 742, although there is no actual collision of the engine and cars with the person or property injured by such negligence, in all cases in which the plaintiff is entitled to sue and recover damages under the law for the alleged injury of which he complains resulting from such negligence of the company *Georgia R. & B. Co. v. Wynn*, 42 Ga. 331.

A failure to comply with the statute requiring signals at crossings renders the company liable, notwithstanding Ill. Rev. St. 1874, ch. 114, § 6, omits the provision of the law of 1849 declaring a company liable "for all damages sustained by reason of such neglect." *Ohio & M. R. Co. v. Reed*, 40 Ill. App. 47.

One exercising ordinary care in crossing a street who is injured by a train of cars because of the failure of the railroad company to ring the bell or have a man stationed on the car farthest from the engine to give danger signals or to keep a watchman at the street crossings, as required by ordinance, is entitled to recover; and it makes no difference whether the injury was caused by two or more of such negligent acts or by one. *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. Rep. 817.

The failure to ring the bell or sound the whistle at a highway crossing, as required by Utah Comp. Laws 1888, § 2350 (Comp. L. 1876, § 494), is such statutory negligence as, in the absence of contributory negligence, will render a railroad company liable for injuries resulting from a collision to a person in a wagon crossing the track. *Bitner v. Utah C. R. Co.*, 4 Utah 502, 11 Pac. Rep. 620.

Under the statutes of Utah Territory it is negligence for a railroad company not to provide its engines with a bell of at least twenty pounds weight and not to ring the same at least eighty rods from a crossing, or in lieu thereof not to sound the whistle at least a quarter of a mile from the crossing; and a party injured by such negligence is

entitled to recover unless he were himself guilty of contributory negligence. *Olsen v. Oregon S. L. & U. N. R. Co.*, 9 Utah 129, 33 Pac. Rep. 623.

132. Illustrations.—Where a party is killed at a crossing near a city where another track runs alongside of the one on which the killing occurs, and it appears that blow-posts were not erected nor the whistle sounded nor the speed of the train checked, as required by the statute, the company is liable if the deceased was exercising ordinary care. *Brunswick & W. R. Co. v. Hoover*, 74 Ga. 426.—**EXPLAINING** *Western & A. R. Co. v. Jones*, 65 Ga. 631.

In an action under the statute for a wrongful killing it appeared that the deceased was killed on a dark night at the crossing of a public street in frequent use, by a train of freight cars which had been detached from the engine and was running along the track under the control of no person, without any light or signal. *Held*, that these facts constituted great negligence on the part of the company, for which it must be held responsible. And a verdict for \$2400 was not excessive. *Chicago & A. R. Co. v. Garvy*, 58 Ill. 83, 10 Am. Ry. Rep. 431.

In an action for an injury done to plaintiff's son while driving in a wagon which was run down at a crossing by an engine on the defendant's road the evidence showed that the train to which the engine was attached had emerged from a cut and that about fifteen seconds later the accident occurred. The train was traveling at the rate of 35 miles an hour. No bell was rung or warning given as it approached the crossing. The engineer might have seen the wagon in which plaintiff's son was riding from the time he left the cut, and might, by the application of the air-brakes, have stopped the train in time to avert the accident. *Held*, that it was clear that there had been negligence on the part of the company defendant. *Indianapolis & V. R. Co. v. McLin*, 8 Am. & Eng. R. Cas. 237, 82 Ind. 435.

133. Failure to signal is negligence per se.—The omission of a railway company to perform its statutory duty in relation to ringing a bell or sounding a whistle on approaching a highway crossing, resulting in injury to another, is negligence *per se* or as a conclusion of law. A statute commanding an act to be done creates an absolute duty to perform the act, and the

duty of performance does not depend upon and is not controlled by surrounding circumstances. *Terre Haute & I. R. Co. v. Voelker*, 39 *Am. & Eng. R. Cas.* 615, 129 *Ill.* 540, 22 *N. E. Rep.* 20; *affirming* 31 *Ill. App.* 314. *Pittsburgh, C. & St. L. R. Co. v. Martin*, 8 *Am. & Eng. R. Cas.* 253, 82 *Ind.* 476. *Cincinnati, H. & I. R. Co. v. Butler*, 23 *Am. & Eng. R. Cas.* 262, 103 *Ind.* 31, 2 *N. E. Rep.* 138. *Reed v. Chicago, St. P., M. & O. R. Co.*, 74 *Iowa* 188, 37 *N. W. Rep.* 149. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 *Pa. St.* 219. *Texas & P. R. Co. v. Howard*, 2 *Tex. Unrep. Cas.* 429. *Texas & P. R. Co. v. Anderson*, 2 *Tex. App. (Civ. Cas.)* 161.

And the court has a right to so instruct as a matter of law. *Chicago & E. I. R. Co. v. Boggs*, 23 *Am. & Eng. R. Cas.* 282, 101 *Ind.* 522, 51 *Am. Rep.* 761.

But such negligence does not necessarily entitle the plaintiff to a verdict against the company in a case where he was himself guilty of negligence. *Zimmerman v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 191, 71 *Mo.* 476.—*QUOTING* *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 *Mo.* 482.—*Atchison, T. & S. F. R. Co. v. Townsend*, 35 *Am. & Eng. R. Cas.* 352, 39 *Kan.* 115, 17 *Pac. Rep.* 804.

The omission on the part of a railroad company to ring a bell or sound a whistle continuously for the required distance on approaching a road crossing renders the company liable "for all damages which shall be sustained by any person by reason of such neglect." But it was not intended that this omission of duty should *per se* render the company liable for damages for injuries; the injury must be shown by circumstances, at least, to have been the consequence of or caused by such neglect. *Chicago & R. I. R. Co. v. McKean*, 40 *Ill.* 218.

134. — prima-facie negligence.—An omission to perform a statutory duty is *prima-facie* negligence; and this rule applies to a failure to give the statutory signals required where trains are approaching a highway crossing. *Terre Haute & P. R. Co. v. Barr*, 31 *Ill. App.* 57.—*FOLLOWING* *St. Louis, J. & C. R. Co. v. Terhune*, 50 *Ill.* 151.—*Terre Haute & I. R. Co. v. Black*, 18 *Ill. App.* 45.—*QUOTING* *Chicago & N. W. R. Co. v. Hatch*, 79 *Ill.* 138.—*St. Louis, J. & C. R. Co. v. Terhune*, 50 *Ill.* 151.—*DISTINGUISHING* *Galena & C. U. R. Co. v. Dill*, 22 *Ill.* 271; *Illinois C. R. Co. v. Phelps*, 29

3 *D. R. D.*—33.

Ill. 447; *Illinois C. R. Co. v. Goodwin*, 30 *Ill.* 117.—*FOLLOWED IN* *Terre Haute & P. R. Co. v. Barr*, 31 *Ill. App.* 57.

Where an injury at a railroad crossing is caused by a locomotive upon which a bell was not kept ringing continuously nor a whistle blown at intervals at a distance of eighty rods before reaching the crossing, and also in passing over it, as required by section 486 of the Civil Code, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence; and it need not be further proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury. *Orcutt v. Pacific Coast R. Co.*, 85 *Cal.* 291, 24 *Pac. Rep.* 661.

Under Mo. Rev. St. § 806, as amended in 1881 (Acts, p. 79), a person suing for damages sustained at the crossing by a railroad of a public road or street, makes out a *prima-facie* case of negligence when he shows that neither the bell was rung nor whistle sounded, as required by the statute, and the burden of rebutting it is cast upon the corporation. *Huckshold v. St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 659, 90 *Mo.* 548, 2 *S. W. Rep.* 794.

135. — gross negligence.—Under the Illinois statute it is the duty of railroad companies to ring a bell or sound a whistle eighty rods before reaching a crossing, and a wilful disregard of the statute is gross negligence. *Ohio & M. R. Co. v. Eaves*, 42 *Ill.* 288.

It is negligence to run a locomotive over any public road crossing without ringing a bell or sounding a whistle; and it is gross negligence to do so at a crossing known to be unusually dangerous. *St. Louis, V. & T. H. R. Co. v. Faltz*, 23 *Ill. App.* 498.

The omission by a railroad train to give the signals as required by Kan. Gen. St. ch. 23, § 60, may be, in some cases, gross negligence; in others, negligence simply. *Leavenworth, L. & G. R. Co. v. Rice*, 10 *Kan.* 426.

If the defendant ran the engine at a dangerous rate of speed without giving the statutory signals before reaching the crossing, and without a sufficient headlight, it was guilty of such gross negligence as entitles the plaintiff to recover; and if defendant was not so negligent, plaintiff could not recover, because of his want of care in failing to look and listen, and in not

having his team in such a state, as to driving, that he could stop it at once if necessary. *Thomas v. Chicago & G. T. R. Co.*, 86 Mich. 496, 49 N. W. Rep. 547.

The omission to ring a bell or sound a whistle on a train approaching a highway crossing, where a collision occurs with a team, cannot be said, as a matter of law, to be gross negligence, so as to fix the liability of the company for the injury. To have that effect it must be a just inference from the evidence. *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425.—DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 557. REVIEWED IN *Woodward v. Oregon R. & N. Co.*, 18 Oreg. 289.

The statute does not require both the ringing of a bell and the blowing of a whistle at crossings; and it is therefore error to instruct the jury that a failure to sound the whistle or to ring the bell is evidence of gross negligence, as the jury may have inferred therefrom that both are required. *St. Louis, A. & T. H. R. Co. v. Pfugmacher*, 9 Ill. App. 300.

136. Whether failure to signal was cause of accident is a question for the jury.*—Whether the failure to ring a bell or sound a whistle on approaching a highway crossing by a railroad train, as required by the statute, was the cause of an injury sustained, is a question of fact for the determination of the jury. *Illinois C. R. Co. v. Benton*, 69 Ill. 174. *Chicago & A. R. Co. v. McDaniels*, 63 Ill. 122, 7 Am. Ry. Rep. 60. *Terre Haute & I. R. Co. v. Jones*, 11 Ill. App. 322. *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 Mo. App. 109. *Sauerborn v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 478, 52 N. Y. S. R. 784, 69 Hun 429; affirmed in 141 N. Y. 553. *Calhoun v. Gulf, C. & S. F. R. Co.*, 84 Tex. 226, 19 S. W. Rep. 341.

Whether the company was negligent in giving warning of the approach of a train, and whether a person injured at a crossing was also negligent, are both questions of fact. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346.

The primary object of the provision of Ga. Code, § 708, requiring a signal to be given and the speed of the train to be checked as it approaches a crossing, is for

the protection of persons and property at the crossing; yet where an accident takes place beyond the crossing, the fact that the requirements of the statute were disregarded may be considered by the jury in determining the question of the company's negligence. *Western & A. R. Co. v. Jones*, 8 Am. & Eng. R. Cas. 267, 65 Ga. 631.

Where the suit is to recover for the killing of a person at a crossing by an engine in charge of a fireman only, and no signals were given as required by statute, the question of the company's negligence is for the jury. *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.—FOLLOWING *Bilbee v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 584; *Stapley v. London, B. & S. C. R. Co.*, L. R. 1 Ex. 21; *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 13.—DISTINGUISHED IN *Dodge v. Burlington, C. R. & M. R. Co.*, 34 Iowa 276; *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219; *Culhane v. New York C. & H. R. R. Co.*, 60 N. Y. 133. QUOTED IN *Mallard v. Ninth Ave. R. Co.*, 15 Daly (N. Y.) 376, 7 N. Y. Supp. 666, 27 N. Y. S. R. 801; *Pendril v. Second Ave. R. Co.*, 43 How. Pr. (N. Y.) 399. REVIEWED IN *Keating v. New York C. R. Co.*, 3 Lans. (N. Y.) 469.

Ordinary care and prudence may require the giving of signals from an approaching train to warn persons lawfully upon the track, and the omission to do so when so required will subject the corporation to liability for injury caused by the omission; but unless it is at a highway crossing in respect to which the statutory duty exists, the omission to give the designated signals is not negligence as matter of law, but the question of negligence is one of fact for a jury. *Cordell v. New York C. & H. R. R. Co.*, 64 N. Y. 535; reversing 6 Hun 461.—FOLLOWED IN *Byrne v. New York C. & H. R. R. Co.*, 94 N. Y. 12.

In an action to recover for injuries received at a street crossing it appeared that the train was being run at a rapid rate of speed; that no warning was given; that the crossing was in a populous part of a city and the night dark. Plaintiff and a companion were in a carriage with sides closed. There were five tracks, the two westerly ones belonging to defendant; and as they approached the first track going west they stopped, looked up and down the tracks and, seeing nothing, made haste to cross, and were struck on the last track of defend-

* See also ante, 22; post, 143.

ant's road. The view north was unobstructed, except by the glare of an electric light near the crossing. *Held*, that whether defendant exercised due care in running the train was properly submitted to the jury. *Moore v. New York C. & H. R. R. Co.*, 49 N. Y. S. R. 516, 2 Misc. 23, 21 N. Y. Supp. 436.—FOLLOWED IN *Hughes v. New York C. & H. R. R. Co.*, 22 N. Y. Supp. 1136.

In an action to recover damages for an injury done by defendant's train to plaintiff and his team at a railroad crossing, there being a conflict of testimony as to whether the engine had given the signal required by statute, the circuit judge erred in charging: "A man might lie down on the track and rely on being warned of the approach of the railroad train by the sounding of the whistle and the ringing of the bell; whereas if the law did not enjoin specifically those precautions on the part of the railroad company, the man might be guilty of negligence, and would not be on the lookout when he knew he was approaching a railroad crossing." What facts constitute gross negligence must be left to the jury. *White v. Augusta & K. R. Co.*, 30 So. Car. 218, 9 S. E. Rep. 96.

137. When question for jury whether signals were given.—Where the evidence is conflicting as to whether signals were given as a train approached a highway crossing, the jury is the proper judge of the weight of the evidence and the question should be submitted to them. *Chicago, B. & Q. R. Co. v. Kuster*, 22 Ill. App. 188. *Cleveland, C. & St. L. R. Co. v. Richey*, 43 Ill. App. 247. *Battishill v. Humphreys*, 34 Am. & Eng. R. Cas. 69, 29 Am. & Eng. R. Cas. 411, 64 Mich. 514, 38 N. W. Rep. 581, 14 West. Rep. 863. *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 Mo. App. 109.—FOLLOWING *Summerville v. Hannibal & St. J. R. Co.*, 29 Mo. App. 48; *Catheart v. Hannibal & St. J. R. Co.*, 19 Mo. App. 113.—*Roach v. Flushing & N. S. R. Co.*, 58 N. Y. 626. *Shaw v. Jewett*, 6 Am. & Eng. R. Cas. 111, 86 N. Y. 616. *Beckwith v. New York C. & H. R. R. Co.*, 54 Hun (N. Y.) 446, 28 N. Y. S. R. 292, 7 N. Y. Supp. 719; affirmed in 125 N. Y. 759, mem., 36 N. Y. S. R. 1010. *Towns v. Rome, W. & O. R. Co.*, 4 Silv. Sup. Ct. (N. Y.) 332. *Gray v. North Eastern R. Co.*, 48 L. T. 904.

Whether a railroad company failed to

ring a bell or blow a whistle when approaching a highway crossing, at which place a train collided with the plaintiff's team, and whether the plaintiff was guilty of a want of ordinary care in attempting to pass over the track, are questions for the jury. *Mobile & O. R. Co. v. Davis*, 42 Am. & Eng. R. Cas. 70, 130 Ill. 146, 22 N. E. Rep. 850; reversing 31 Ill. App. 490, 24 Ill. App. 250.

In an action for injuries received at a crossing the negligence charged against the defendant was a failure to give any signal as the train approached the crossing. The defendant's witnesses testified that proper signals were given before the train reached the crossing. A single witness for the plaintiff testified that he was observing the train which caused the accident and did not hear it give any signal, although he was in a situation to hear it if it had been given. *Held*, that there was a conflict in the testimony and the case was for the jury. *Lee v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 157, 80 Iowa 172, 45 N. W. Rep. 739.—DISTINGUISHING *Ralph v. Chicago & N. W. R. Co.*, 32 Wis. 182.—*Annaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa 267, 47 N. W. Rep. 68.

138. — also as to what signals should have been given.—Whether the proper signals were given or the necessary precautions were used by the company at the time the accident occurred to prevent injury is a question of fact to be determined by the jury. *Paducah & M. R. Co. v. Hoeft*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338.

It is not, however, for the jury to determine what signals should have been given in a particular case; and a general submission of that question to them without qualification or limitation is error. *Dyer v. Erie R. Co.*, 71 N. Y. 228.—FOLLOWING *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.—APPLIED IN *Hoffmann v. Fitchburg R. Co.*, 67 Hun (N. Y.) 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463.

139. Frightening teams by reason of failure to give signals.*—(1) General

* See also *ante*, 15, 10; *post*, 284; and title FRIGHTENED TEAMS.

Frightening horses at a crossing by train approaching without warning, see 45 AM. & ENG. R. CAS. 206, *abstr.*

Frightening teams by noises and obstructions at crossings, see note, 55 AM. & ENG. R. CAS. 134.

Frightening a horse by striking it in lowering

rules.—Evidence of the failure of the railroad company to give the regular signals at a public crossing, and of the blowing of the whistle on the crossing just immediately before the collision with the vehicle in which plaintiff was riding, which frightened the horse and caused the accident, is sufficient to require the case to be submitted to the jury. *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. Rep. 105. See also *Green v. Eastern R. Co.*, 52 Minn. 79, 53 N. W. Rep. 808.

If a train approaches a highway crossing at grade without giving the signals required by Mass. Act of 1862, ch. 81, or other proper warning, it is liable to a person injured thereby, though the injury results not from a collision, but from plaintiff's horse becoming frightened, where it appears that the fright might have been guarded against if the signals had been given. *Norton v. Eastern R. Co.*, 113 Mass. 366. — DISTINGUISHING *Flint v. Norwich & W. R. Co.*, 110 Mass. 222. — DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538. FOLLOWED IN *Prescott v. Eastern R. Co.*, 113 Mass. 370. REVIEWED IN *Hart v. Chicago, R. I. & P. R. Co.*, 56 Iowa 166.

The provision of N. Y. Railroad Act of 1854, § 7, requiring certain signals to be given upon railroad trains approaching highway crossings, was intended not only to protect persons lawfully using a highway from danger of collision at crossings, but also from danger arising from the fright of horses by passing trains. *Voak v. Northern C. R. Co.*, 75 N. Y. 320.

If a traveler upon a highway crossing a railroad is himself free from fault, and does not hear an approaching train, and the company is guilty of negligence in not giving the proper signals, it cannot escape responsibility because the horse of the traveler, frightened by the sudden approach of the engine, suddenly starts forward and, getting beyond control, draws the wagon onto the track and so exposes the traveler to injury. It is not a legal inference that the traveler heard the approach of the train because the horse did. *Cosgrove v. New York C. & H. R. R. Co.*, 6 Am. & Eng. R. Cas. 35, 87 N. Y. 88, 41 Am. Rep. 355; see 13 Hun 329. — DISTINGUISHED IN *Sanborn*

railroad gate. Company liable for injury received by overturning carriage due to driver's rein breaking, see 49 AM. & ENG. R. CAS. 488, *abstr.*; see also FRIGHTENED TEAMS, § 3.

v. Detroit, B. C. & A. R. Co., 91 Mich. 538.

If one driving on the highway does not discover the approach of a train by reason of a failure to give the proper signals and the horses become unmanageable and rush upon the track, the company is not relieved of liability if the fright of the horses and their unmanageable state were occasioned by the near approach of the train and that near approach was occasioned by the failure to give proper signals. *Texas & P. R. Co. v. Chapman*, 57 Tex. 75.

Wis. Rev. St. § 1809, requiring the bell to be rung and the whistle blown before a locomotive crosses a highway, was intended to guard against the danger of injury from the frightening of teams traveling upon the highway near the crossing, as well as the danger of actual collision at the crossing; and a company is therefore liable for injuries caused by a failure to comply with the statute, to persons traveling upon a highway parallel to the railroad and not intending to cross the track. *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 Am. & Eng. R. Cas. 16, 62 Wis. 178, 22 N. W. Rep. 147, 51 Am. Rep. 718. — CRITICISING *East Tenn., V. & G. R. Co. v. Feathers*, 10 Lea (Tenn.) 103. DISTINGUISHING *Holmes v. Central R. & B. Co.*, 37 Ga. 593; *Elwood v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 808; *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401. QUOTING *People v. New York C. R. Co.*, 25 Barb. (N. Y.) 199. REVIEWING *Harty v. Central R. Co.*, 42 N. Y. 468. — DISAPPROVED IN *Louisville, E. & St. L. Con. R. Co. v. Lee*, 47 Ill. App. 384. DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538.

A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway onto the track, though there was no contact between the engine and the carriage. *Grand Trunk R. Co. v. Sibbald*, 20 Can. Sup. Ct. 259; affirming 18 Ont. App. 184, 19 Ont. 164. — FOLLOWING *Grand Trunk R. Co. v. Rosenberger*, 9 Can. Sup. Ct. 311. RECONCILING *Victorian R. Com'rs v. Coultas*, 13 App. Cas. 222.

(2) *Illustrations.*—Conn. Gen. St. § 3554 requires that the steam whistle be blown or

the bell rung all the way after a train is within eighty rods of a grade crossing. *Held*, that an engineer was not in fault for blowing the whistle when the ringing of the bell would not have frightened horses on the highway, that being a more effective method of warning persons near the grade crossing of the approach of the train. *Bailey v. Hartford & C. V. R. Co.*, 37 *Am. & Eng. R. Cas.* 483, 56 *Conn.* 444, 16 *Atl. Rep.* 234.

No liability of the company to plaintiff could grow out of the fact that the engineer did not begin to blow his whistle so far back as the law required and that plaintiff, if it had been so blown, would have been warned of the approach of the train in season to have waited in a safe place for it to pass. *Bailey v. Hartford & C. V. R. Co.*, 37 *Am. & Eng. R. Cas.* 483, 56 *Conn.* 444, 16 *Atl. Rep.* 234.

Plaintiff was riding in a buggy upon a highway crossed by defendant's track, she herself driving. She was accustomed to drive and had a steady horse. She approached the track with great caution, looking and listening for a train. A train approached the crossing without giving the statutory warnings, and in consequence of obstructions plaintiff did not see its approach until she was within three rods of the crossing. She could not turn around, her horse became frightened and restive, she backed it about three rods, and at a loud blast of the whistle given at the crossing it turned around and she was thrown from the buggy and injured. *Held*, that the jury were authorized to find that if the warning had been given she could and would have stopped in time to have escaped danger, and that it was because it was not given she was lured on, without any fault on her part, to a place of danger; and that these facts authorized a verdict in her favor. *Voak v. Northern C. R. Co.*, 75 *N. Y.* 320.

The neglect of a railroad company's employes to give warning of the approach of an engine to a crossing caused the driver of a team to go upon the track, where he found himself in such a position of seeming peril that he justifiably dropped the lines and leaped from the wagon, leaving the horses to shift for themselves. An injury to one of the horses resulting, as supposed, from the entanglement of the lines in the wheel of the wagon while the horses were running away in fright caused by the approach of the engine was the natural,

primary, and proximate result of the negligent act of the engineer, no intervening independent cause being shown to exist. *Quigley v. Delaware & H. Canal Co.*, 142 *Pa. St.* 388, 21 *Atl. Rep.* 827.

A railroad built a wharf or platform alongside a siding to be used in piling lumber to be loaded on cars. About 200 feet distant it built a crossing over the track for the use of persons bringing in lumber. A driver came to a mill near by for lumber, but there being none there the owner of the mill brought him to the siding for it. A train came through a cut near by, without whistle or other signal. The horses took fright and ran toward the crossing. In trying to rescue them the driver was carried to the crossing and killed by the train. *Held*, that the driver was lawfully at the siding, and that it was negligence in the company to allow the train to approach without a signal. *Vanwart v. New Brunswick R. Co.*, 27 *New Brun.* 59.

As the accident might have been avoided if the defendants had exercised reasonable care and caution in approaching the cutting, there was not such contributory negligence on the part of the deceased as to prevent his widow from recovering damages for his death. *Vanwart v. New Brunswick R. Co.*, 27 *New Brun.* 59.

140. Frightening team by blowing.*—Where an engineer is approaching a highway crossing with his train at a rapid rate and when near the crossing, but as soon as it is possible, he sees a team approaching the track and that a collision will certainly occur unless something is done immediately to prevent it, the natural and usual thing to do is to sound the whistle, and in so doing he is not guilty of negligence, though the sound of the whistle, by frightening the horses, may possibly contribute to the collision. *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 *Iowa* 624, 17 *N. W. Rep.* 893.

141. No liability unless failure to give signals caused or contributed to injury.—A recovery cannot be had for personal injuries caused by a moving railroad train merely because the engineer in charge of the train failed to give the cautionary signals prescribed by the statute when it appears that the injuries did not result from such failure; nor when the

* See also *ante*, 15, 16; *post*, 155, 284.

plaintiff's own negligence contributed proximately to the injury. *East Tenn., V. & G. R. Co. v. King*, 31 *Am. & Eng. R. Cas.* 385, 81 *Ala.* 177, 2 *So. Rep.* 152. *Central R. Co. v. Brinson*, 19 *Am. & Eng. R. Cas.* 42, 70 *Ga.* 207. *Chicago & A. R. Co. v. McDaniels*, 63 *Ill.* 122, 7 *Am. Ry. Rep.* 60.—FOLLOWED IN *Indianapolis & St. L. R. Co. v. Holloway*, 63 *Ill.* 121; *Western Union R. Co. v. Fulton*, 64 *Ill.* 271.—*Chicago, B. & Q. R. Co. v. Van Patten*, 64 *Ill.* 510. *Peoria, P. & J. R. Co. v. Siltman*, 67 *Ill.* 72. *Rockford, R. I. & St. L. R. Co. v. Linn*, 67 *Ill.* 109.—DISTINGUISHED IN *Toledo, W. & W. R. Co. v. McGinnis*, 71 *Ill.* 346.—*Illinois C. R. Co. v. Benton*, 69 *Ill.* 174. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 *Am. & Eng. R. Cas.* 150, 135 *Ill.* 41, 25 *N. E. Rep.* 846; reversing 31 *Ill. App.* 563. *Chicago, B. & Q. R. Co. v. Wells*, 42 *Ill. App.* 26. *Cleveland, C., C. & St. L. R. Co. v. Richey*, 43 *Ill. App.* 247. *Chicago & A. R. Co. v. Logue*, 47 *Ill. App.* 292.—FOLLOWING *Chicago, B. & Q. R. Co. v. Dvorak*, 7 *Ill. App.* 555; *Galena & C. U. R. Co. v. Dill*, 22 *Ill.* 265; *Indianapolis & St. L. R. Co. v. Blackman*, 63 *Ill.* 117; *Toledo, W. & W. R. Co. v. Jones*, 76 *Ill.* 311.—*Arts v. Chicago, R. I. & P. R. Co.*, 34 *Iowa* 153, 3 *Am. Ry. Rep.* 469. *Horn v. Baltimore & O. R. Co.*, 54 *Fed. Rep.* 301, 6 *U. S. App.* 381, 4 *C. C. A.* 346.—QUOTING *Pennsylvania Co. v. Rathgeb*, 32 *Ohio St.* 66.—*Texas & P. R. Co. v. Wright*, 23 *Am. & Eng. R. Cas.* 304, 62 *Tex.* 515. *Butcher v. West Virginia & P. R. Co.*, 37 *W. Va.* 180, 16 *S. E. Rep.* 457.—QUOTING *Beyel v. Newport News & M. V. R. Co.*, 34 *W. Va.* 538.

Railroad companies are not liable *prima facie* for any and all damages that a party may sustain when they have omitted to give the statutory signals, whether such damages were sustained by reason of such failure or not. Until some proof is given tending to show that the injury resulted from the failure to ring a bell or blow a whistle, the burden of proving that it did not arise from such failure is not cast on the company. *Galena & C. U. R. Co. v. Loomis*, 13 *Ill.* 548.—DISTINGUISHED IN *Chicago, R. I. & P. R. Co. v. Fitzsimmons*, 40 *Ill. App.* 360. REVIEWED IN *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335.

In a suit for a personal injury, where the evidence is conflicting, an instruction for plaintiff that if, while he was crossing the track, defendant ran its train recklessly and negligently, without ringing a bell or blow-

ing a whistle, or warning of any kind, and ran a car upon and against the plaintiff's wagon, thereby causing to plaintiff serious injury, then plaintiff is entitled to recover, is not erroneous as omitting the vital condition that the reckless running of the train, and failing to give the usual signals, must have been the cause of the accident. The word "thereby" was intended to refer to all that preceded it, both as to the act of propulsion and the act of striking. *Union Rolling Mill Co. v. Gillen*, 100 *Ill.* 52.

142. Whether failure to signal was cause of injury is a question for the jury.—The neglect to sound the whistle or ring the bell of a locomotive engine is not of itself such negligence as will justify a recovery for damage to property injured upon the track. The injury must be shown to be the result of the omission or neglect of the duty imposed by statute, and this is to be determined by the jury. *Indianapolis & St. L. R. Co. v. Blackman*, 63 *Ill.* 117, 7 *Am. Ry. Rep.* 56.—FOLLOWING *Galena & C. U. R. Co. v. Dill*, 22 *Ill.* 264.—FOLLOWED IN *Chicago & A. R. Co. v. Logue*, 47 *Ill. App.* 292.—*Chicago, B. & Q. R. Co. v. Lee*, 68 *Ill.* 576.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Goebel*, 119 *Ill.* 515.

Under the statute requiring signals to be given by a railroad train on approaching a public crossing, a failure to give the signals is negligence as a matter of law only when injury results from the neglect. *Maney v. Chicago, B. & Q. R. Co.*, 49 *Ill. App.* 105.

Where the suit is to recover for personal injuries at a crossing, and the complaint alleges negligence in running the train at a prohibited rate of speed, and in failing to ring a bell or sound a whistle, instructions which take from the jury the consideration of the question whether the injuries were received in that way are erroneous. *Chicago, B. & Q. R. Co. v. Dvorak*, 7 *Ill. App.* 555.—FOLLOWED IN *Chicago & A. R. Co. v. Logue*, 47 *Ill. App.* 292.

143. Blowing before reaching the signal-post.—The Texas statute providing that a whistle shall be blown at least eighty rods from all highway crossings is sufficiently complied with by blowing at a greater distance than eighty rods from the crossing, if it was so blown that a person of ordinary hearing could have heard it at the crossing, whether plaintiff actually heard it or not. *Texas & P. R. Co. v. Bryant*, 56 *Fed. Rep.* 799.

An engineer, approaching a grade crossing, where there was a whistling-post eighty rods from the crossing, blew the whistle at a point four hundred feet short of the post, and did not blow it again. The bell, however, was constantly rung until the crossing was passed. The plaintiff's intestate was approaching the crossing when the whistle was blown, and was soon after killed there. The wind was unfavorable for carrying the sound of the whistle to him, and it did not appear that he heard it, although it could have been heard. The court below found, wholly by reason of the neglect of the engineer to blow the whistle when within the eighty rods, that he was guilty of negligence. *Held*, correct (two judges dissenting). *Bates v. New York & N. E. R. Co.*, 60 Conn. 259, 22 Atl. Rep. 538.

144. Failure not excused by fact that engineer was busy.—Except in a case of sudden and unexpected emergency, the fact that the engineer of the locomotive was otherwise engaged upon it, and therefore did not give the statutory signal on approaching a highway crossing, is no justification to a railroad company. *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.

145. Giving statutory signals does not always dispense with other precautions.—In case of collision the fact that the statutory signals were given is not enough in all cases to absolve the railroad company from a charge of negligence; other precautions may be required in some localities and under some circumstances. *Dyer v. Erie R. Co.*, 71 N. Y. 228.—APPLIED IN *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680. QUOTED IN *Crawford v. Delaware, L. & W. R. Co.*, 22 J. & S. (N. Y.) 262, 13 N. Y. S. R. 298.—*Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22. *Webb v. Portland & K. R. Co.*, 57 Me. 117.—QUOTING *Bradley v. Boston & M. R. Co.*, 2 Cush. (Mass.) 539. REVIEWING *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.—*Linfield v. Old Colony R. Corp.*, 10 Cush. (Mass.) 562.—DISTINGUISHED IN *Favor v. Boston & L.*

R. Co., 114 Mass. 350.—*New York, L. E. & W. R. Co. v. Randel*, 23 Am. & Eng. R. Cas. 308, 47 N. J. L. 144. *Lindeman v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 837, 46 Hun 679. *Vandewater v. New York & N. E. R. Co.*, 74 Hun 32, 26 N. Y. Supp. 397, 56 N. Y. S. R. 208. *Ham v. Grand Trunk R. Co.*, 11 U. C. C. P. 86.—APPROVING *Renaud v. Great Western R. Co.*, 12 U. C. Q. B. 424.

Under ordinary circumstances it is not the duty of a railroad engineer upon approaching a highway crossing to both blow the whistle and ring the bell; but notwithstanding an order of the railroad commissioners dispensing with the blowing of the whistle, it is yet his duty to blow it if necessary to prevent accident, and if the exercise of reasonable care requires it. *Rowen v. New York, N. H. & H. R. Co.*, 59 Conn. 364, 21 Atl. Rep. 1073.

The statute (Conn. Gen. St. § 3554) requires engineers of railroad trains to commence sounding the steam whistle or bell when within eighty rods of any grade crossing, and to keep sounding it occasionally until the crossing is passed. *Held*, that where the highest degree of diligence may justly be required a literal compliance with the statute may not be enough. *Bates v. New York & N. E. R. Co.*, 60 Conn. 259, 22 Atl. Rep. 538.

This is especially so where the duty which the statute was intended to enforce did not originate in and is not measured by the statute, but existed at common law. *Bates v. New York & N. E. R. Co.*, 60 Conn. 259, 22 Atl. Rep. 538.

A company does not discharge its whole duty to the public merely by ringing a bell, where the speed of the train is such as to render the notice thereby given of no avail. *Bleyle v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46 Hun 675, *mem.*; *affirmed in* 113 N. Y. 626, *mem.*, 20 N. E. Rep. 877, 22 N. Y. S. R. 993.

A railroad company has not discharged its whole duty to the public by simply causing the bell to be rung or the whistle sounded for the distance required by statute before crossing a street or highway, and particularly in populous cities or villages. *Zimmer v. New York C. & H. R. R. Co.*, 7 Hun (N. Y.) 552; *affirmed in* 67 N. Y. 601, *mem.*—QUOTING *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. 103. REVIEWING *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209;

* See also *ante*, 7.

Strict observances of statutory regulations as to signals not conclusive in favor of company, see note, 19 AM. & ENG. R. CAS. 296.

Where ringing bell and sounding whistle would not prevent injury, see note, 23 AM. & ENG. R. CAS. 307.

Beiseigel v. New York C. R. Co., 34 N. Y. 628.

Where a train is backing at a rate of four miles an hour near a street crossing unprotected by gates, with cars in front, merely giving the statutory signals will not necessarily relieve it from the duty of using other precautions to warn persons who may be on or near the crossing. *McCaffrey v. Delaware & H. Canal Co.*, 16 N. Y. Supp. 495; *affirmed in* 33 N. E. Rep. 339.

The requirements of the statute law as to signals at a railroad crossing, and to be given by an engine on approaching a crossing, did not supersede other proper signals, nor give a new cause of action under these statutes. *Kaminitzky v. Northeastern R. Co.*, 25 So. Car. 53.

Plaintiff was injured at a crossing where the view of an approaching train was obstructed by a deep cut and a watch-house erected by the company, and where the sound of falling water prevented the noise of the train or signals from being heard. The train was running about sixty miles an hour. *Held*, that under such circumstances the mere ringing of the bell and sounding the whistle did not excuse the company from giving further warning. *Richardson v. New York C. R. Co.*, 45 N. Y. 846.—APPLIED IN *Finklestein v. New York C. & H. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680. DISTINGUISHED IN *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119. QUOTED IN *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376. REVIEWED IN *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Ingersoll v. New York C. & H. R. R. Co.*, 6 T. & C. (N. Y.) 416, 4 Hun 277, *mem.*

146. Necessity of other precautions is for the jury.*—The fact that a bell was rung will not necessarily establish due care on the part of the company, if the jury are of the opinion that the circumstances required other and additional precautions to secure the safety of persons at the crossing. *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680.—APPLYING *Richardson v. New York C. R. Co.*, 45 N. Y. 846; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Ryan v. N. Y.*

York C. & H. R. R. Co., 37 Hun 186; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289.—*Crawford v. Delaware, L. & W. R. Co.*, 22 J. & S. (N. Y.) 262.—QUOTING *Beiseigel v. New York C. R. Co.*, 40 N. Y. 13; *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 458; *Dyer v. Erie R. Co.*, 71 N. Y. 230.—*Texas & P. R. Co. v. Howard*, 2 Tex. Unrep. Cas. 429.—FOLLOWING *Eaton v. Erie R. Co.*, 51 N. Y. 544.

Where a train is backing toward the crossing, the fact that the bell was rung does not, as matter of law, establish reasonable care; it is for the jury to determine as to whether any other precautions should have been taken upon the train, under the circumstances. *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. Rep. 539, 5 N. Y. S. R. 722, 58 Am. Rep. 512; *affirming* 36 Hun 647, *mem.*—APPLIED IN *Buck v. Manhattan R. Co.*, 15 Daly (N. Y.) 48, 2 N. Y. Supp. 718, 19 N. Y. S. R. 908; *Larkin v. New York & N. R. Co.*, 46 N. Y. S. R. 658. DISTINGUISHED IN *Morris v. Brown*, 111 N. Y. 318, 18 N. E. Rep. 722, 19 N. Y. S. R. 355, 7 Am. St. Rep. 751.

147. Contrary rule.*—A statute which requires of railroad companies certain precautionary measures at highway crossings, is exhaustive and defines the whole of the ordinary duty of such companies in the matter. *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9, 17 Atl. Rep. 137.

The statute requires every railroad corporation to cause a bell of at least thirty pounds' weight to be rung or a steam whistle to be sounded at the distance of at least eighty rods before a public highway is reached by a train or locomotive, and kept so ringing or being sounded until the highway is reached; and when this is done, the railroad company has discharged its duty imposed by the statute, whether such signal given is heard or not. The statute does not require the giving of such signals of the approach of a train as to enable others absolutely to ascertain its approach and avoid being injured. *Chicago, B. & Q. R. Co. v. Dougherty*, 19 Am. & Eng. R. Cas. 292, 110 Ill. 521; *reversing* 14 Ill. App. 196; *further appeal* 125 Ill. 127, 14 West. Rep. 400, 17 N. E. Rep. 1.

If a railway company has such a bell on

* When it is province of jury to determine whether other precautions should have been taken in addition to ringing bell at highway crossings, see note, 15 L. R. A. 429.

* Giving statutory signals as measure of trainmen's duty at highway crossings, see note, 15 L. R. A. 426.

an engine attached to a train as the statute requires, and it is rung in the manner required, then, so far as giving signals before the train reaches a public highway crossing is concerned, the company is without blame, whether the signal so given is observed or heeded, or not, by one attempting to cross the railroad track on the public highway. *Chicago, B. & Q. R. Co. v. Dougherty*, 19 *Am. & Eng. R. Cas.* 292, 110 *Ill.* 521; *reversing* 14 *Ill. App.* 196; *further appeal*, 125 *Ill.* 127, 14 *West. Rep.* 400, 17 *N. E. Rep.* 1. —APPROVED IN *New York, L. E. & W. R. Co. v. Leaman*, 54 *N. J. L.* 202, 23 *Atl. Rep.* 691. —APPROVING *Chicago, B. & Q. R. Co. v. Dougherty*, 110 *Ill.* 521.

148. May be necessary where not required by statute.*—While the statute only requires signals at public highway crossings, still a jury may find that a company is negligent in not giving them at other places, as where the injury occurs on the company's grounds at a station which is extensively and notoriously used by the public as a crossing, without objection from the company. *Winslow v. Boston & A. R. Co.*, 11 *N. Y. S. R.* 831.

Although the statute did not require the whistle to be blown at the place in question, if those in charge of the train saw the plaintiff approaching the crossing and believed that he was unaware of the train's approach, it was their duty to sound the whistle as well as to take every other reasonable precaution to prevent the collision. *Piper v. Chicago, M. & St. P. R. Co.*, 77 *Wis.* 247, 46 *N. W. Rep.* 165.

149. Duty to blow or ring.—The law only requires that either a bell or a whistle be sounded at highway crossings, not both. *Ohio & M. R. Co. v. Reed*, 40 *Ill. App.* 47. *Tyler v. Old Colony R. Co.*, 157 *Mass.* 336, 32 *N. E. Rep.* 227. *Turner v. Kansas City, St. J. & C. B. R. Co.*, 19 *Am. & Eng. R. Cas.* 506, 78 *Mo.* 578. —QUOTED IN *Barr v. Hannibal & St. J. R. Co.*, 30 *Mo. App.* 248. —*Terry v. St. Louis & S. F. R. Co.*, 89 *Mo.* 586, 1 *S. W. Rep.* 746. *Kenney v. Hannibal & St. J. R. Co.*, 105 *Mo.* 270, 15 *S. W. Rep.* 983, 16 *S. W. Rep.* 837. *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 *Mo. App.* 109. —FOLLOWING *Braddy v. Kansas City, Ft. S. & M. R. Co.*, 47 *Mo. App.* 519. —

Spicer v. Chesapeake & O. R. Co., 45 *Am. & Eng. R. Cas.* 28, 34 *W. Va.* 514, 12 *S. E. Rep.* 553.

Where one count in a declaration alleges a failure to ring a bell and the other count a failure to sound a whistle, both are fatally defective. *Terry v. St. Louis & S. F. R. Co.*, 89 *Mo.* 586, 1 *S. W. Rep.* 746.

In Alabama a railroad engineer is required to "blow the whistle or ring the bell at least one fourth of a mile before reaching any public road crossing, * * * and continue to blow such whistle or ring such bell at intervals until he passes such road crossing" (Code, § 1699); but while a charge is erroneous which makes it his duty to blow the whistle, omitting the alternative (as to ringing the bell), the error is without injury to the defendant when it appears that the bell was not rung at any time. *East Tenn., V. & G. R. Co. v. Deaver*, 79 *Ala.* 216.

The statute (§ 1, p. 79, Laws of Mo., 1881) does not impose the alternative duty on railroads to sound the bell or whistle at street crossings in cities. They are only required to ring the bell. *Coffin v. St. Louis & S. F. R. Co.*, 22 *Mo. App.* 601.

Whether the ringing of a locomotive bell, without blowing the whistle, is a sufficient warning of the approach of a train to a public road crossing depends on the circumstances, of which generally in actions for negligence it is for the jury to judge. *Longenecker v. Pennsylvania R. Co.*, 105 *Pa. St.* 328.

150. Where the view of track is obstructed.*—Where a railroad company has created extra danger it is bound to use extra precautions; and if the track is put in a position where the trains, when close to their transit over a public street or road, cannot be seen, that is an extra danger calling for more than ordinary cautionary signals. *New York, L. E. & W. R. Co. v. Randel*, 23 *Am. & Eng. R. Cas.* 308, 47 *N. J. L.* 144. —FOLLOWING *Pennsylvania R. Co. v. Matthews*, 36 *N. J. L.* 531. —*Chicago, B. & Q. R. Co. v. McGaha*, 19 *Ill. App.* 342. —QUOTING *Galena & C. U. R. Co. v. Dill*, 22 *Ill.* 264; *Indianapolis & St. L. R. Co. v. Stables*, 62 *Ill.* 319; *Chicago, B. & Q. R. Co. v. Lee*, 87 *Ill.* 457. —*Funston v. Chicago, R. I. & P. R. Co.*, 14 *Am. & Eng. R. Cas.*

* See also *post*, 286-307.

Injury at crossings where view is obstructed, see notes, 6 *Am. & Eng. R. Cas.* 191; 14 *Id.* 647; 19 *Id.* 311, 371. See also 42 *Id.* 166, *abstr.*

* See also *ante*, 7.

640, 61 *Iowa* 452, 16 *N. W. Rep.* 518. *Peoria, P. & J. R. Co. v. Siltman*, 88 *Ill.* 529, 21 *Am. Ry. Rep.* 352.—FOLLOWED IN *Chicago & A. R. Co. v. Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill.* 570, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286.

A failure to ring the bell or sound the whistle for a distance of eighty rods before an engine crosses a public road is, as a matter of law, negligence. Where a railway company failed to do this, and its cars were standing on a side track so as to obstruct the view of an approaching train, whereby one attempting to cross the track was injured and disabled from work for a year, it was held—that a judgment for \$1000 was not excessive. *Houston & T. C. R. Co. v. Wilson*, 60 *Tex.* 142.—QUOTED IN *Texas & P. R. Co. v. Rosedale St. R. Co.*, 22 *Am. & Eng. R. Cas.* 160, 64 *Tex.* 80; *Gulf, C. & S. F. R. Co. v. Greenlee*, 23 *Am. & Eng. R. Cas.* 322, 62 *Tex.* 344.

Plaintiff was injured in crossing a track where the gates were up, while riding in the rear of a brewer's wagon, and where the view of the track was obstructed by standing cars. It appeared that he stopped when near the track and looked and listened for trains, but the evidence was conflicting as to whether the signals were given as the train approached. Held, that a verdict for plaintiff should not be disturbed. *Ander-son v. New York, L. E. & W. R. Co.*, 25 *N. Y. S. R.* 158, 53 *Hun* 633, *mem.*, 2 *Sitv. Sup. Ct.* 9, 6 *N. Y. Supp.* 182; affirmed in 125 *N. Y.* 701, *mem.*, 34 *N. Y. S. R.* 1012.

The plaintiff, early in the morning, it not being quite daybreak and snowing a little, was driving a yoke of oxen and a pair of bob-sleighs along the highway towards a railway crossing, sitting on the front bob low down behind the oxen. The track crossed the highway at an acute angle, and was some seven feet above the highway, which was graded up to it. At the crossing there were some bushes which obstructed the view, but before reaching them there was a view of the track for some sixty or seventy rods, but not while in the hollow at the bottom of the grade and sitting as the plaintiff was. The plaintiff, without looking out for the train, drove on the track, and as he did so he saw a train approaching a few rods off, when he jumped to the off side and hit the off ox, causing it to spring aside and clear the track; but before he could get clear himself he was

struck by the train and injured. It was urged that the plaintiff by so doing voluntarily exposed himself to danger, but there was evidence to the contrary. The defendant's engine had an automatic bell. A witness stated that these bells do not always ring when the train is in motion. The engineer stated that the bell was in good order when the engine left the last station, but he could not say whether or not it was ringing when the accident happened; while a number of witnesses stated that the bell was not then ringing. The jury found that the bell was not ringing; that it was not in good order; and that the plaintiff exercised reasonable care. On motion to enter a nonsuit—held, that there was evidence for the jury; that it could not be said that the findings were not justified, and the court therefore refused to interfere. *Wilton v. Northern R. Co.*, 5 *Ont.* 490.—DISTINGUISHING *Hay v. Great Western R. Co.*, 37 *U. C. Q. B.* 456. NOT FOLLOWING *Johnston v. Northern R. Co.*, 34 *U. C. Q. B.* 432. REVIEWING AND QUOTING *Dublin, W. & W. R. Co. v. Slattery*, 3 *App. Cas.* 1155.

151. — by curves or cuts.*—Where a train is made up of flat-cars which are being pushed in front of the engine through a cut, and which cannot be discovered by a person on a highway until the crossing is reached, it is the duty of the company to use every precaution to avoid accidents. The statutory signals should not only be given, but the train run at a low rate of speed. *Chicago, B. & Q. R. Co. v. Triplett*, 38 *Ill.* 482.

A verdict for plaintiff is warranted by evidence showing that her son was killed by a train at a crossing near the city limits, where, by reason of the curve in the track, the approaching train could not be easily seen, and such train was running at the rate of from 18 to 30 miles an hour, with the tender of the engine turned towards the crossing, no signal having been given, except a whistle blown about 400 yards from the crossing. *Richmond & D. R. Co. v. Johnston*, 89 *Ga.* 560, 15 *S. E. Rep.* 908.—QUOTING *Atlanta & W. P. R. Co. v. Newton*, 85 *Ga.* 525, 11 *S. E. Rep.* 776.

Where a railroad is so constructed that the place where it crosses a public highway is unusually dangerous to the traveling

* See also *post*, 299, 300.

public, as where its track intersects the highway in a cut and is approached on the road by descending a hill, and persons approaching the crossing cannot see the railroad track, owing to brush, until within a few feet of it, and then only a small portion of it, owing to a sharp curve—*held*, that a neglect to sound the whistle or ring the bell, as required by the statute under such circumstances, would be gross negligence. *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313, 7 Am. Ry. Rep. 365.—QUOTED IN *Chicago, B. & Q. R. Co. v. McGaha*, 19 Ill. App. 342.

And where a railroad track crossed a public highway at a place of unusual danger and peril to persons who might be passing over such crossing, and a person traveling over the same with his wagon and team was struck and injured by a passing train which was running at a rapid rate—*held*, that the speed of the train might be considered in connection with the location of the roads and the other surrounding circumstances on the question of negligence. *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313, 7 Am. Ry. Rep. 365.

If the bell and whistle on trains approaching a crossing can give no warning to persons on the highway because of a high intervening bank, then the company is bound to employ some other means of giving warning. *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679.

152. — In cities. — In every case where a street crossing is at grade, and upon which there is considerable travel, it is the duty of the company to use a high degree of care. *Bleyle v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46 Hun 675, *mem.*; *affirmed in* 113 N. Y. 626, *mem.*, 20 N. E. Rep. 877, 22 N. Y. S. R. 993.

Where a company leaves its cars on tracks near a city street crossing so as to obstruct the view of approaching trains, it is its duty in some manner to give notice to persons on the street of the approach of trains. *Bleyle v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46 Hun 675, *mem.*; *affirmed in* 113 N. Y. 626, *mem.*, 20 N. E. Rep. 877, 22 N. Y. S. R. 993.

Where the action is for killing plaintiff's intestate at a street crossing, the obstructions to the intestate's view and the rate of speed of the train are elements for the consideration of the jury. *Bleyle v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46

Hun 675, *mem.*; *affirmed in* 113 N. Y. 626, *mem.*, 20 N. E. Rep. 877, 22 N. Y. S. R. 993.

Proofs showing that the view at a crossing is so obstructed that trains could be seen either way but a short distance, and that the usual signals were not always given and could not be heard, and that the street was a crowded one, will justify a court in ordering the erection of an electric-bell signal, though it appear that persons of extreme prudence might avoid injuries. *In re Highway Com'rs of Brookhaven*, 74 Hun (N. Y.) 46, 26 N. Y. Supp. 293.

A train was passing through a city on a railroad which had a number of short curves, so that persons could see the train but for a short distance; it was crossed by several streets and passed over a river on a drawbridge; the rule of the company required that the whistle should be sounded about a certain point to warn the bridge-tender and persons about to cross at other streets. *Held*, the use of the whistle at that point in the ordinary manner was not negligence. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.

153. Injuries near crossings. — Where the statute only requires signals at crossings a failure to give them a half mile from a crossing where an injury occurs cannot be considered as the proximate cause of the injury. *Pike v. Chicago & A. R. Co.*, 39 Fed. Rep. 754.

Railroads are required by law to establish posts on each side of public crossings, to blow the whistle and check the speed of their trains in approaching them, so as to be able to stop should any one be on the crossing. While these provisions are intended to protect life and property at such crossings, yet where an accident took place just beyond a crossing, the fact that these requirements were disregarded may be considered by the jury in determining the question of negligence on the part of the employés of the railroad. *Western & A. R. Co. v. Jones*, 8 Am. & Eng. R. Cas. 267, 65 Ga. 631.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111. EXPLAINED IN *Brunswick & W. R. Co. v. Hoover*, 74 Ga. 426.

Where a person is injured while walking without permission on the track two hundred yards from a crossing, and with his back toward an approaching train, the fact that the statutory signals were not given

nor the speed of the train reduced, as required by law, as the train neared the crossing may be considered by the jury as tending to show negligence. *Georgia R. Co. v. Williams*, 74 Ga. 723.—DISTINGUISHING *Holmes v. Central R. & B. Co.*, 37 Ga. 593.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

The statute requiring the checking of trains and ringing of bells in approaching public crossings is applicable to this case without reference to the distance from the crossing to the point at which the train started. *East Tenn., V. & G. R. Co. v. Markens*, 88 Ga. 60, 13 S. E. Rep. 855.—DOUBTING AND DISTINGUISHING *Morgan v. Central R. Co.*, 77 Ga. 788.

The liability of railroads, under the Act of 1849, § 38, requiring a bell to be rung or whistle sounded for a distance of eighty rods before reaching a highway crossing, is not confined to damages for injuries at the actual intersection of the two roads. *Held*, to apply to a case where a cow was killed a few feet or yards from a crossing and opposite uninclosed grounds. *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449.—DISTINGUISHING *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Seeley v. Peters*, 10 Ill. 138; *Great Western R. Co. v. Thompson*, 17 Ill. 133; *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541; *Illinois C. R. Co. v. Reedy*, 17 Ill. 580; *Illinois C. R. Co. v. Phelps*, 29 Ill. 448; *Illinois C. R. Co. v. Goodwin*, 30 Ill. 118.

The common law requires all reasonable efforts to be made by persons managing trains to avoid injury; therefore, where an injury occurs after an engine has passed the street crossing, and where the statute does not require signals, the question of whether a failure to give them was such negligence as to render the company liable is for the jury. *Toledo, P. & W. R. Co. v. Foster*, 43 Ill. 415.

If one in the vicinity of, but not intending to use, a crossing may hold a railroad company liable for injuries caused by failure to give a statutory signal, the liability must grow out of peculiar facts and circumstances by reason of which the injured party had a right, in the exercise of ordinary care, to rely upon and wait for the signals, and making an omission to give them negligence. *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105.

154. Where highway passes under or over track.—The provisions of N. Y. Act of 1850, § 39, prescribing a penalty for running a locomotive past highway crossings without giving signals, applies to a crossing where the track is carried over the highway on a bridge. *People v. New York C. R. Co.*, 13 N. Y. 78; *affirming* 25 Barb. 199.

It is as much the duty of a company to give notice of the approach of trains where highways pass under or over the track as where they cross at grade, if danger is likely to result to persons or property from a failure to do so. *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259.—APPROVED IN *Rupard v. Chesapeake & O. R. Co.*, 88 Ky. 280.

155. Blowing in unusual or improper manner.*—Where the statute does not require signals in crossing city streets, but permits them to be given, the company is not liable for giving the signals, unless it be at a time and place, in a manner, and under circumstances not necessary for the proper conduct of its business—which are questions for the jury. *Mayer v. New York C. & H. R. R. Co.*, 29 N. Y. S. R. 183, 8 N. Y. Supp. 461, 55 Hun 608, *mem.*; *affirmed* in 132 N. Y. 579, *mem.*, 43 N. Y. S. R. 965.

Where it is alleged and denied that the blowing of a locomotive whistle was the cause of an accident it is for the jury to say whether the whistle was blown in an unnecessary and extraordinary manner, and whether the accident was caused thereby. *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St. 405.

If an engineer, in giving the usual signal on approaching a public crossing by blowing the whistle, continues such whistle after he becomes apprised of the fright of a team near by, endangering life, such act would be negligence. *Gulf, C. & S. F. R. Co. v. Box*, 81 Tex. 670, 17 S. W. Rep. 375.

156. Qui tam actions under Illinois statutes.—Under the statute prescribing a penalty for running a locomotive over a road crossing without ringing a bell or sounding a whistle, an informer may sue either on behalf of the people or in his own name. *Chicago & A. R. Co. v. Howard*, 38

* See also *ante*, 15, 10, 140.

Liability for frightening a horse at a crossing by blowing the train whistle, see 28 AM. & ENG. R. CAS. 685, *abstr.*

Ill. 414.—DISTINGUISHING Schuyler County v. Mercer County, 9 *Ill.* 20.

The action may be brought either by the prosecuting attorney in the name of the people, or *qui tam* by an informer. *Toledo, P. & W. R. Co. v. Foster*, 43 *Ill.* 480.

A person suing *qui tam* has no vested title in a penalty until he, by a recovery, reduces the claim to a judgment. *Chicago & A. R. Co. v. Adler*, 56 *Ill.* 344, 3 *Am. Ry. Rep.* 278.

It is not necessary in such actions to authorize a recovery to specify in the declaration the trains the engineers of which were guilty of a violation of the statute. Neither is proof of the numbers or description of the engines drawing the trains omitting to give the signals material to a right of recovery. *Chicago & A. R. Co. v. Adler*, 56 *Ill.* 344, 3 *Am. Ry. Rep.* 278.—QUOTED IN *Ohio & M. R. Co. v. People*, 45 *Ill. App.* 583.

It is erroneous to instruct the jury that if plaintiff had proved his case they should find a verdict for \$50 on each count in the declaration, the legislature having, previous to the trial, by the act of February 27, 1869, changed the penalty of \$50 for each omission, as to make it discretionary with the jury to give any sum not exceeding \$100 for each omission. *Chicago & A. R. Co. v. Adler*, 56 *Ill.* 344, 3 *Am. Ry. Rep.* 278.

Under the act of 1869, which provides that one half the penalty against a railroad for an omission to ring the bell or sound the whistle on approach to a crossing of a public highway shall go to the "prosecuting witness," it is not essential to entitle the person in whose name the suit is brought to recover, that he should actually have testified in the case. *Illinois C. R. Co. v. Herr*, 54 *Ill.* 356.

So where, in such a case, there were no witnesses examined, but the case was tried upon an agreed state of facts, the person in whose name the suit was brought was regarded as the prosecutor, and being competent to testify, was the prosecuting witness, within the meaning of the act, and as such entitled to maintain the suit. *Illinois C. R. Co. v. Herr*, 54 *Ill.* 356.

The act referred to provides that one half the penalty shall go to the prosecuting witness, "the other half to go to the state." *Held*, the judgment for the penalty, so far as it is to go to the state, is properly rendered in favor of "the people of the state of

Ill.," and should not be entered in favor of "the state." *Illinois C. R. Co. v. Herr*, 54 *Ill.* 356.—DISTINGUISHING *Illinois C. R. Co. v. Tait*, 50 *Ill.* 48.

The judgment should be for a recovery of money, one half to the use of plaintiff and one half to be paid to the state, and should direct execution to issue in that form. *Illinois C. R. Co. v. Tait*, 50 *Ill.* 48.—DISTINGUISHED IN *Illinois C. R. Co. v. Herr*, 54 *Ill.* 356.

The court instructed the jury, at plaintiff's request, "that a preponderance of evidence only is required and that it was not necessary that the jury should be satisfied of the guilt of the defendant beyond a reasonable doubt." *Held*, error. While the same amount of proof is not required as in ordinary criminal cases, a slight preponderance will not suffice. *Toledo, P. & W. R. Co. v. Foster*, 43 *Ill.* 480.

The Act of 1849, § 38, "to provide for a general system of railroad corporations," required a bell of at least thirty pounds' weight, or a steam whistle, to be placed on each locomotive engine, and that the same should be rung or whistled at least eighty rods from the place where the railroad crossed any other road or street, and be kept ringing or whistling until such other road or street was crossed, "under a penalty of fifty dollars for every neglect." The act of 1869, entitled "An act to amend the railroad law," so amended the law in respect of the penalty for this neglect of duty, as to read "under a penalty of not exceeding one hundred dollars." *Held*, that as the latter act allowed a latitude of discretion in respect to the penalty from one cent to one hundred dollars (\$100), it was inconsistent with and repugnant to that of 1849, directing an absolute and fixed penalty of \$50, and repealed the former by implication. *Wilson v. Ohio & M. R. Co.*, 64 *Ill.* 542, 3 *Am. Ry. Rep.* 285.—QUOTING *Van Inwagen v. Chicago*, 61 *Ill.* 31.

157. Validity of municipal ordinance requiring.—Municipal ordinances requiring the ringing of the locomotive bell whenever a steam-engine is approaching or crossing a public street, and requiring the presence of a flagman at important crossings, to the end that people may be suitably and reasonably warned of the approach of railroad trains, are reasonable and proper regulations. *Denver & R. G. R. Co. v. Ryan*, 17 *Colo.* 98, 28 *Pac. Rep.* 79.

158. Repeal of New York act of 1854.—It seems that the provision of the Railroad Act of 1854, ch. 282, § 7, imposing upon railroad companies the duty of attaching a bell or steam whistle to each locomotive engine, and of ringing the bell or blowing the whistle at eighty rods from the crossing at grade of a traveled public road, and making the companies responsible for damages resulting from such an omission, was repealed by the General Repealing Act of 1886, Laws of 1886, ch. 593. *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496, 26 N. E. Rep. 357, 34 N. Y. S. R. 373; affirming 53 Hun 614, 1 Silv. Sup. Ct. 393, 24 N. Y. S. R. 435, 5 N. Y. Supp. 313.—DISTINGUISHED IN *Petrie v. New York C. & H. R. R. Co.*, 49 N. Y. S. R. 279, 66 Hun 282, 21 N. Y. Supp. 159.

Where, however, in an action to recover damages for injuries received at a crossing through a collision with one of defendant's trains, the contention upon the part of defendant was that the place at which the accident occurred was not a public highway, but a private crossing, to which said provision of the act of 1854 did not apply, and the court, in its charge, assumed, as matter of law, the existence of the duty, and submitted to the jury the question as to its performance, and defendant's counsel, while excepting to the charge, did not present the question as to the repeal of the provision, but conceded it was in force and only denied its application to the case—held, that it could not be presented as a ground of reversal on appeal. *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496, 26 N. E. Rep. 357, 34 N. Y. S. R. 373; affirming 53 Hun 614, 1 Silv. Sup. Ct. 393, 24 N. Y. S. R. 435, 5 N. Y. Supp. 313.

Since such repeal the only statute upon the subject remaining is the provision of the Penal Code (§ 421), which provides that the engineer of a locomotive who fails to ring the bell or sound the whistle upon it, eighty yards from a crossing, shall be guilty of a misdemeanor; this imposes no duty upon the company. (Maynard, J., dissenting as to last proposition). *Vandewater v. New York & N. E. R. Co.*, 135 N. Y. 583, 32 N. E. Rep. 636, 49 N. Y. S. R. 55; reversing 63 Hun 186, 43 N. Y. S. R. 420, 17 N. Y. Supp. 652.

It seems, however, a railroad company owes a duty to the public to run its trains with care and caution at crossings, and the

failure to give due warning of an approaching train by the signals specified or in some other way, may properly be considered as bearing upon the question of negligence. *Vandewater v. New York & N. E. R. Co.*, 135 N. Y. 583, 32 N. E. Rep. 636, 49 N. Y. S. R. 55; reversing 63 Hun 186, 43 N. Y. S. R. 420, 17 N. Y. Supp. 652.

And so long as the company has at hand, or there are available to it these appliances for giving notice of approaching danger, it is its duty to use them. *Hermans v. New York C. & H. R. R. Co.*, 43 N. Y. S. R. 900, 63 Hun 625, 17 N. Y. Supp. 319; affirmed in 137 N. Y. 558, mem., 33 N. E. Rep. 337, 50 N. Y. S. R. 932.

In the absence of a statute, it is not negligence *per se* to fail to give signals at crossings, and it is error to instruct a jury that if the bell was not rung as required by statute, such failure was negligence. In such case the question of whether there was negligence in running the train should have been left to the jury. *Austin v. Staten Island R. T. R. Co.*, 39 N. Y. S. R. 76, 14 N. Y. Supp. 923.

The law requiring a railroad company to ring a bell or blow a whistle when its trains arrived within eighty rods of a crossing having been repealed, it is reversible error to charge that the same is the measure of duty of a company. *Petrie v. New York C. & H. R. R. Co.*, 49 N. Y. S. R. 279, 66 Hun (N. Y.) 282, 21 N. Y. Supp. 159.—DISTINGUISHING *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496, 34 N. Y. S. R. 373; *Kane v. New York, N. H. & H. R. Co.*, 132 N. Y. 160, 43 N. Y. S. R. 497.

159. Pleadings — Sufficiency of complaint.*—A declaration, in an action for damages, for injury at a crossing resulting from a failure to give the statutory signals, must allege that the failure to ring the bell or sound the whistle occurred while the train was approaching the crossing. *Wilson v. Rochester & S. R. Co.*, 16 Barb. (N. Y.) 167.

160. Evidence, weight and sufficiency of—Positive and negative.†

* See also *post*, 330-335.

Negligence at a crossing. What is a sufficient averment thereof, see 23 AM. & ENG. R. CAS. 297, *abstr.*

† See also *post*, 348.

Evidence as to signals at crossing, see note, 38 AM. & ENG. R. CAS. 6; see also 55 *Id.* 245, *abstr.*

When sufficient evidence of negligence to

Where the plaintiff charges negligence in not giving the statutory signals on a train, the burden is on him to prove it; and it is not sufficient to show by one or more witnesses that they did not hear a signal, without further showing that they were in a position to hear it had a signal been given. *Ohio & M. R. Co. v. Reed*, 40 Ill. App. 47. *Bleyle v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 585, 46 Hun 675, mem.; affirmed in 113 N. Y. 626, mem., 20 N. E. Rep. 877, 22 N. Y. S. R. 993.

If one present at the crossing was conscious and in the exercise of his ordinary senses and swears he heard no signals, then if he was in a position to hear if the signals were given, the triers of the fact would be justified in the conclusion that no such sounds were made. *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 Mo. App. 109.

Negative evidence—that is, that witnesses did not hear a signal—is not entitled to equal weight with affirmative evidence of other witnesses that a signal was given. *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Ill. App. 407. *Chicago & A. R. Co. v. Robinson*, 19 Am. & Eng. R. Cas. 396, 106 Ill. 142; reversing 9 Ill. App. 89.

There may be cases when a jury is justified in giving greater weight to negative evidence than to positive. Thus, where witnesses who were near at hand and in a position to see and hear testify that they did not hear a signal as a train approached the crossing, they may be believed as against others who state affirmatively that the signal was given. *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.—EXPLAINING *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499.—QUOTED IN *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill. 235.

Where a person injured at a crossing states that he saw no lights on the train and heard no whistling, but the foreman and engineer testify that the lamps were lighted and could be seen for a long way off, and the porter testifies that he called to the plaintiff not to cross, there is no evidence of negligence to go to the jury. *Ellis v. Great Western R. Co.*, L. R. 9 C. P. 551, 43 L. J. C. P. 304, 31 L. T. 874.

The conductor, engineer, fireman, and submit case to jury, see 42 AM. & ENG. R. CAS. 190, *abstr.*

Positive and negative testimony as to giving of signals, see notes, 19 AM. & ENG. R. CAS. 399; 45 *Id.* 163.

brakeman having testified that the brakeman stood on the forward end of the train with a lighted lantern and that the bell was ringing, the testimony of the plaintiff and several other witnesses who looked only casually at the train that they did not hear the bell or see the lantern is at most a mere scintilla of evidence, and not enough to have justified the submission of those questions to the jury or to have warranted a special finding that no one stood on the forward end of the train with a lantern. *Bohan v. Milwaukee, L. S. & W. R. Co.*, 19 Am. & Eng. R. Cas. 276, 61 Wis. 391, 21 N. W. Rep. 241.

161. — competency of.—Where it is proven that a party injured by a collision at a crossing of a highway was in the exercise of due care and caution it may be a reasonable inference that the accident was produced by reason of the neglect to ring a bell or sound a whistle. It may be made to appear by circumstantial as well as direct evidence. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

The customary rate of speed of the trains at the place at which the collision causing the injury occurred is competent, as was the habit not to ring the bell at such crossing, where it appeared that the injured party was well acquainted with the crossing and the testimony was in conflict whether the bell was rung on the occasion of the collision and injury. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.—QUOTING *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

162. Burden of proof.*—The burden of proof is on a plaintiff who alleges that signals were not given, to sustain it by evidence. *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Ill. App. 407. *Becht v. Corbin*, 92 N. Y. 658.—APPLIED IN *Parsons v. New York C. & H. R. R. Co.*, 37 Hun (N. Y.) 128.

An instruction which places the burden of proof on the railroad company to show that an accident at a crossing did not result from a failure to give signals, is error. *Peoria, D. & E. R. Co. v. Foltz*, 13 Ill. App. 535.

Plaintiff was bound to prove, before he could recover, that a highway existed at the point alleged, and it was error for the court to refuse to so instruct the jury. Evidence,

* See also *post*, 220, 337.

however, that a road was there, used by the public, and recognized and repaired, so far as repairs were needed, by the officers having charge of highways would, *prima facie*, prove its existence. *Chicago & A. R. Co. v. Adler*, 56 Ill. 344, 3 Am. Ry. Rep. 278.

Ala. Code of 1876, § 1699, exacts certain positive duties of those in charge of a train approaching a public crossing or other place mentioned in the statute, rendering the railroad company liable for all damages to persons or property occasioned by the failure to observe these requirements and imposing on it the burden of showing compliance with the statute if the injury occurs at one of the places therein mentioned. *South & N. Ala. R. Co. v. Thompson*, 62 Ala. 494.—QUOTED IN *Georgia Pac. R. Co. v. Blanton*, 84 Ala. 154, 4 So. Rep. 621.

Under Mo. Rev. St. of 1889, § 2608, making railroads liable for injuries occasioned by failure to ring a bell or to sound a whistle at a public crossing, but permitting them to show that a failure to do so did not cause the injury, the burden of proof where it appears the signals were not given is on the company as to the cause of the injury. *Crumpley v. Hannibal & St. J. R. Co.*, 111 Mo. 152, 19 S. W. Rep. 820.

Neither Rev. St. Mo. § 806, nor Laws of 1881, p. 79, § 1 (and they are the same except that the latter devolves upon the railway company the burden of proof where it fails to ring the bell, etc.), relieves the railroad from the obligation, in cities, to ring the bell or sound the whistle eighty rods from each street crossing. But when the company has complied with the statute by ringing its bell up to the time it stopped at the station and then resumed the ringing, as it should do, the instant it moved on, this would be a practical compliance with the statute. *Coffin v. St. Louis & S. F. R. Co.*, 22 Mo. App. 601.

163. How failure to give signals may be proven.—In an action against a company for an injury resulting from an omission of the engineer to give the statutory signal as his train approached a highway crossing, such omission may be proved by other than positive and direct testimony. *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575; *affirming* 28 Ill. App. 73.

2. Lookouts.

164. General duty to furnish.—It is the duty of an engineer when his engine is

in motion to keep a constant lookout for obstructions, and when one is discerned, no matter when or where, he should promptly resort to all means within his power known to skilful engineers to avert the threatened danger. *Bullock v. Wilmington & W. R. Co.*, 42 Am. & Eng. R. Cas. 93, 105 N. Car. 180, 10 S. E. Rep. 988.—DISTINGUISHED IN *High v. Carolina C. R. Co.*, 112 N. Car. 385.

It is the duty of railway companies to have a lookout kept, not only where traveled ways cross their track, but throughout its length—a duty which is required by the safety of their passengers, as also that of those who might otherwise be injured. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.—REVIEWED IN *Artusy v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177.

A railroad company is bound to provide for a careful lookout in the direction in which a train is moving, in places where people, and especially where children, are liable to be upon the track. *Heddes v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.—QUOTED IN *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.

One who is injured by detached box-cars in motion in defendant's yard, where it was crossed by a public street, such cars being accompanied by a single brakeman placed about the middle of the forward car, is entitled to recover if in the exercise of ordinary care. *Chicago, A. & St. L. R. Co. v. Gomes*, 46 Ill. App. 255.—FOLLOWING *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641.

165. At crossings.—In approaching a public crossing it is the duty of those who handle a train to be on the lookout, as well as to give the statutory signals. *Halferty v. Wabash, St. L. & P. R. Co.*, 82 Mo. 90. *Purinton v. Maine C. R. Co.*, 78 Me. 569, 7 Atl. Rep. 707.

An engineer is reckless who, with knowledge that there are no semaphores, flagman, or gates at a railroad crossing, a view of which is obstructed, attempts to make a crossing without seeing that the way is clear for so doing. *Kelly v. Duluth, S. S. & A. R. Co.*, 92 Mich. 19, 52 N. W. Rep. 81.

While a railway company has the right to use its own track, and while its engineer

ordinarily, when his train is in motion, seeing persons near the track ahead of him, has the right to presume that they will keep out of the way, yet, when the train is moving in a town, great watchfulness on the part of the company's servants is required. It is then the duty of the engineer, before starting his engine across a street, not only to give timely warning of his intention to start, but to look ahead and see that his train is not likely to hurt persons who are passing. *Texas & P. R. Co. v. Lowry*, 61 *Tex.* 149.

166. On backing trains.*—Where a train is about to move from a street crossing backward, a lookout should be provided at the rear of the car, upon whose signal the engineer may act. *Robinson v. Western Pac. R. Co.*, 48 *Cal.* 409.

It is gross negligence in a railroad company to back its trains across the main street in a village without a brakeman at the rear end as a lookout, and in readiness, in case of danger, to apply the brakes, and thus prevent collision or accident. *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 261, 10 *West. Rep.* 184, 33 *N. W. Rep.* 306.

Negligence on the part of a railroad company, and the absence of contributory negligence on the part of one injured while crossing its track, are properly inferred from the facts that the locomotive was running backwards at a high rate of speed, that neither the engineer nor the fireman was looking out, that the bell was not rung, that the person injured stopped and looked each way before crossing, but saw no cars, and that he could have heard the bell at a distance of fifty yards had it been rung. *Clampitt v. Chicago, St. P. & K. C. R. Co.*, 49 *Am. & Eng. R. Cas.* 468, 84 *Iowa* 71, 50 *N. W. Rep.* 673.

Where the action is to recover for killing plaintiff's intestate by backing an engine upon him at a city street crossing on a dark night, instructions that "the company was bound to have so much light, and so located, that a person reasonably diligent, and of natural powers of observation, might have been able to discover it," and that it was the engineer's duty "to keep a lookout

to see whether he is running down foot passengers who are crossing the railroad track upon the highways of the city," are correct. *Cheney v. New York C. & H. R. R. Co.*, 16 *Hun (N. Y.)* 415.

A child nine years old, while attempting to cross the track, caught his foot between the rails and was injured by a train which was backing. He was not seen by the employes on the train in time to stop before reaching him. *Held*, that it was negligence on the part of the railroad company in failing to keep a proper lookout. *Louisville, N. A. & C. R. Co. v. Head*, 4 *Am. & Eng. R. Cas.* 619, 80 *Ind.* 117.—**DISTINGUISHING** *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 *Ind.* 43.

Where a person has been run over by a railroad train and injured, in an action for damages therefor a finding that the injury was caused by the gross negligence of the company will not be set aside when it appears that he was run over by a train consisting of a locomotive, tender, one baggage and two passenger cars, which was started backward over a public crossing in a populous city, with the brake on the engine out of repair and useless, with no brakeman at the other brakes, with no flagman or other person at the rear of the train or at the crossing to warn persons of their danger, and no one on the train except three persons, who were all on the locomotive, without the blowing of any whistle, though with the ringing of the bell, and along a track which from the locomotive could not be seen for a distance of from forty to fifty feet from the rear of the train. *Kansas Pac. R. Co. v. Pointer*, 14 *Kan.* 37.

167. Under Canadian statute.—An engine with tender, moving reversely, is a "train of cars," within the meaning of section 260 of 51 *Vict. c. 29*; and some one should be stationed on the tender to warn persons crossing the track. *Hollinger v. Canadian Pac. R. Co.*, 21 *Ont.* 705.

A highway crossed defendants' line at right angles. Defendants were shunting a train of flat-cars, and after backing for some distance the engine uncoupled from the train, switched upon another track, and the train and engine both continued to back down on different tracks to the highway. Plaintiff was proceeding along the highway and was about to cross the tracks. The flat-cars had reached the highway and were passing over it. Plaintiff, while watching

* See also *post*, 325.

Backing or pushing cars at crossings, see note, 19 *AM. & ENG. R. CAS.* 283.

Failure to sound signal and place brakeman on front car of a backing train, see 39 *AM. & ENG. R. CAS.* 660, *abstr.*

those in front of her, did not see or hear the engine coming down on the other track, and was struck by the tender and injured. There was no lookout on the tender, and there was contradictory evidence as to the ringing of the bell at all, though at most it was not rung until the engine had run some distance towards the highway, and the whistle was not blown. The jury found that the accident was caused by the negligence of the defendants, and that the negligence consisted in not ringing the bell in time. *Held*, that there was sufficient in the general facts of the case to justify a verdict in favor of the plaintiff; that whether section 256 of the Railway Act 1888 applied or not under the circumstances of this case, defendants did not object to its application by the trial judge, and the jury having on contradictory evidence found negligence against them in not ringing the bell in passing over the distance from the starting point to the crossing, the verdict should not be interfered with; that section 256 did not apply to shunting in a station yard, and that there had been misdirection on that point; but that the defendants had no right to use the highway as part of their station yard, and were therefore trespassers *ab initio*, and liable for all damages resulting from their dangerous use thereof. *Hollinger v. Canadian Pac. R. Co.*, 20 Ont. App. 244.

V. LIABILITY AS DEPENDENT ON RATE OF SPEED.*

168. At common law.—In the absence of a statute, or of a municipal regulation, trains may be run over crossings at any rate of speed which is reasonably safe to the passengers carried. *Chicago, B. & Q. R. Co. v. Florens*, 32 Ill. App. 365.—QUOTING *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 582.

In the absence of a statute regulating the rate of speed of trains, the common law rule prevails, which is that the railroad company is under the duty and obligation at all times to use ordinary care and prudence, so that no unnecessary risk or hazard shall be cast upon the public. *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172; affirmed in 51 Fed. Rep. 174.

Neither the statute nor the common law fixes any definite rule as to the rate of speed

of trains at crossings. The weight of authority is that they may be run at any speed that is safe to the freight and passengers carried, as to them; but as to persons at crossings the rate of speed depends somewhat upon the locality and the circumstances of the case. *East Tenn., V. & G. R. Co. v. Deaver*, 79 Ala. 216.

The statute does not regulate the speed of railroad trains in passing stations, nor, except when entering a curve crossed by a public road, where the engineer cannot see at least one fourth of a mile ahead, require that the speed shall be moderated; and in the absence of statutory provisions in this respect the question of negligence *vel non* must be determined by the rules of the common law; nor can it be declared, as matter of law, that any rate of speed is negligence *per se*. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

169. Independent of statute.*—

Although there is no statute limiting the speed of trains over a crossing, yet the speed must nevertheless be consistent with the care and prudence required in good railroad management, and with that degree of care and prudence required for the safety of the lives and property of the persons rightfully approaching and traveling over such crossings. If the company makes up by increased diligence and care in guarding people against the dangers to which they are exposed by reason of the train being off time, then they are not guilty of negligence. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. Cas. 89, 66 Mich. 150, 9 West. Rep. 903, 33 N. W. Rep. 161.

Irrespective of any ordinance or law regulating the speed of railroad trains at crossings, the running at an excessive rate of speed is negligence, and if a collision is caused thereby the company is liable. As to whether the rate of speed is excessive or dangerous in the locality, is a question of fact for the jury. *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524; affirming 6 Hun 314.—FOLLOWED IN *Salter v. Utica & B. R. R. Co.*, 8 Am. & Eng. R. Cas. 437, 88 N. Y. 42. QUOTED IN *Louisville & N. R. Co. v. Milam*, 9 Lea (Tenn.) 223.

As a general rule negligence cannot be inferred from the speed of the train alone,

* Duty of company to slacken speed and give signals on approaching crossings independent of statutes, see note, 9 L. R. A. 160.

* See also *post*, 208, 320, 335, 346.

and defendant company was not bound to slacken its speed in passing a crossing much used within the limits of a city, though it was found as a fact that the crossing was especially dangerous, by reason of the view being obstructed and the road being constructed in a cut and on a curve. So held, where the neighborhood was thinly settled, the proper danger signals given, and the city, though having the power, had made no order touching the speed of trains at such crossing. *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9, 17 Atl. Rep. 137.

In the absence of statute there is no limit to the speed which railroad trains are entitled to make, except that fixed by a careful regard to the safety of the trains and the passengers conveyed by them. *Telfer v. Northern R. Co.*, 30 N. J. L. 188.—QUOTED IN *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417.

A charge of the court instructing the jury that it was the duty of a railway company to reduce the speed of the engine when crossing any of the streets of a city was error, in the absence of legislation regulating that matter. In a given case a failure to reduce speed might, as a matter of fact, be negligence; but this must be ascertained and determined by the jury. *International & G. N. R. Co. v. Graves*, 59 Tex. 330.

170. Constitutionality of statutes.—A statute regulating the speed of railroad trains, requiring guards to be placed at bridges and other points of danger, and requiring the sounding of a whistle or a bell at road crossings and thoroughfares, for the safety of passengers and others, and their property, is constitutional. *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140.

171. Power to regulate.—By charters, unlimited discretion in the regulation of the speed of trains is not conferred. Among the rights reserved is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger from the rapid speed of railway trains. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 61, 7 Am. Ry. Rep. 150.—QUOTED IN *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309. REVIEWED IN *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604.

172. Speed, generally.—If there is

imminent danger of a collision, which might be avoided by stopping or slowing a train, the engineer cannot justify himself in driving his engine upon a wagon and horses under the plea that the driver should have kept out of the way. *Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.

Where it is required by law that a train must be so checked that the engineer can stop at a crossing, and the whistle blown, it is not necessary, to enable the plaintiff to recover for a personal injury, for him to show that the speed was reckless, or that the engineer could not have stopped the train at the crossing. *Augusta & S. R. Co. v. McElmurry*, 24 Ga. 75.

There is always room for dwelling before a jury, if it is allowed, on the perilous character of a fast train; but the law allows it, and has imposed what the legislature considers sufficient guards against danger from it. On the other hand, nothing could be more dangerous than irregular running. Reliability in the movements of trains is necessary for the protection of the numerous lives on the trains themselves, which exceed in number any likely to be found at any crossing. Time lost by slowing at one place must be made up afterwards, and any considerable loss always creates danger. Persons at crossings can always inform themselves sufficiently of the times and conditions of passing, and accidents do not happen very often where both parties are reasonably vigilant. *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. Rep. 275.

A railroad company is guilty of negligence in maintaining the usual rate of speed when approaching a highway crossing without observing the usual precautions and giving the required danger signals to warn the public of the approach of the train. *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150, 53 N. W. Rep. 216.

The law places no restrictions upon the rate of speed at which trains may be run across the country and over highway crossings;

notes, 19 AM. & ENG. R. CAS. 275; 11 L. R. A. 434.

Liability of company for injuries caused by running train past crossings at high rate of speed, see notes, 49 AM. & ENG. R. CAS. 486; 3 L. R. A. 594.

Running train at unexpected time and at extraordinary speed, see 32 AM. & ENG. R. CAS. 121, *abstr.*

* See also *post*, 346, 356.

Speed of trains at highway crossings, see

nor is the train required to stop or reduce its speed at such places. Neither is the company liable in damages for an injury occurring from the rate of speed, if statutory signals have been given. *Warner v. New York C. R. Co.*, 44 N. Y. 465; *reversing* 45 Barb. 299.—FOLLOWING *Ernst v. Hudson River R. Co.*, 39 N. Y. 66; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.—QUOTED IN *Black v. Burlington, C. R. & M. R. Co.*, 38 Iowa 515; *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417.

Negligence cannot be imputed to an engineer for striking a person at a crossing with a moving engine, in the absence of proof that he saw the person, or that he approached the crossing at an improper rate of speed. *Moore v. Philadelphia, W. & B. R. Co.*, 108 Pa. St. 349.

So long as a railroad company makes it safe for the public to cross its road on the public highway by providing gates, watchmen, or other means, it may run its trains at any rate of speed over such crossings; but if it neglects to use every precaution necessary for the safety of the public, no moderation or slowness of speed will excuse its neglect. *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430, 3 Atl. Rep. 234.

Ordinary care requires those running a hand-car to check its speed if it threatens danger to plaintiff, even though he was not at the time on the track, but only approaching it. *Moore v. Central R. Co.*, 47 Iowa 688.

173. In violation of city ordinance.*—A municipal ordinance prohibiting, under penalty of a fine, the backing of a railroad engine at a greater speed than four miles an hour, is a reasonable police regulation, the violation of which is negligence and renders the railroad company liable for damages at the suit of a person injured. *Louisville & N. R. Co. v. Webb*, 49 Am. & Eng. R. Cas. 427, 90 Ala. 185, 8 So. Rep. 518.

If an engineer of a railway company, knowing that persons are accustomed to cross the track between the streets of a large and crowded city, drives his engine forward recklessly, or with indifference as to whether such persons are injured or not, and at a rate of speed greatly in excess of

that limited by a city ordinance, an injury thereby inflicted upon one of such persons, even though he be a trespasser, will be regarded as the result of "such gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness." *Lake Shore & M. S. R. Co. v. Bodemer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692; *affirming* 33 Ill' App. 479.

The fact that a train was violating a city ordinance as to speed at the time of an accident does not of itself constitute negligence, unless the plaintiff shows that the injury would not otherwise have occurred. *Philadelphia, W. & B. R. Co. v. Stebbing*, 19 Am. & Eng. R. Cas. 36, 62 Md. 504.

But is competent evidence as tending to show negligence. *Meek v. Pennsylvania Co.*, 13 Am. & Eng. R. Cas. 643, 38 Ohio St. 632.

Whether an injury received by one from a moving train in crossing a railroad track could have been prevented by the company's observance of a city ordinance, is a question for the jury. *Dahlstrom v. St. Louis, I. M. & S. R. Co.*, 108 Mo. 525, 18 S. W. Rep. 919.

174. Speed should not be so great as to render signals useless.—The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when the sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, an unslackened speed is desirable. Watchmen should be stationed at the crossing. *Baltimore & O. R. Co. v. Owings*, 28 Am. & Eng. R. Cas. 639, 65 Md. 502, 5 Atl. Rep. 329.

If a train is moving at such rate of speed that it would cover the distance between a point from which its bell could be heard at a crossing and the place of crossing in so short a time as to make the signal of little or no use to one in the act of crossing the track, then failure to give notice by the whistle from a longer distance would be negligence. *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73, 24 Atl. Rep. 341.

175. At railroad intersections.—Where trains are required by law to come to a full stop at railroad intersections, their neglect to do so has some bearing on the

* Violation of ordinances as to speed, see notes, 13 AM. & ENG. R. CAS. 647; 19 Id. 41. See also 35 Id. 362, *abstr.*

question of the speed at which they were running near such crossing. *Staal v. Grand Rapids & I. R. Co.*, 57 Mich. 239, 23 N. W. Rep. 795.

Texas Rev. St. art. 4232 (Sayles's ed.) provides that each "engine approaching a place where two lines of railway cross each other shall, before reaching such crossing, be brought to a full stop." This does not render improper a charge in a suit for damages inflicted in a collision of trains at such a crossing, "that if defendant did not bring its engine to a full stop before reaching the crossing at such a distance therefrom as, under the circumstances, common prudence would dictate as necessary to avoid colliding," such failure would be negligence. *Ft. Worth & D. C. R. Co. v. Mackney*, 83 Tex. 410, 18 S. W. Rep. 949.

176. In cities.—To run a train at a rapid rate of speed across a public street in a city or town is, *prima facie*, wilful negligence. *Eskridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580.

A railroad company may be liable for an injury at a street crossing in a thickly settled district, where the train was running at an unlawful speed, if it appears that the accident would not have happened had it been running at proper speed. *Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380.

Where an accident happened in a city whose population is not shown, and prior to the passage of the Act of 1889, ch. 242, providing that in cities of fifty thousand population or less, where railroad crossings are provided with gates, the city cannot limit the speed of trains to less than thirty miles per hour, it is not error to allow the reading, as evidence, of an ordinance making it unlawful to back trains at a greater speed than two miles per hour. *Haywood v. New York C. & H. R. R. Co.*, 35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177; affirmed in 128 N. Y. 596, mem., 38 N. Y. S. R. 1011.

Where plaintiff was injured at a dangerous crossing near a populous city, and it appeared that the train was run at a rapid rate on a down grade, without steam, rendering it comparatively noiseless, and without ringing a bell or sounding a whistle—held, sufficient to warrant the jury in finding the company guilty of gross negligence. *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534, 11 Am. Ry. Rep. 157.—APPLIED IN *Chicago,*

M. & St. P. R. Co. v. O'Sullivan, 143 Ill. 48. FOLLOWED IN *Chicago, M. & St. P. R. Co. v. Dowd*, 115 Ill. 659.

177. In towns or villages.—Me. Acts of 1885, ch. 377, prohibits a train running across a highway near the compact part of a town at a speed greater than six miles an hour, unless the parties operating the railroad maintain a flagman or a gate at the crossing. *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. Rep. 64.

There must be a reasonable and fair regard on the part of railroads for persons and property in running their trains through villages and over frequented public crossings, and the rate of speed must be made to conform reasonably with the surroundings. *Stepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229.

A statute regulating speed across highways in the compact part of a town applies to railroads extending into an adjoining state. *Clark v. Boston & M. R. Co.*, 31 Am. & Eng. R. Cas. 548, 64 N. H. 323, 5 N. Eng. Rep. 48, 10 Atl. Rep. 676.

Evidence held sufficient to justify the jury in finding that the defendant was negligent in running a train at a high rate of speed over a village street crossing, without giving signals of its approach sufficiently near the crossing to be heard by travelers. *Beanstrom v. Northern Pac. R. Co.*, 46 Minn. 193, 48 N. W. Rep. 778.

178. At country crossings.—No obligation rests upon a railroad to slacken the ordinary speed of its trains before reaching a highway crossing in an open level country where persons seldom pass. *Toledo, W. & W. R. Co. v. Miller*, 76 Ill. 278. *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88.

But the greater the speed the greater the degree of care required in giving warning when approaching a road crossing at grade. *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73, 24 Atl. Rep. 341.

While in the absence of municipal regulations no rate of speed is negligence *per se*, still it does not follow that a company may at all times and places run its trains at any rate of speed. A high rate of speed at a country crossing may be considered by the jury as tending to show negligence. *Stepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229.

* Duty of company to give warning and slacken speed on approaching highway crossings, see note, 7 L. R. A. 317.

179. At curves or cuts.—The engineer is required "before entering any curve crossed by a public road on a cut, where he cannot see at least one fourth of a mile ahead," to reduce the speed of his train, and "approach and pass such crossing in such cut at such moderate speed as to prevent accident in the event of an obstruction at the crossing" (Ala. Code, § 1699); but the statute only applies to such crossings as are particularly described, and leaves his duty at other crossings to be determined by the common law. *East Tenn., V. & G. R. Co. v. Deaver*, 79 Ala. 216.—REVIEWING Memphis & C. R. Co. v. Lyon, 62 Ala. 71.

180. Dangerous crossings -- Duty to slacken speed and give signals.*

—A train approaching a public crossing must not only give the warnings and observe the other precautions required by statute, but its speed must be so slackened that the train may be more manageable in passing the crossing; and hence a charge that the company "had a right to run its train at any speed it pleased, so that it did not endanger freight or persons on board," asked in a suit to recover damages for injury to persons or property at a public crossing, is properly refused. *South & N. Ala. R. Co. v. Thompson*, 62 Ala. 494.

Where there is evidence that a crossing was dangerous and was approached by a train at a very high rate of speed, it was not error to refuse to charge that the company performed its whole duty in connection with the approach of the train to the crossing, if the whistle was sounded and the bell rung at a proper distance therefrom. *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. St. 506, 21 Atl. Rep. 140.

Negligence being the absence of care according to the circumstances, it must be measured by the apparent danger; the character of such a crossing necessarily affects the duties of the railroad company toward travelers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed, proportionate to the danger. *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. St. 506, 21 Atl. Rep. 140.

181. Under the Georgia statute.—The Georgia statute requiring the checking of trains at road crossings applies to the crossings of streets in cities. *Central R. Co. v. Russell*, 75 Ga. 810.

The law requires only that the engineer should blow his whistle at the blow-post and so check his train that he may be able to stop it at the crossing. It is not necessary for the regular speed to be checked before reaching the blow-post. *Crawley v. Georgia R. & B. Co.*, 82 Ga. 190, 8 S. E. Rep. 417.

When a train is run against a man upon the track whilst the engineer is engaged in a criminal violation of a public law by not checking speed in approaching a public crossing, it is not true as matter of law that the engineer has a right to assume, on first seeing the man on the track, that he would get off in time to save himself. *Georgia R. & B. Co. v. Daniel*, 89 Ga. 463, 15 S. E. Rep. 538.

182. — trains starting at crossing.—The Georgia statute regulating the speed of trains at public crossings does not apply where the train is started at or upon the crossing. *Harris v. Central R. Co.*, 30 Am. & Eng. R. Cas. 581, 78 Ga. 525, 3 S. E. Rep. 355.

183. When for jury.*—It is competent for a witness to testify that very near the crossing a train was going at a high rate of speed without giving signals, and it is then a question for the jury to determine whether the facts constituted negligence. *Fleck v. Burlington, C. R. & M. R. Co.*, 38 Iowa 515. *Bolinger v. St. Paul & D. R. Co.*, 29 Am. & Eng. R. Cas. 408, 36 Minn. 418, 31 N. W. Rep. 856.

Where the action is to recover for killing plaintiff's husband at a street crossing in a city and the evidence shows that it was on a dark, foggy morning; that the train was running without signals at a rate of speed prohibited by ordinance, and that the deceased was struck immediately upon stepping on the track, there is sufficient evidence to warrant the submission of the question of the company's negligence to the jury. *Keim v. Union R. & T. Co.*, 90 Mo. 314, 2 S. W. Rep. 427.—APPROVING *Persinger v. Wabash, St. L. & P. R. Co.*, 82 Mo. 197; *Turner v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 578; *Kendrick v. Chicago & A. R. Co.*, 81 Mo. 521; *Edwards v. Chicago, R. I. & P. R. Co.*, 76 Mo. 399. DISTINGUISHING *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 138. OVERRULING *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562.—

* Duty of motorman to slow up at crossings, see ELECTRIC RAILWAYS, 38.

* See also ante, 22, 137.

APPLIED IN *Hudson v. Wabash & W. R. Co.*, 32 Mo. App. 667.

Where the action is for an injury at a crossing the question whether the train was running at an improper speed is for the jury, although the speed allowed by a city ordinance was not exceeded. *McGrath v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 243.—QUOTING *Grippen v. New York C. R. Co.*, 40 N. Y. 45.

Deceased and two companions, one of whom owned and drove the team, approached very slowly, in an open wagon, a level crossing of defendant's railroad. It was about 10 o'clock on a starlight night. When about 350 feet from the crossing a locomotive whistle was heard, but no bell was heard by them at any time. Another railroad passed in the immediate neighborhood; and deceased and his companions could not tell, from the sound of the whistle, upon which road the train was. The team moved on without stopping, and almost immediately upon reaching the crossing a collision took place, by which two of the three men were instantly killed. The approach to the crossing was upon a slightly descending grade and the view of the track was almost entirely obstructed by houses and other structures. Gates had been constructed at the crossing; but they had been left open and the flagman had left them for the night. *Held*, that the jury might have inferred that the travelers looked and listened after hearing the whistle; that there was evidence of negligence on the part of the company in running the train at a rate greater than the statutory rate, and in leaving the gates open, thus inviting persons to cross; and that plaintiff was entitled to recover. *State v. Boston & M. R. Co.*, 35 Am. & Eng. R. Cas. 356, 80 Me. 430, 15 Atl. Rep. 36.

184. Various speeds considered.—The crossing of a turnpike by appellant's trains at the rate of from fifteen to twenty miles an hour without sufficient warning is a public nuisance. *Louisville, C. & L. R. Co. v. Commonwealth*, 14 Am. & Eng. R. Cas. 613, 80 Ky. 143, 44 Am. Rep. 468.—FOLLOWING *Louisville & N. R. Co. v. Commonwealth*, 13 Bush (Ky.) 390.

A rate of speed over twenty-five miles an hour in a populous neighborhood of a city is too great and rebuts any presumption of negligence on the part of a party run over and killed by the train while attempting to

cross the street. *Hagan v. Philadelphia & T. R. Co.*, 5 Phila. (Pa.) 179.

It is not negligence *per se* to run a train at the rate of twenty-five or thirty miles an hour across a public road in the country. *Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 460, 75 Mo. 73.—DISTINGUISHED IN *Harlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483.—*Reading & C. R. Co. v. Ritchie*, 19 Am. & Eng. R. Cas. 267, 102 Pa. St. 425.

Where a railroad train came round a curve and approached a street crossing at a speed of twenty-five or thirty miles per hour without checking its speed, running down grade, so as to render it impossible for the engineer to stop or the owner of a horse and vehicle on the crossing to save them, the presumption of negligence resulting from an injury to the property was not rebutted. Nor did it appear that the owner could have saved the property from the injury. *Central R. Co. v. Russell*, 75 Ga. 810.

Where a train is running in the country with signals which can be heard a mile a speed of forty to forty-five miles an hour at a crossing is not excessive. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574.

185. Special circumstances may require speed to be checked.—A railroad is not responsible for not slackening the speed of its train at a place where the public highway crosses the track, unless special circumstances existed which rendered such slackening necessary; and whether such necessity existed is for the jury to determine. *Zeigler v. Northeastern R. Co.*, 5 So. Car. 221.

There may be special circumstances which impose the duty of slackening speed at a particular time: as where the engineer sees that a person is crossing the track or there are sounds which might prevent the signals from being noticed. In such a case the company would be liable for his negligence. *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9, 17 Atl. Rep. 137.

In a suit for damages by being run over by defendant's train the judge instructed the jury that the speed at the time of the accident was not negligence, and that at a common highway crossing there was no duty to reduce the rate of speed; that if the bell and whistle were not sounded as required by statute and this contributed to the accident, the defendant would be liable, in the

absence of fault on plaintiff's part, but if so sounded there could be no recovery; and left it to the jury to determine whether there was any unusual circumstance which made the speed unreasonable. The declaration alleged no exceptional circumstances as relied on and the testimony showed none. *Held*, that this created a contradiction and left the jury to find that a full compliance with the statutory conditions, which they had already been told would be a defense, was not a defense. *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. Rep. 275.—CRITICISED IN *Brooke v. Chicago, R. I. & P. R. Co.*, 81 Iowa 504.

186. Person may assume that speed is lawful.*—A person about to cross a railroad track upon the public street of a city which has an ordinance limiting the speed of railroad trains, has a right to presume, until the contrary is made apparent, that the company will not run its trains in violation of such ordinance. *Correll v. Burlington, C. R. & M. R. Co.*, 38 Iowa 120. *Ramsey v. Louisville, C. & L. R. Co.*, 89 Ky. 99, 20 S. W. Rep. 162.

Where a law limits the rate of speed that trains may be run at crossings, a person killed at the crossing must be presumed as having known the law and therefore supposing that the train would be run according to law; and the fact that the train was running at a prohibited rate of speed is a material fact in determining the question of negligence. *Langhoff v. Milwaukee & P. du C. R. Co.*, 19 Wis. 489.—FOLLOWED IN *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.

187. Negligence as to speed.—It is negligence, as matter of law, for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance. *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.—CRITICISED IN *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500.

An instruction that it is the duty of the employes of a railroad company "to approach the crossing at such rate of speed as will enable them to check the train, if necessary," is erroneous. *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376.—DISTINGUISHING *Lafayette & I. R. Co. v. Adams*, 26 Ind. 76.

Proof that a carriage was standing near a crossing or approaching it, and that a train

approached also at its usual rate of speed, does not tend to show negligence. *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

Unless the approach of the wagon and team was attended with such unusual circumstances as indicated some danger of collision, the railway company was not required to take any steps to stop its train until the wagon or team appeared as an obstruction upon its track, and within striking distance of its train. *Louisville & N. R. Co. v. Howard*, 90 Tenn. 144, 19 S. W. Rep. 116.

The plaintiff alleged in his petition that the defendant carelessly and negligently caused the rear end of a freight train, propelled by an engine, to pass rapidly over its tracks while approaching a street crossing, whereby he and his horses and wagon were injured. In support of these allegations the opinions of witnesses were received in evidence as to the speed of the train at the time, and there was evidence as to the time the train started, the distance it traveled, the force with which it struck the wagon and horses, and the distance it moved after striking them. *Held*, that negligence was sufficiently charged in the petition, and that the evidence was such as to warrant the submission of the question to the jury. *Annaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa 267, 47 N. W. Rep. 68.

188. Presumption of negligence.—Proximate cause.*—Proof that a train was running at a prohibited rate of speed, at a crossing when an accident occurred, raises a presumption of negligence, in the absence of anything to show that the accident was due to some other cause. *Atchison, T. & S. F. R. Co. v. Feehan*, 47 Ill. App. 66.

Where it appears that a person was killed at a crossing by a train running at a prohibited rate of speed, and that he would have had time to cross in safety had the train been running only at lawful speed, the unlawful speed may be considered the proximate cause of the accident. *Winstanley v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856.

189. When speed evidence of negligence.†—An unlawful rate of speed over

* Proximate and remote causes of injury at crossing, see note, 23 AM. & ENG. R. CAS. 341.

† Evidence of speed of train as affecting company's liability, see 45 AM. & ENG. R. CAS. 169, *abstr.*

* See also *post*, 215, 261.

a crossing is evidence from which negligence may be found. *Clark v. Boston & M. R. Co.*, 31 *Am. & Eng. R. Cas.* 548, 64 *N. H.* 323, 5 *N. Eng. Rep.* 48, 10 *Atl. Rep.* 676.

But the rate of speed at which a train can be run with safety to the passengers can not, in itself, be deemed negligence as against one who is injured thereby at such a crossing. *Terre Haute & I. R. Co. v. Clark*, 6 *Am. & Eng. R. Cas.* 84, 73 *Ind.* 168.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Jones*, 28 *Am. & Eng. R. Cas.* 170, 108 *Ind.* 551. FOLLOWED IN *Toledo, St. L. & K. C. R. Co. v. Adams*, 131 *Ind.* 38.

An excessive rate of speed of a train at a highway crossing is not in itself negligence; but where it tends to make the usual signals of no effect, it may be considered by the jury as tending to show negligence. *Martin v. New York C. & H. R. R. Co.*, 27 *Hun (N. Y.)* 532, *mem.*; *affirmed in 97 N. Y.* 628, *mem.*—QUOTING *Continental Imp. Co. v. Stead*, 95 *U. S.* 161.

Evidence as to the speed at which trains usually ran over a certain crossing was not admissible upon the issue whether or not a particular train was run over it at a negligent rate of speed, nor was it rendered admissible by testimony that the train in question was going at about the usual rate. *Aiken v. Pennsylvania R. Co.*, 41 *Am. & Eng. R. Cas.* 571, 130 *Pa. St.* 380, 18 *Atl. Rep.* 619.

VI. CONTRIBUTORY NEGLIGENCE.

1. Generally.*

190. Elementary principles.†—If a traveler on a highway takes the risk of crossing a railroad without using reasonable care and is injured, he must bear the consequences of his own imprudence. *Wabash, St. L. & P. R. Co. v. Hicks*, 13 *Ill. App.* 407.

The rule of law that a railroad track is itself a warning of danger applies as well to a side track as to the main line of the road. *Mynning v. Detroit, L. & N. R. Co.*, 23 *Am. & Eng. R. Cas.* 317, 59 *Mich.* 257, 26 *N. W. Rep.* 514.

Where the question of plaintiff's negligence in approaching defendant's road at a highway crossing is properly and fairly sub-

mitted to the jury, a judgment in her favor will be affirmed. *Thayer v. Flint & P. M. R. Co.*, 93 *Mich.* 150, 53 *N. W. Rep.* 216.

Generally, the negligence of a person injured by a collision upon a railroad track is not a bar to an action by him for damages, unless the railroad company show that the precautions provided by the code were observed; but an action cannot be maintained for an injury occasioned by the wilful act of the party injured. *Louisville & N. R. Co. v. Burke*, 6 *Coldw. (Tenn.)* 45.

191. Rights of traveler on crossings.*—Crossing a railroad track, whether in town or country, is not a trespass; nor is the person crossing guilty of negligence if he uses due diligence in looking out for approaching trains. *Glass v. Memphis & C. R. Co.*, 94 *Ala.* 581, 10 *So. Rep.* 215.

A traveler has an equal right with a railroad company to the use of a public street, and also the right to presume that the company will discharge its duties and obey the laws and ordinances of the city regulating the management of trains. *Jennings v. St. Louis, I. M. & S. R. Co.*, 112 *Mo.* 268, 20 *S. W. Rep.* 490.—APPLYING *Petty v. Hannibal & St. J. R. Co.*, 88 *Mo.* 308; *Bluedorn v. Missouri Pac. R. Co.*, 108 *Mo.* 449; *Kellny v. Missouri Pac. R. Co.*, 101 *Mo.* 76.

Pedestrians have the right to use streets for all ordinary purposes. They may walk along and across them at any point they may see fit, in the exercise of due care and caution. *Henry v. Grand Ave. R. Co.*, 113 *Mo.* 525, 21 *S. W. Rep.* 214.

A party is not, *prima facie*, guilty of contributory negligence by being on a railroad track when a train is passing, where he is crossing on a street for a proper purpose, and carefully watching and trying to avoid an approaching train, and is struck by another going in the opposite direction on another track. *New Jersey R. & T. Co. v. West*, 32 *N. J. L.* 91.

192. Plaintiff's negligence contributing to injury bars a recovery.—A person crossing a railroad upon a public highway is bound to exercise proper care to avoid the cars; and if he does not, and for that reason is injured, and by the exercise of such care could have avoided the danger, he cannot recover, even though the company were also negligent. *Hearne v. Southern Pac. R. Co.*, 50 *Cal.* 482, 12 *Am.*

* See also CHILDREN, INJURIES TO, 80-82; COMPARATIVE NEGLIGENCE, 8; CONTRIBUTORY NEGLIGENCE, 29, 30, 30, 30; DEATH BY WRONGFUL ACT, 192-202; SUNDAY, 0.

† See also *post*, 359.

* See also *ante*, 0.

Ry. Rep. 181. *Morris v. Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 22. *Macon & W. R. Co. v. Winn*, 19 *Ga.* 440. *Byrd v. New Orleans City & L. R. Co.*, 43 *La. Ann.* 822, 9 *So. Rep.* 565. *Telfer v. Northern R. Co.*, 30 *N. J. L.* 188.—FOLLOWING *Moore v. Central R. Co.*, 24 *N. J. L.* 268, 853; *Runyon v. Central R. Co.*, 25 *N. J. L.* 556.—APPLIED IN *Morris & E. R. Co. v. Haslan*, 33 *N. J. L.* 147. FOLLOWED IN *New Jersey Exp. Co. v. Nichols*, 33 *N. J. L.* 434. QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 *Ind.* 335.—*Galveston, H. & S. A. R. Co. v. Matula*, (Tex.) 19 *S. W. Rep.* 376. *Davey v. London & S. W. R. Co.*, 12 *Q. B. D.* 70, 35 *L. J. Q. B. D.* 58.

If a traveler upon a highway, when approaching a railroad crossing, neglects to take the precaution dictated by common prudence, and, consequently, suffers injury from a passing train, he cannot recover of the company, although it may be chargeable with gross negligence. *Grand Trunk R. Co. v. Ives*, 55 *Am. & Eng. R. Cas.* 159, 144 *U. S.* 408, 12 *Sup. Ct. Rep.* 679.

A railroad company is not liable for an injury, caused by a moving train, to a person while negligently driving across the track at a street crossing, where it appears that the servants of the company were guilty of no neglect of duty, and that the engineer, after discovering the person on the track, did all he could to prevent the injury. *Neier v. Missouri Pac. R. Co.*, (Mo.) 1 *S. W. Rep.* 387.

A plaintiff cannot recover for an injury at a crossing, if his own negligence contributed in any degree thereto, although the company was negligent in allowing its brakes to be out of order. *Owen v. Hudson River R. Co.*, 35 *N. Y.* 516; *affirming* 7 *Bostw.* 329.

193. Care to be observed in going on track.*—The care and caution required of a person in crossing a railroad are such reasonable care and caution as a man of ordinary prudence and judgment might exercise under similar circumstances. *Wichita & W. R. Co. v. Davis*, 32 *Am. & Eng. R. Cas.* 65, 37 *Kan.* 743, 16 *Pac. Rep.* 78.—QUOTING *Clark v. Missouri Pac. R. Co.*, 35 *Kan.* 354.—*Chicago, B. & Q. R. Co. v. Kuster*, 22 *Ill. App.* 188. *Hoyt v. New York, L.*

E. & W. R. Co., 118 *N. Y.* 399, 23 *N. E. Rep.* 565, 29 *N. Y. S. R.* 48; *reversing* 42 *Hun* 657, 6 *N. Y. S. R.* 7. *Burke v. New York C. & H. R. R. Co.*, 57 *N. Y. S. R.* 7, 73 *Hun* 32, 25 *N. Y. Supp.* 1009.—FOLLOWING *Tucker v. New York C. & H. R. R. Co.*, 124 *N. Y.* 308, 26 *N. E. Rep.* 916.—*International & G. N. R. Co. v. Dyer*, 76 *Tex.* 156, 13 *S. W. Rep.* 377.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Anderson*, 76 *Tex.* 244; *Galveston, H. & S. A. R. Co. v. Porfert*, 72 *Tex.* 349.—*Galveston, H. & S. A. R. Co. v. Matula*, (Tex.) 19 *S. W. Rep.* 376.—FOLLOWING *Galveston, H. & S. A. R. Co. v. Matula*, 79 *Tex.* 581, 15 *S. W. Rep.* 573.

What are due care and caution on the part of a person crossing a street is a question for the jury under all the facts and circumstances in proof, to be determined in the light of the dangers to be reasonably apprehended. *Henry v. Grand Ave. R. Co.*, 113 *Mo.* 525, 21 *S. W. Rep.* 214. *Morris v. Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 22. *Terre Haute & I. R. Co. v. Voelker*, 39 *Am. & Eng. R. Cas.* 615, 129 *Ill.* 540, 22 *N. E. Rep.* 20. *Central R. Co. v. Moore*, 24 *N. J. L.* 824.

The rule that a person about to cross a railroad must exercise the care of ordinarily careful and prudent persons, applies to persons crossing on the company's grounds, as well as to those crossing at public crossings. *Winslow v. Boston & A. R. Co.*, 11 *N. Y. S. R.* 831.

It is the duty of persons about to cross a railway track to look about them and see if there is danger; not to go recklessly upon the road, but to take the proper precautions themselves to avoid accidents. If a party rushes into danger which by ordinary care he could have seen and avoided, no rule of law or justice can be invoked to compensate him for an injury he may thereby receive. *Lake Shore & M. S. R. Co. v. Clemens*, 5 *Ill. App.* 77.—DISTINGUISHING *Illinois C. R. Co. v. Ebert*, 74 *Ill.* 399. QUOTING *Illinois C. R. Co. v. Hetherington*, 83 *Ill.* 510; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 *Ill. App.* 307.

A person going upon the track of a railroad for the purpose of walking thereon, is bound to exercise ordinary caution in looking out for the approach of the cars, and to use his ordinary senses to that end. His failure to do so constitutes negligence on his part as matter of law. *Carlin v. Chicago, R. I. & P. R. Co.*, 37 *Iowa* 316, 8

* See also *post*, 245, 287; and ELECTRIC RAILWAYS, 37; CARRIAGE OF PASSENGERS, 451-453.

Am. Ry. Rep. 141.—**APPROVING STEVES v. Oswego & S. R. Co.**, 18 N. Y. 422; *Brooks v. Buffalo & N. F. R. Co.*, 25 Barb. (N. Y.) 600. **FOLLOWING ARTZ v. Chicago, R. I. & P. R. Co.**, 34 Iowa 153; *Dodge v. Burlington, C. R. & M. R. Co.*, 34 Iowa 276. —**DISTINGUISHED IN Correll v. Burlington, C. R. & M. R. Co.**, 38 Iowa 120. **FOLLOWED IN Lang v. Holiday Creek R. Co.**, 42 Iowa 677.

Inasmuch as the exigencies of modern life have compelled the legalizing of railroads as a means of commerce, the law has imposed upon the citizen the duty of exercising the highest practicable degree of care in avoiding the danger to himself and the possible injury to those carried likely to be caused by a collision with or an obstruction of trains. *Pennsylvania R. Co. v. Richter*, 2 *Am. & Eng. R. Cas.* 220, 42 *N. J. L.* 180.

A person crossing a track is only bound to use due care, such as the circumstances and the law require; and it is therefore not error to refuse to charge that such person "is bound to use extra precaution and vigilance in approaching a crossing." *Kain v. New York & N. E. R. Co.*, 20 *N. Y. S. R.* 891, 50 *Hun* 606, 3 *N. Y. Supp.* 311.

Due and ordinary care is required in crossing public streets as in all other transactions of life. Even on the sidewalk especially devoted to foot passengers, a man is bound to look where he is going, and this duty is still more imperative when he is about to cross the street where horses, wagons, and cars have equal rights with himself, and where each is bound to take notice of such other rights, and to use his own with due regard thereto. *Buzby v. Philadelphia Traction Co.*, 42 *Am. & Eng. R. Cas.* 144, 126 *Pa. St.* 559, 17 *Atl. Rep.* 895.

194. Care to be observed where the crossing is particularly dangerous.—The fact that a crossing is difficult or requires extraordinary effort to ascertain whether or not it is safe, does not excuse one who is familiar with the locality and the danger surrounding it from exercising care proportioned to the probable danger. *Cincinnati, H. & I. R. Co. v. Butler*, 23 *Am. & Eng. R. Cas.* 262, 103 *Ind.* 31, 2 *N. E. Rep.* 138. *Indiana, B. & W. R. Co. v. Greene*, 25 *Am. & Eng. R. Cas.* 322, 106 *Ind.* 279, 55 *Am. Rep.* 736, 6 *N. E. Rep.* 603.—**QUOTED IN Louisville & N. R. Co. v.**

Eves, 1 *Ind. App.* 224.—*Louisville, N. A. & C. R. Co. v. Stommel*, 126 *Ind.* 35, 25 *N. E. Rep.* 863.

Where a person in the daytime attempted a difficult crossing with a team, being familiar with the crossing, and without looking to see an approaching train, and the whistle was sounded ninety rods distant, and the bell rung continuously, and an alarm sounded twenty-five rods from the crossing, and he then discovered the train, but failed to get off the track, and was killed, his negligence was so great as to prevent a recovery, though the company was derelict in not making the crossing easier. *Rockford, R. I. & St. L. R. Co. v. Byam*, 80 *Ill.* 528.

195. Where party is familiar with the crossing.—There is no presumption that a person injured on a highway and railway crossing, with which he was familiar, was himself free from negligence. *Prima facie* the fault was his own, and it is therefore essential that the proof should show that he was in the exercise of due care. *Indiana, B. & W. R. Co. v. Hammock*, 32 *Am. & Eng. R. Cas.* 127, 113 *Ind.* 1, 14 *N. E. Rep.* 737, 12 *West. Rep.* 297.

Where a party who is familiar with the surroundings and knows that he is approaching a track, drives so rapidly that he is unable to stop after he is warned of an approaching train by signals, he cannot recover for an injury received by being struck by a train. *Wilds v. Hudson River R. Co.*, 24 *N. Y.* 430, 23 *How. Pr.* 492; *reversing* 33 *Barb.* 503.—**FOLLOWING STEVES v. Oswego & S. R. Co.**, 18 N. Y. 422.—**APPROVED IN Seefeld v. Chicago, M. & St. P. R. Co.**, 32 *Am. & Eng. R. Cas.* 109, 70 *Wis.* 216, 35 *N. W. Rep.* 278. **DISTINGUISHED IN Belseigel v. New York C. R. Co.**, 34 *N. Y.* 622. **FOLLOWED IN Warner v. New York C. R. Co.**, 44 *N. Y.* 465. **REVIEWED IN Cosgrove v. New York C. & H. R. R. Co.**, 13 *Hun* (N. Y.) 329.

The fact that plaintiff was injured at a crossing in a place where he was a stranger, and did not know that he was approaching a railroad crossing, is an important fact in determining the question of his negligence. *Cohen v. Eureka & P. R. Co.*, 14 *Nev.* 376.

196. Mutual care to be observed.*—As there is great danger in crossing a railroad track where trains are liable to pass

* See also *ante*, 8, 119.

at any time, proper and reasonable care is demanded alike of the engineer and of the traveler. Both have the right to pass, and their rights, duties, and obligations are mutual and reciprocal, and the same degree of care is required of each. *Schofield v. Chicago, M. & St. P. R. Co.*, 2 *McCrary* (U.S.) 268.—QUOTING *Continental Imp. Co. v. Stead*, 95 U.S. 165.—DISTINGUISHED IN *Northern Pac. R. Co. v. Holmes*, 3 Wash. T. 543, 18 Pac. Rep. 76. FOLLOWED IN *Holland v. Chicago, M. & St. P. R. Co.*, 5 *McCrary* (U.S.) 549, 18 Fed. Rep. 243.—*Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426. *Louisville, C. & L. R. Co. v. Goetz*, 14 Am. & Eng. R. Cas. 627, 79 Ky. 442, 42 Am. Rep. 227.—CRITICISING *Hanover R. Co. v. Coyle*, 55 Pa. St. 396. QUOTING *Continental Imp. Co. v. Stead*, 95 U.S. 163.—REVIEWED IN *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.—*Whitney v. Maine C. R. Co.*, 69 Me. 208. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604. *Randall v. Richmond & D. R. Co.*, 42 Am. & Eng. R. Cas. 603, 104 N. Car. 410, 10 S. E. Rep. 691.—REVIEWING *East Tenn., V. & G. R. Co. v. Feathers*, 10 Lea (Tenn.) 103.—REVIEWED IN *Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472.—*Beyel v. Newport News & M. V. R. Co.*, 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532.—QUOTING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

Where a railroad is crossed by any street, road, or public highway, the rights of the traveling public and the railroad company to the use of said crossing are equal, and both parties are bound to use ordinary care, the one to avoid committing and the other to avoid receiving an injury. *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376. *Zeigler v. Northeastern R. Co.*, 5 So. Car. 221.

197. Duty to exercise ordinary care not affected by company's negligence.*—Negligence by a railroad company does not relieve a person attempting to cross its track from the duty of exercising ordinary care and prudence. *Blaker v. New Jersey Midland R. Co.*, 30 N. J. Eq. 240, 18 Am. Ry. Rep. 81.

He directly contributes to his own injury who, paying no attention to his own safety, trusts to the obligations imposed upon the company to warn him of an approaching

train. *Turner v. Hannibal & St. J. R. Co.*, 6 Am. & Eng. R. Cas. 38, 74 Mo. 602.

The fact that a railway company was running its train within a city at a speed prohibited by ordinance will not relieve a party injured from the exercise of ordinary care for his personal safety, and the speed of the train will not, of itself, furnish a sufficient reason for holding that the injury was wilful or wanton. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 Ill. 416, 18 N. E. Rep. 799; affirming 27 Ill. App. 22.

Although the failure of the train to stop a reasonable time was a breach of defendant's duty, this does not relieve plaintiff from the consequences of his own rash and negligent conduct. *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 Miss. 601, 7 So. Rep. 401.—FOLLOWING *Bardwell v. Mobile & O. R. Co.*, 63 Miss. 574; *Dowell v. Vicksburg & M. R. Co.*, 61 Miss. 519.

198. — in failing to give signals.

—Although a railway company may omit the statutory duty of ringing a bell or sounding a whistle at a public road crossing, still a party claiming to recover for an injury in consequence of such omission of duty must have used due care and caution. The negligence of the company does not absolve him from all care. The plaintiff in such case, to recover, is required to exercise such care as might be expected of prudent men generally, under like circumstances. *Wabash, St. L. & P. R. Co. v. Wallace*, 19 Am. & Eng. R. Cas. 359, 110 Ill. 114.—OVERRULING *Chicago & A. R. Co. v. Elmore*, 67 Ill. 178.—*Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115. *Cincinnati, H. & I. R. Co. v. Butler*, 23 Am. & Eng. R. Cas. 262, 103 Ind. 31, 2 N. E. Rep. 138. *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624, 17 N. W. Rep. 893. *Sala v. Chicago, R. I. & P. R. Co.*, 85 Iowa 678, 52 N. W. Rep. 664. *Matta v. Chicago & W. M. R. Co.*, 32 Am. & Eng. R. Cas. 71, 69 Mich. 109, 13 West. Rep. 717, 37 N. W. Rep. 54. *Stepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229. *Petty v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 618, 88 Mo. 306. *Stevens v. Oswego & S. R. Co.*, 18 N. Y. 422.—FOLLOWING *Brooks v. Buffalo & N. F. R. Co.*, 25 Barb. 600.—APPLIED IN *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810, 41 N. W. Rep. 778. APPROVED IN *Carlin v. Chicago, R. I. & P. R. Co.*, 37 Iowa 316. DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106;

* See also *post*, 203-207, 321, 340.

Beiseigel v. New York C. R. Co., 34 N. Y. 622. FOLLOWED IN Wilds v. Hudson River R. Co., 24 N. Y. 430, 23 How. Pr. 492; Wilds v. Hudson River R. Co., 29 N. Y. 315; Deyo v. New York C. R. Co., 34 N. Y. 9. REVIEWED IN Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358.—*Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.—EXPLAINING Ernst v. Hudson River R. Co., 35 N. Y. 9. REVIEWING Sheffield v. Rochester & S. R. Co., 21 Barb. 339; Brooks v. Buffalo & N. F. R. Co., 25 Barb. 600; Dascomb v. Buffalo & S. L. R. Co., 27 Barb. 221; Mackey v. New York C. R. Co., 27 Barb. 528; Steves v. Oswego & S. R. Co., 18 N. Y. 422; Mackay v. New York C. R. Co., 35 N. Y. 75; Renwick v. New York C. R. Co., 36 N. Y. 132.—APPROVED IN Taylor v. Missouri Pac. R. Co., 86 Mo. 457. DISTINGUISHED IN Solen v. Virginia & T. R. Co., 13 Nev. 106. FOLLOWED IN Baxter v. Troy & B. R. Co., 41 N. Y. 502; Havens v. Erie R. Co., 41 N. Y. 296. QUOTED IN Beiseigel v. New York C. R. Co., 40 N. Y. 9; Cleveland, C. & I. R. Co. v. Elliott, 28 Ohio St. 340.—*Baxter v. Troy & B. R. Co.*, 41 N. Y. 502.—FOLLOWING Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358.—QUOTED IN Bellefontaine R. Co. v. Hunter, 33 Ind. 335; Hamm v. New York C. & H. R. R. Co., 18 J. & S. (N. Y.) 78.—*Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; *affirmed in 24 How. Pr.* 609.—APPROVED IN Taylor v. Missouri Pac. R. Co., 86 Mo. 457. DISTINGUISHED IN Solen v. Virginia & T. R. Co., 13 Nev. 106; Beiseigel v. New York C. R. Co., 34 N. Y. 622. REVIEWED IN Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358.—*Krauss v. Wallkill Valley R. Co.*, 23 N. Y. Supp. 432, 52 N. Y. S. R. 838, 69 Hun 482. *Cleveland, C. & I. R. Co. v. Elliott*, 28 Ohio St. 340, 14 Am. Ry. Rep. 123.—APPROVING Galena & C. U. R. Co. v. Dill, 22 Ill. 271. QUOTING Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358; Spencer v. Illinois C. R. Co., 29 Iowa 55. REVIEWING Artz v. Chicago, R. I. & P. R. Co., 34 Iowa 154.—*International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301. *Beyel v. Newport News & M. V. R. Co.*, 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532. *Williams v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 274, 64 Wis. 1, 24 N. W. Rep. 422.—APPROVED IN Siegel v. Milwaukee & N. R. Co., 79 Wis. 404. QUOTED IN Bauer v. St. Louis, I. M. & S. R. Co., 46 Ark. 388.

One crossing a railroad track must be on the alert to avoid injury from trains that may happen to be passing; and the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributed to an alleged injury, does not impose a liability upon the company. *Parker v. Wilmington & W. R. Co.*, 8 Am. & Eng. R. Cas. 420, 86 N. Car. 221.

It is negligence *per se* for one to stand between tracks while trains are passing, defeating a recovery for an injury so received, even though no whistle was sounded or bell rung. *Moore v. Philadelphia, W. & B. R. Co.*, 108 Pa. St. 349.—QUOTING Carroll v. Pennsylvania R. Co., 12 W. N. C. 348.—FOLLOWED IN Marland v. Pittsburg & L. E. R. Co., 123 Pa. St. 487. QUOTED IN Dlauhi v. St. Louis, I. M. & S. R. Co., 105 Mo. 645; McGeehan v. Lehigh Valley R. Co., 149 Pa. St. 188.

The statute requiring signals at crossings superadds a duty upon the company, the disregard of which would impose no greater or other liability than would follow from a common law liability in respect to care in running a train, and the mere omission would not of itself render the company liable. *International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301.—QUOTING Houston & T. C. R. Co. v. Nixon, 52 Tex. 19.

Though the company was negligent in failing to give the signals, such negligence would justify no one in carelessly driving upon the track, if such act was negligence and contributed to the injuries sustained. *International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301.

The jury were instructed that "if, by the neglect or omission of those in charge of the yard to give any warning of the approach of that car to the crossing, at the time when the engine was standing still or moving west, the plaintiff's vigilance was allayed, the defendants are not at liberty to impute the consequences of their acts to his want of vigilance, and if their acts brought him within the boundaries of peril the defendants must answer for the result." Held, error, since the jury might infer that if the defendants' employes were guilty of negligence which in any way tended to influence the plaintiff's action, negligence on the part of the plaintiff should not affect his right to recover. *Abbot v. Dwinell*, 74 Wis. 514, 43 N. W. Rep. 496.

199. — or to maintain a sign.—

The negligence of a railroad company in failing to erect and keep a sign at a crossing, as required by statute, will not entitle one injured by a train at the crossing to recover damages therefor, if he himself is guilty of negligence contributing to the injury. *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523.—FOLLOWING *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153.—FOLLOWED IN *Payne v. Chicago, R. I. & P. R. Co.*, 47 Iowa 605.

The failure to erect a sign at a crossing renders railway companies liable only for damages sustained by the neglect or refusal to erect the signs, and does not release a party seeking to recover, from the necessity of establishing due care on his part. *Lang v. Holiday Creek R. & C. M. Co.*, 49 Iowa 469.

200. Entering track at crossing, but walking along it.—

Ordinary care by one crossing a railway upon a public crossing is not the measure of ordinary care for one using the track to walk upon, although at the moment he may be at or on such a crossing. One who undertakes to make a passway of a railroad must use that degree of diligence which every prudent person uses who puts himself unnecessarily in a perilous situation. *Central R. & B. Co. v. Raiford*, 37 Am. & Eng. R. Cas. 481, 82 Ga. 400, 9 S. E. Rep. 169.

It is negligence for a person to walk upon the track of a railroad, whether laid in the city or upon the open field, and he who deliberately does so will be presumed to assume the risk of the perils he may encounter, where there is no excuse for it except that it is more convenient. *Chicago, B. & Q. R. Co. v. Olson*, 12 Ill. App. 245.

But if an engineer should discover him there, in danger of being run over by the train, it would be his duty to use reasonable care in trying to avoid the injury. *McAllister v. Burlington & N. W. R. Co.*, 19 Am. & Eng. R. Cas. 108, 64 Iowa 395, 20 N. W. Rep. 488.—QUOTING *Illinois C. R. Co. v. Hall*, 72 Ill. 222.—FOLLOWED IN *Richards v. Chicago, St. P. & K. C. R. Co.*, 81 Iowa 426.

Plaintiff's intestate, instead of going directly across defendant's tracks, walked along one of them for some distance and then stepped to another track in front of an approaching train from behind. He was familiar with the surroundings, and the

tracks upon which trains generally run, and knew that the trains passing over that particular place made little noise. The train was running slowly. He could have safely walked between the tracks, and could have seen the train if he had looked back. *Held*, that his own negligence would defeat a recovery. *Fiarty v. Central R. Co.*, 42 N. Y. 468.—APPROVED IN *Haines v. Illinois C. R. Co.*, 41 Iowa 227. REVIEWED IN *Gonzales v. New York & H. R. Co.*, 50 How. Pr. (N. Y.) 126.

201. Where an unauthorized stranger gives signal to advance.—

Plaintiff, a street-car driver, who was injured at a railroad crossing testified that he was signaled to "come on" by one whom he supposed to be the gate-keeper, but who was not a servant of the railroad company and who denied giving such signal, and testified that he warned plaintiff not to attempt to make the crossing. The gate was open at the time and the gate-keeper was temporarily absent for the purpose of attending a switch near by. *Held*, that the conduct of the stranger, as found by the jury from the conflicting testimony, was proper to be considered by them as bearing upon plaintiff's contributory negligence; that an open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger or the protests of a bystander; and that an assurance of safety, although given by a stranger, would be entitled to consideration and weight in explanation of the conduct of one to whom such assurance was given. *Evans v. Lake Shore & M. S. R. Co.*, 88 Mich. 442, 50 N. W. Rep. 386.—FOLLOWING *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

202. Place of crossing.—It is contributory negligence to attempt to cross a track at a point where a street is intended but is not yet open, though the people are in the habit of crossing there. *Matze v. New York C. & H. R. R. Co.*, 1 Hun (N. Y.) 417, 3 T. & C. 513.

A person undertaking to pass over railway tracks at a point where there is no walk or highway takes upon himself all the risks of a hazardous enterprise. *Adams v. New York, L. E. & W. R. Co.*, 49 N. Y. S. R. 854, 66 Hun 634, 21 N. Y. Supp. 681.

If the plaintiff in passing the railroad crossing rode near the side, out of the route usually traveled and which she could have used with safety, and was injured by

her horse there stepping into a hole, this would presumptively be a want of ordinary care and would constitute contributory negligence. *Patterson v. South & N. Ala. R. Co.*, 89 Ala. 318, 7 So. Rep. 437.

The mere fact that by going several blocks out of his direct course a party might have crossed a railroad at a place where there were fewer tracks and the crossing was safer, which he fails to do, does not necessarily and as a matter of law charge him with a want of ordinary care. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; *affirming* 33 Ill. App. 129.—DISTINGUISHING *Centralia v. Krouse*, 64 Ill. 19.

When a public street crosses a railroad track a foot passenger has a right to cross the railroad anywhere in the street; and to cross otherwise than by a footpath made for convenience is not negligence, though thereby his foot becomes so fastened between the rail of the track and a guard-rail that he cannot escape an approaching train and in consequence is injured. *Louisville, N. A. & C. R. Co. v. Head*, 4 Am. & Eng. R. Cas. 619, 80 Ind. 117.

203. Not bound to cross track at right angles.—It cannot be laid down as a legal principle that a person attempting to go over a railway track where it crosses a street or highway is bound at his peril to pursue a course at right angles to the track. His right is, in using a street or highway, to walk in any direction he chooses, and his duty is to exercise reasonable and ordinary care in crossing a railroad track to avoid injury. *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. Rep. 729.

So far as affects the liability of defendant the plaintiffs had a right to assume that it had performed its duty and maintained the crossing in good condition; and conceding that the plaintiffs crossed the track at a different angle from what travelers generally did, it cannot be said, as matter of law, that a person of ordinary prudence would not have crossed as plaintiffs did, but it was for the jury to say whether it was culpable negligence on their part and whether it contributed proximately to the injury. *Whalen v. Arcata & M. R. R. Co.*, 92 Cal. 669, 28 Pac. Rep. 833.

204. Proximate and remote cause.*
—The rule is, not that any degree of negli-

gence, however slight, which directly concurs in producing the injury will prevent a recovery, but if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately in any degree to the injury, the plaintiff shall not recover. *Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.—DISTINGUISHING *Fleming v. Western Pac. R. Co.*, 49 Cal. 253.

If a person while crossing the track of a railroad on a public highway is injured by a passing train, his negligence, if it contributes at all to the injury, contributes directly and proximately. *Hearne v. Southern Pac. R. Co.*, 50 Cal. 482, 12 Am. Ry. Rep. 181.

A person attempting to cross a railway track, whether at a road crossing or elsewhere, must use due care himself to avoid danger; if he does not do so, and his own negligence is the proximate cause of injury inflicted by a passing train, he cannot recover, although the railway company may not have given the signals which the law requires to indicate the approach of a train. In such case he contributes to his own injury, and it is not the result of the omission of the act required by law. *International & G. N. R. Co. v. Graves*, 59 Tex. 330.—QUOTED IN *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep. 862.

But if in such a case the deceased was negligent in attempting to cross at the particular time or under the particular circumstances of the case, still the defendants may be convicted in such proceeding if it appear that the negligence of the proprietors of the railroad or their servants was the more proximate cause of the injury. *State v. Manchester & L. R. Co.*, 52 N. H. 528.—REVIEWED IN *Lewis v. Eastern R. Co.*, 60 N. H. 187.

To make a railroad company liable where the party injured has also been negligent it should appear that the proximate cause of the injury was defendant's omission, after becoming aware of plaintiff's danger, to use a proper degree of care to avoid injuring him. If on discovering him upon the track it was impossible, with safety to the train and those on board, to stop the train in time to prevent the casualty, the company cannot be held, unless guilty of negligence beforehand which creates the impossibility. *Maker v. Atlantic & P. R. Co.*, 64 Mo. 267, 17 Am. Ry. Rep. 231.—FOLLOWING, *Karle v. Kansas City, St. J. & C. B.*

* See also *post*, 255.

R. Co., 55 Mo. 484; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 482.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283. DISTINGUISHED IN *Langan v. St. Louis, I. M. & S. R. Co.*, 3 Am. & Eng. R. Cas. 355, 72 Mo. 392; *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485; *Frick v. St. Louis, K. C. & N. R. Co.*, 5 Mo. App. 435.

If the failure to so discover a person on the track at a street crossing was the result of the omission of that measure of duty which the law requires in view of the locality, circumstances, and dangers to be anticipated, and the due observance thereof would have enabled the persons in control of dangerous agencies of this sort to have avoided the injury by the use of reasonable care, then and in such case such omission and want of reasonable care is, under the law, held the proximate cause of the injury, and liability for the resulting damage may then exist, notwithstanding the negligence of the person injured. *Hiltz v. Missouri Pac. R. Co.*, 101 Mo. 36, 13 S. W. Rep. 946.

Where the injured person would not have gone on the crossing but for the negligence of the engineer in failing to give the proper signal, a railway company will be liable for the damages resulting from a collision, although the party injured may have been careless in exposing himself. *Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472, 13 S. E. Rep. 884.—REVIEWING *Randall v. Richmond & D. R. Co.*, 104 N. Car. 416.

Plaintiff was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter and so producing the injury complained of. The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident. *Held*, that, upon evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants. *Atkinson v. Grand Trunk R. Co.*, 17 Ont. 220.

205. Intervening cause—Putting one in peril.—Where a person goes upon a railway track and is, at the time of the collision, by his own negligence, placed in a dangerous position, he is not entitled to recover damages resulting from the injuries

received on account of the failure of the train operatives to discover his position of peril in time to avoid the accident. In such case his contributory negligence precludes a recovery, unless it also appears that after his position of danger is discovered the operatives are guilty of negligence that contributes to the injury. *Texas & P. R. Co. v. Roberts*, 2 Tex. Civ. App. 111, 20 S. W. Rep. 960.

Where at the time of the collision the person on the track is not guilty of negligence, though originally negligent in going thereon, an intervening cause absolutely or morally beyond his control having put him in a position of peril, the railway company will be guilty of negligence if through want of proper care its trainmen fail to discover the dangerous position of such person in time to avert the injury. *Texas & P. R. Co. v. Roberts*, 2 Tex. Civ. App. 111, 20 S. W. Rep. 960.

Plaintiff's intestate was standing near a track, and was killed either by a backing car striking a cart and forcing it on him, or by the effort of the driver of the cart to escape sudden danger. *Held*, that it was proper to charge that if a sudden and instinctive effort on the part of the cart driver to escape impending danger after receiving warning thereof resulted in the accident, there not being sufficient time to form an intelligent and deliberate judgment as to the best means of escape, negligence was not imputable to him. *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313, 32 N. Y. S. R. 612, 11 N. Y. Supp. 80; *affirmed in* 126 N. Y. 629, *mem.*, 36 N. Y. S. R. 1012.

When a railroad company, by its own negligence, misleads a traveler, and puts him in peril of his life, and the traveler, in the excitement of that peril and in his honest efforts to escape, makes a mistake, and is injured, such an error of judgment is not contributory negligence. *Pittsburgh, C. & St. L. R. Co. v. Martin*, 8 Am. & Eng. R. Cas. 253, 82 Ind. 476.—DISTINGUISHING *Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168.

Whether the course adopted by a person crossing a railroad track, to free himself from the peril in which he was involved by an approaching train, was such as a man of ordinary prudence might, or would, have adopted, is a question for the jury. *Donohue v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 673, 91 Mo. 357, 2 S. W. Rep. 424, 3 S. W. Rep. 848.

The rule that a person suddenly put in a position of great peril by the negligence of another is not responsible for an unwise choice of a mode of escape, is not applicable to the case of a traveler approaching a railroad track where he knows trains are frequent and where his view is unobstructed. And in such a case it was error to instruct the jury that "it is the right and duty of every man who comes into a dangerous place of any kind to exercise his own best judgment as to what he shall do. It is for him to determine for himself whether or not a train is so distant that it is perfectly safe to cross the track in advance of it or whether it is so near as to make it dangerous to attempt to cross." *Liermann v. Chicago, M. & St. P. R. Co.*, 82 Wis. 286, 52 N. W. Rep. 91.—REVIEWED IN *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460.

206. Not a defense if injury could have been avoided by ordinary care.*

—There may be such gross negligence on the part of a railroad company's employes as would amount to such reckless disregard of the safety of travelers at a crossing that contributory negligence is no defense. *Louisville & N. R. Co. v. Webb*, 55 Am. & Eng. R. Cas. 121, 97 Ala. 308, 12 So. Rep. 374.

The plaintiff in an action to recover damages for personal injuries sustained by him while crossing a railroad track at a crossing, is entitled to recover, notwithstanding the want of ordinary care upon his part, if those in charge of the train could, by the exercise of ordinary prudence on their part, have avoided injuring him. *Louisville & N. R. Co. v. Schuster*, (Ky.) 35 Am. & Eng. R. Cas. 407, 7 S. W. Rep. 874. *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22.—FOLLOWED IN *Brooks v. Hannibal & St. J. R. Co.*, 35 Mo. App. 571. QUOTED IN *Scoville v. Hannibal & St. J. R. Co.*, 81 Mo. 434.—*Richmond & D. R. Co. v. Howard*, 79 Ga. 44, 3 S. E. Rep. 426.—APPROVED IN *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500. QUOTED IN *Richmond & D. R. Co. v. Johnston*, 89 Ga. 560.—*Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380. *State v. Manchester & L. R. Co.*, 52 N. H. 528. *Bullock v. Wilmington & W. R. Co.*, 42 Am. & Eng. R. Cas. 93, 105 N. Car. 180, 10 S. E. Rep. 988. *Texas & P. R. Co. v. Chapman*, 57 Tex. 75. *Butcher v. West*

Virginia & P. R. Co., 55 Am. & Eng. R. Cas. 181, 37 W. Va. 180, 16 S. E. Rep. 457.

Where those in charge of a train are guilty of reckless negligence in running the train without keeping a proper lookout, and thereby injure a person upon the track, the question of contributory negligence does not arise, if the trainmen might by the exercise of reasonable diligence have prevented the accident. *Battishill v. Humphreys*, 29 Am. & Eng. R. Cas. 411, 34 Am. & Eng. R. Cas. 69, 64 Mich. 514, 38 N. W. Rep. 581, 14 West. Rep. 863.

Contributory negligence of the plaintiff will not prevent a recovery where the defendant could have stopped the train in time to avoid the injury if a brakeman had been posted on the forward end of the train, as is required by ordinance. *Merz v. Missouri Pac. R. Co.*, 13 Mo. App. 589; see 14 Mo. App. 459.

When one who is not a trespasser is injured on railroad tracks by being run over by an engine of the railroad company, and the accident occurs in a city, and is due in part to a disregard of municipal regulations, the railway company is liable for the injury, notwithstanding contributory negligence on the part of the injured person, if those in charge of its engine saw, or by the exercise of ordinary care could have seen, the perilous condition of that person in time to have averted the injury. *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348.—APPLYING *Dunkman v. Wabash, St. L. & P. R. Co.*, 95 Mo. 232. RECONCILING *Loeffler v. Missouri Pac. R. Co.*, 96 Mo. 267; *Rafferty v. Missouri Pac. R. Co.*, 91 Mo. 33. REVIEWING *Hudson v. Wabash Western R. Co.*, 32 Mo. App. 678.

Although a plaintiff is guilty of negligence in crossing the tracks of a street railway operated by electricity, the railway company is nevertheless liable to him for the damages suffered by him in consequence of his being run into by one of its cars, if the driver of the car either saw, or by the exercise of ordinary diligence could have seen, the peril of the plaintiff in time to have avoided the collision. *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65.

If a party injured near a railroad crossing by his horses becoming frightened at a passing engine, was guilty of negligence in not stopping his team when warned by a flagman, it did not contribute to his injury if the engineer, after discovering the danger,

* See also *post*, 283.

refused to use the means in his power to prevent the injury. *Houston & T. C. R. Co. v. Carson*, 66 Tex. 345, 1 S. W. Rep. 107. —DISAPPROVED AND REVIEWED IN *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417.

Plaintiff sued for an injury received by a train while his team was stalled on the track at a crossing, which the company was bound to keep in repair. Held, that he could not be charged with the want of ordinary care for failing to examine the crossing before venturing on it, or in failing to look at his watch to ascertain how long it would be till a train was due, where he could have passed the crossing in safety had it been in good condition. *Bullock v. Wilmington & W. R. Co.*, 42 Am. & Eng. R. Cas. 93, 105 N. Car. 180, 10 S. E. Rep. 988.

In an action for an injury at a railroad crossing it is error to instruct the jury that even if they find that the plaintiff was guilty of want of due care and prudence in attempting to cross the track, still they should find for him unless they should further find that the railroad company could not by the exercise of care and diligence on its part have avoided the accident. Such instruction should be modified by the statement that in order to enable him to recover the plaintiff must show knowledge on the part of defendant or its agents of the plaintiff's peril, and that there was sufficient time after such knowledge had been acquired within which to make an effort to save the plaintiff from the impending danger. *Maryland C. R. Co. v. Neubaur*, 19 Am. & Eng. R. Cas. 261, 62 Md. 391.

207. Goes in mitigation of damages in Tennessee.—Contributory negligence of the plaintiff, however gross, does not operate as an absolute bar to an action against a railway company for injury resulting from the non-observance of the statutory precautions for prevention of accidents; but such negligence goes only in mitigation of damages. *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428. —APPROVING *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *Hill v. Louisville & N. R. Co.*, 9 Heisk. 823; *Railroad v. Walker*, 11 Heisk. 383; *Nashville & C. R. Co. v. Nowlin*, 1 Lea 523;

Nashville & C. R. Co. v. Smith, 9 Lea 470. DISTINGUISHING *East Tenn., V. & G. R. Co. v. Swaney*, 5 Lea 119.

The contributory negligence of a person injured on a railroad in going upon the track and falling asleep there, where the statutory precautions were not complied with, may be looked to in mitigation of damages. *East Tenn., V. & G. R. Co. v. Humphreys*, 15 Am. & Eng. R. Cas. 472, 12 Lea (Tenn.) 200. —QUOTED IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea 128.

Where an accident has occurred by a non-compliance on the part of a railroad company with sections 1166-1168 of the Code, requiring a lookout to be kept ahead, contributory negligence on the part of the person injured cannot be pleaded in bar to the action, yet it may be relied on in mitigation of damages. It is the duty of the court to charge the jury that if they find the party injured was guilty of negligence they should diminish the damages according as they may find his negligence to be slight or gross. *Nashville & C. R. Co. v. Nowlin*, 1 Lea (Tenn.) 523. —APPROVED IN *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428.

208. Suddenly coming on track too near to avoid a collision.—There is no error in granting a nonsuit where the testimony, construed fairly and naturally, shows that notwithstanding the train by which plaintiff was injured was running too fast and that the bell was not rung in approaching the crossing, the injury did not take place at the crossing, but some distance beyond it, and did not result directly from the company's negligence, but from the sudden and unnecessary conduct of the plaintiff himself in stepping upon the track immediately in front of the train, and so near to the locomotive that it was impossible to avoid striking him after he thus put himself in a position of danger. *Jay v. East Tenn., V. & G. R. Co.*, 88 Ga. 71, 13 S. E. Rep. 947. *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480, 17 Am. Ry. Rep. 300. —APPLIED IN *White v. Wabash Western R. Co.*, 34 Mo. App. 57. DISTINGUISHED IN *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485. QUOTED AND APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457. QUOTED IN *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198; *Prewitt v. Eddy*, 54 Am. & Eng. R. Cas. 138, 115

* See also COMPARATIVE NEGLIGENCE, 24; CONTRIBUTORY NEGLIGENCE, 51.

Tennessee statute to prevent accidents on railroad, see note, 15 AM. & ENG. R. CAS. 477.

Mo. 283, 21 S. W. Rep. 742. REVIEWED IN *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 543.

209. Slight negligence.—Extreme care is not exacted of persons passing on or over a public street or thoroughfare, where a railroad crosses it at grade, and the law does not deprive a person injured of redress, though he was guilty of slight neglect which contributed to his injury. *McGrath v. Hudson River R. Co.*, 19 *How. Pr. (N. Y.)* 211, 32 *Barb.* 144.

210. How far trainmen may presume that party will keep off or get off track.*—It is not the duty of those in charge of the train to anticipate the conduct of plaintiff, and because they saw him approach the crossing to conclude that he would attempt to cross in advance of the train. *Maryland C. R. Co. v. Neubeur*, 19 *Am. & Eng. R. Cas.* 261, 62 *Md.* 391.

It cannot be required of persons managing a locomotive and train of cars that they shall stop the train whenever any one is seen upon the track, especially at points where many persons are passing and crossing the track. They have a right to presume that persons walking along or across the track will not remain until an approaching train is upon them. *Terre Haute & I. R. Co. v. Graham*, 46 *Ind.* 239, 6 *Am. Ry. Rep.* 358.

But this rule has no application where the person injured has reasonable ground to suppose there is no danger in the position in which he is rightfully engaged, in unloading a car upon a side track, such confidence in his safety being induced by the previous conduct of the company, and whereby he is thrown off his guard and lulled into a sense of security, and is injured by the sudden striking of the car he is unloading. *Chicago & N. W. R. Co. v. Goebel*, 119 *Ill.* 515, 10 *N. E. Rep.* 369; *affirming* 20 *Ill. App.* 163.

211. Failing to observe or heed signals.†—Where one goes upon a track when the gates are down, with danger signals thereon, and is struck by a train running on time, he is guilty of contributory negligence. *Granger v. Boston & A. R. Co.*, 146 *Mass.* 276, 5 *N. Eng. Rep.* 821, 15 *N. E. Rep.* 619.—QUOTED IN *Chicago, R. I.*

* See also *ante*, 12.

† Contributory negligence in failing to heed warnings and signals, see 41 *AM. & ENG. R. CAS.* 534, *abstr.*

& *P. R. Co. v. Fitzsimmons*, 40 *Ill. App.* 360.

If one, after the proper signals have been given, ventures upon the track he does so at his own risk, unless the railroad company is guilty of some negligence to which any resulting injury can be directly imputed. *Hinkle v. Richmond & D. R. Co.*, 109 *N. Car.* 472, 13 *S. E. Rep.* 884.

Where a man drove upon a railroad, failing to heed a signal of the flagman or his calls to stop and back, and there was no invitation to go forward, nor any neglect of the ordinary and necessary precautions on the part of the company, he cannot recover for injuries received by being struck by the train. *Deikman v. Morgan's L. & T. R. & S. Co.*, 40 *La. Ann.* 787, 5 *So. Rep.* 76.

To render one guilty of contributory negligence in attempting to cross a track where a switchman in full view is signaling the approach of a train, it must appear that plaintiff, seeing it, understood it to be a warning of an approaching train, or that a person of ordinary intelligence would so understand it. *Chicago, B. & Q. R. Co. v. Notzki*, 66 *Ill.* 455.

An instruction that if the watchman at a crossing waved his light and halloosed to the persons to "hold up," no recovery can be had, is properly refused when it does not also require the jury to find that the watchman's position in waving the light was such as could have been seen if the deceased had looked; that it was an understood method of signaling, and that, under the circumstances, his halloosing must have been heard. *Union R. Co. v. State*, 42 *Am. & Eng. R. Cas.* 172, 72 *Md.* 153, 19 *All. Rep.* 449.

In an action by plaintiff against a railroad company for the killing of her husband at one of its crossings by the alleged negligence of the company, a recovery cannot be had where the evidence shows that the deceased was not seen by the engineer in time to stop the train before reaching the crossing, but that the danger signal was given when the deceased was within a few feet of the crossing, which signal he disregarded, and went onto the crossing and was killed. And it makes no difference in such case that the train was running at a greater rate of speed than that fixed by an ordinance of the city in which the accident occurred. *Fox v. Missouri Pac. R. Co.*, 85 *Mo.* 679.

212. Going on track when intox-

lented.*—If a party goes on the track when so intoxicated as not to be able to take care of himself, and could not have been discovered by the train employes in time to have avoided a collision, and is injured, he cannot recover; but it is otherwise if, after he is discovered, the train employes, by the exercise of reasonable care, might have avoided the accident. *Kean v. Baltimore & O. R. Co.*, 19 Am. & Eng. R. Cas. 321, 61 Md. 154.—APPROVED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

Testimony of the surgeon who saw the injured person immediately after the occurrence, that he was then grossly intoxicated, is competent as tending to show contributory negligence. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

Plaintiff sued for injuries received at a highway crossing, charging negligence on the part of the company that no signals were given; that the view of the approaching train was obstructed by weeds and bushes, and that the train was otherwise negligently operated. The proof showed by a great preponderance that the signals were given, and in addition the noise necessarily made by the train passing over a long bridge only a short distance away; that the partial obstruction to the view would not perceptibly affect the hearing. There was also evidence that plaintiff was considerably under the influence of liquor. *Held*, not sufficient to show due care on his part. *Fulton County N. G. R. Co. v. Butler*, 48 Ill. App. 301.

Plaintiff's evidence showed that he was traveling on foot on a country road crossing defendant's track, and carrying a bag with provisions in it. He was somewhat intoxicated, and after depositing his bag upon the track sat down between two ties just outside of one of the rails and went to sleep, and was struck and injured by a passing train. *Held*, that the injury was due to his own negligence, and a peremptory nonsuit was properly ordered on his own evidence. *Dennan v. St. Paul & D. R. Co.*, 26 Minn. 357, 4 N. W. Rep. 605.—FOLLOWED IN *Newport News & M. V. R. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121.

Plaintiff was injured while crossing a track in a buggy owned and driven by a third person. Both were somewhat under

the influence of liquor, and the driver approached the track at a rapid rate, and in disregard of signals. *Held*, that it was error to charge the jury so as to make plaintiff's negligence depend upon whether the intoxication of the driver and his reckless driving were apparent to plaintiff, or whether it occurred to his mind that the driving was reckless, or whether he assented to it. *Smith v. New York C. & H. R. R. Co.*, 38 Hun (N. Y.) 33.—DISTINGUISHING *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11; *Dyer v. Erie R. Co.*, 71 N. Y. 228.

213. At crossings where flagman is, or has been, stationed.*—It is not, as a matter of law, allowable for a party about to cross a railroad track to implicitly rely on the judgment of a flagman or watchman as to his safety in crossing; but aside from that he must use the prudence and caution that a reasonably prudent man would, under all the circumstances. *Chicago, B. & Q. R. Co. v. Spring*, 13 Ill. App. 174.—QUOTING *Illinois C. R. Co. v. Goddard*, 72 Ill. 567.

Ordinarily it is a question of fact whether it is contributory negligence to attempt to cross a track without the permission of a flagman, and an instruction which makes it so as a matter of law is error. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. Rep. 377.

Because one approaching a track sees no flagman there, but had seen one there formerly, but not habitually, does not give him the right to assume that the passage is clear. The absence of a flagman under such circumstances is no invitation to cross without using ordinary precaution. *Whalen v. New York C. & H. R. R. Co.*, 58 Hun (N. Y.) 431, 35 N. Y. S. R. 556, 12 N. Y. Supp. 527.—DISTINGUISHING *Kellogg v. New York C. & H. R. R. Co.*, 79 N. Y. 72.

Therefore, in an action to recover damages for injuries sustained by a traveler at a crossing—*held*, that the receipt of evidence of such custom, and that the flagman was absent at the time of the accident, as a circumstance bearing on the question of plaintiff's negligence, was error. *McGrath v. New York C. & H. R. R. Co.*, 59 N. Y. 468, 17 Am. Rep. 359; *reversing* 1 Hun 437, 3 T. & C. 776.—FOLLOWING *Belsiegel v. New York C. R. Co.*, 40 N. Y. 9; *Shelton v. London & N. W. R. Co.*, L. R. 2 C. P. 631.—DISTIN-

* See also *post*, 317.

* See also *post*, 279.

GUISHED IN *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302, 52 N. Y. S. R. 351. QUOTED IN *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37.

Where a traveler was crossing, in a wagon, the tracks of a railroad in a place of extra danger, and the flagman did not notify him of the coming of the train until after he had begun to cross the tracks, and the traveler then misunderstood the warning and went forward when he ought to have retreated—*held*, that such misunderstanding should not, under the circumstances, be imputed to him as negligence. *New York, L. E. & W. R. Co. v. Randel*, 23 Am. & Eng. R. Cas. 308, 47 N. J. L. 144.

214. Where gate is maintained.*—It is not *per se* negligence in a party to attempt to pass over railroad tracks crossing a public street generally traveled, and guarded by a watch-tower, and by gates across the street on both sides of the tracks, when a watchman is also stationed there, both night and day, to warn persons of danger. To hold this negligence would be tantamount to closing the street as a public highway. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; *affirming* 33 Ill. App. 129.

A collision at a railroad crossing is *prima facie* evidence of negligence on the part of the traveler; but such inference may be repelled. An open gate which invites passing, and an obstructed view, may be sufficient to bring the question of negligence within the province of the jury to decide, and prevent a nonsuit, or setting a verdict, if the jury find in favor of the traveler. *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. Rep. 64.

Where a party approaches a crossing at night and finds the gates up, and attempts to cross, and is injured by a slowly backing train without lights or signals, the question of his contributory negligence is for the jury. *Lindeman v. New York C. & H. R. R. Co.*, 42 Hun (N. Y.) 306, 3 N. Y. S. R. 731.—REVIEWED IN *Callaghan v. Delaware, L. & W. R. Co.*, 52 Hun 276, 22 N. Y. S. R. 594, 5 N. Y. Supp. 285.

A raised gate is a substantial assurance of safety to one about to cross a track, as saying to him that he may safely cross. *Fitzgerald v. Long Island R. Co.*, 10 N. Y. S. R. 433, 45 Hun 591.—QUOTED IN *Startz v.*

Pennsylvania & N. Y. C. & R. Co., 42 N. Y. S. R. 457.

And should have its full weight with the jury as bearing on the question of contributory negligence. *Fitzgerald v. Long Island R. Co.*, 3 N. Y. Supp. 230, 21 N. Y. S. R. 942; *affirmed in* 117 N. Y. 653.

As gates are liable to be closed at any time, persons crossing would naturally understand they should not linger on the track, but pass over promptly and speedily; therefore, for a person to drive in a trot onto railroad tracks while the gates are open, instead of being negligence, might be a high degree of care. *Cleveland, C., C. & I. R. Co. v. Schneider*, 35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678, 17 N. E. Rep. 321.

A person who is injured in consequence of his attempting to open the gates at a highway crossing has no right of action against the company, although it failed to employ persons to open and shut such gates. *Wyatt v. Great Western R. Co.*, 6 B. & S. 709, 34 L. J. Q. B. 204.—IMPUGNED IN *Lax v. Darlington, L. R.* 5 Ex. D. 28, 49 L. J. Ex. 105, 41 L. T. 489, 28 W. R. 221, 44 J. P. 312.

After refusing to charge that allowing the gates at the crossing to be open was negligence in law and referring this question to the jury, the court charged as follows: "The fact that the gates were up would be notice to plaintiff that there would be no danger in crossing the track; it would be an invitation to him to cross the track;" and "if the jury find that there was no warning given at all, the plaintiff had a right to suppose that the track was clear." Immediately after these instructions the court said: "At the same time it would not excuse him from exercising due care in approaching and crossing the track and finding out whether or not there were cars approaching." *Held*, that judged in connection with their context, the charges were unobjectionable. *Lake Shore & M. S. R. Co. v. Frantz*, 39 Am. & Eng. R. Cas. 628, 127 Pa. St. 297, 18 Atl. Rep. 22.

215. How far one may assume that train will be properly operated.*—A person approaching a railroad crossing has, within reasonable limits, the right to act upon the belief that the railway company will observe its own rules, at least; or, if they will not, and thereby cause un-

* See also *ante*, 46; *post*, 280.

* See also *ante*, 180.

sual peril to travelers, that they will meet such peril with corresponding precautions. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 *Am. & Eng. R. Cas.* 163, 20 *All. Rep.* 976.

Where one about to cross a railroad sees a train standing on a track, he has the right to assume that some signal will be given before it is moved. *Fusili v. Missouri Pac. R. Co.*, 45 *Mo. App.* 535.

Such a person may rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching a crossing. In the legal sense he is innocent of negligence unless there is a want of ordinary care and prudence on his part. *Strong v. Sacramento & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 273, 61 *Cal.* 326.

The duty of active vigilance required of persons going upon railroad tracks must be adapted to the circumstances of the case, and when the company, by its own conduct and its published regulations, has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely upon these assurances, and are not necessarily guilty of negligence when injured by prohibited trains while doing so. *Parsons v. New York C. & H. R. R. Co.*, 113 *N. Y.* 355, 21 *N. E. Rep.* 145, 22 *N. Y. S. R.* 697, 3 *L. R. A.* 683; *affirming* 48 *Hun* 615, 15 *N. Y. S. R.* 1016, *mem.*—*QUOTED IN* *Wall v. Delaware, L. & W. R. Co.*, 54 *Hun* 454; *Towns v. Rome, W. & O. R. Co.*, 28 *N. Y. S. R.* 124; *Wall v. Delaware, L. & W. R. Co.*, 28 *N. Y. S. R.* 132; *Beckwith v. New York C. & H. R. R. Co.*, 7 *N. Y. Supp.* 719.

Where a city ordinance prevents trains from running through the city at a greater than a specified rate, one crossing the track on a street has a right to presume that the company will comply with the ordinance in running its trains. *Hart v. Devereux*, 41 *Ohio St.* 565.

And if a train was moving at an unlawful rate, that fact may be considered in determining the question of contributory negligence. *Piper v. Chicago, M. & St. P. R. Co.*, 77 *Wis.* 247, 46 *N. W. Rep.* 165.

A party driving cattle along a road which is crossed by a railroad at grade has a right to presume that the servants of the company will take all reasonable and proper precautions to avoid injury. It is negligence to approach such a crossing at a speed of 25 or 30 miles an hour; and a

party injured is not guilty of negligence in not anticipating and providing against such conduct on the part of the servants of the company. *Reeves v. Delaware, L. & W. R. Co.*, 30 *Pa. St.* 454.

A traveler is justified in expecting that a company, in approaching a crossing with its train, will give proper signals to indicate its presence; and if, relying on this, he attempts to cross the track without knowledge or means of knowledge of the train's approach, and is injured by the train by reason of the failure to give proper signals of approach required by law, he is entitled to recover. *International & G. N. R. Co. v. Graves*, 59 *Tex.* 330.

Persons have not an unqualified right to act upon the presumption that trains will always be operated with the care and vigilance required by law or custom, without taking the precautions of prudent persons for their own safety. *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, 23 *Fed. Rep.* 738.

A man was killed while trying to drive across a railway track. *Held*, that in the absence of any knowledge as to what was in his mind, he could not be conclusively found negligent unless no sensible explanation of his conduct was reasonably possible. He had a right to suppose that the railroad company would not violate any legal duty and would not fail to take reasonable measures to prevent mischief. He could not be blamed for doing as seemed best under the circumstances, and it would not necessarily be reckless to go forward rapidly. *Staat v. Grand Rapids & I. R. Co.*, 57 *Mich.* 239, 23 *N. W. Rep.* 795.

216. Negligence of driver of carriage in which plaintiff rides.*—Where there is no evidence that a passenger in a public hack knew of danger from an approaching train on a public crossing, the judge may so state to the jury, and may say that there is no evidence of any failure in duty on the part of such passenger to avoid the injury. *East Tenn., V. & G. R. Co. v. Markens*, 88 *Ga.* 60, 13 *S. E. Rep.* 855.

In an action against a railroad company, for injuries received by the plaintiff, in a collision between the locomotive and the wagon in which plaintiff was riding, negligence on the part of the person owning and

* See also *post*, 323; and also *IMPUTED NEGLIGENCE*.

driving the team attached to the wagon, affects the right of the plaintiff to recover equally with her own negligence. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.—DISTINGUISHED IN *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400.

Plaintiff was injured in attempting to cross defendant's track while riding in a wagon belonging to a third person and driven by the owner. *Held*, that it was error to instruct the jury that plaintiff and her driver were required to exercise only such care "as persons of their situation or condition in life" would ordinarily exercise under like circumstances. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.

Plaintiff left a passenger train at night at the end of his journey, and entered a hotel wagon. In leaving the station grounds it was necessary to drive across the track, which the driver undertook to do just as a train was approaching, whereupon plaintiff jumped from the wagon and was injured. *Held*, that the question of contributory negligence was for the jury; but neither the fact of plaintiff's jumping, nor the negligence of the driver, could relieve the company from liability. *Haff v. Minneapolis & St. L. R. Co.*, 4 McCrary (U. S.) 622, 14 Fed. Rep. 558.

Plaintiff was injured at a crossing while riding in a hired carriage, driven by a man from the stable. The facts were such that the jury might have found that both the driver and the company were jointly negligent; but it was admitted on the trial that the negligence of the driver could not be imputed to plaintiff. *Held*, that plaintiff was entitled to the benefit of a finding as to whether both were jointly negligent, and it was error to instruct the jury as to the separate negligence of the two. *Collins v. Long Island R. Co.*, 46 N. Y. S. R. 252, 18 N. Y. Supp. 779.

217. Negligence of wife where husband is driving.—Where a wife was riding in a wagon with her husband, who was driving, and they approached a railroad crossing, known by the wife to be dangerous, when a train was coming up in full view, and the husband stopped the team, but immediately afterwards attempted to cross in front of the train and both were killed, the wife in failing to warn her husband or to look or listen for approaching

trains was guilty of contributory negligence, and there can be no recovery for her death. *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97, 27 N. E. Rep. 339.—APPROVING *Brickell v. New York C. & H. R. Co.*, 120 N. Y. 290; *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280. **LIMITING** *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733. **REVIEWING** *Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199.

Plaintiffs, husband and wife, drove a dull horse in a top phaeton along a street that crossed a railway track. It was growing dark, and was the regular time for a train to leave the station, which was a short distance above this crossing, and to pass over the track at this place. They were familiar with the locality. As they approached the crossing they heard the train arriving at the station, and the wife asked the husband, who was driving, to look out for the cars, and the engine with its headlight could easily have been seen if they had leaned forward and looked. Before they got upon the track the bell rang for the gates to be closed, and the gateman on the other side immediately began to swing his gate. The husband tried to stop the horse but was not able to do so, and the other gate, which was swung immediately after, caught in a wheel of the carriage as he was trying to drive through. The wife being alarmed jumped out and was hurt. The engineer did not start his engine until the carriage had got safely across, and if the wife had remained in the carriage she would not have been hurt. *Held*, that the company was not liable for the injury received by the wife. *Peck v. New York, N. H. & H. R. Co.*, 14 Am. & Eng. R. Cas. 633, 50 Conn. 379.—**QUOTING** *Butterfield v. Western R. Corp.*, 10 Allen (Mass.) 532; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.

218. When for the jury.—(1) *General rules.**—Whether a person, injured by a locomotive at a railroad crossing, was or not at the time of the collision, in the exercise of ordinary care, is a question for the jury to determine from the evidence, under proper instructions. *Webb v. Portland & A. R. Co.*, 37 Me. 117.—**DISTINGUISHED IN** *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354.—*Mahoney v. Metropolitan R. Co.*, 104 Mass. 73. *Hanson v. Minneapolis & St. L. R. Co.*, 32 Am. &

* See also *post*, 258, 307, 311, 320.

Eng. R. Cas. 13, 37 *Minn.* 355, 34 *N. W. Rep.* 223. *Kenney v. Hannibal & St. J. R. Co.*, 105 *Mo.* 270, 15 *S. W. Rep.* 983, 16 *S. W. Rep.* 837. *Omaha, N. & E. H. R. Co. v. O'Donnell*, 35 *Am. & Eng. R. Cas.* 346, 22 *Neb.* 475, 35 *N. W. Rep.* 235.—FOLLOWING *Sioux City & P. R. Co. v. Stout*, 17 *Wall.* (U. S.) 657; *Atchison & N. R. Co. v. Bailey*, 11 *Neb.* 332; *Lincoln v. Gillilan*, 18 *Neb.* 115.—*Hoye v. Chicago & N. W. R. Co.*, 67 *Wis.* 1, 29 *N. W. Rep.* 646.

The question of contributory negligence of one injured in crossing a track is for the jury, where the evidence as to his conduct is conflicting. *Wichita & W. R. Co. v. Davis*, 32 *Am. & Eng. R. Cas.* 65, 37 *Kan.* 743, 16 *Pac. Rep.* 78.—QUOTING *Bernhard v. Rensselaer & S. R. Co.*, 1 *Abb. App. Dec.* (N. Y.) 131; *Weber v. New York C. & H. R. Co.*, 58 *N. Y.* 451.

Or whenever a given state of facts is such that reasonable men would fairly differ upon the question as to whether there was negligence or not. *Leak v. Rio Grande Western R. Co.*, 9 *Utah* 246, 33 *Pac. Rep.* 1045.

In a suit for damages for injury at a crossing the court properly charged the jury that if the bell of the switch-train was not rung, that was negligence, and left it to them to decide whether the person injured had been negligent. *Whiton v. Chicago & N. W. R. Co.*, 2 *Biss.* (U. S.) 282.

Where the jury passes upon the issue of the contributory negligence of a person injured while crossing a railroad track at a highway, and finds, on conflicting evidence, that he was not negligent, this finding will not be disturbed where the court has charged the jury correctly on the law. *Delaware, L. & W. R. Co. v. Converse*, 49 *Am. & Eng. R. Cas.* 323, 139 *U. S.* 469, 11 *Sup. Ct. Rep.* 569.

It is a question for a jury to determine whether a boy who was injured at a railroad crossing exercised that degree of care which could reasonably be expected from him, considering his age, capacity, and experience. *Spillane v. Missouri Pac. R. Co.*, 111 *Mo.* 555, 20 *S. W. Rep.* 293.—QUOTED IN *Burger v. Missouri Pac. R. Co.*, 112 *Mo.* 238.

Where there was no question but that the injury was occasioned by defendant's train, which was at the time running in excess of the speed limited by the city ordinance, and the testimony was conflicting as

to the care exercised by plaintiff, the whole question of negligence was properly submitted to the jury. *Gratiot v. Missouri Pac. R. Co.*, 55 *Am. & Eng. R. Cas.* 108, 116 *Mo.* 450, 21 *S. W. Rep.* 1094.

A party who is injured in crossing a track, in order to recover, must show, under all of the circumstances of the case, that he exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances; and this is always a question for the jury, except where there is gross or inexcusable negligence. *Parsons v. New York C. & H. R. R. Co.*, 113 *N. Y.* 355, 21 *N. E. Rep.* 145, 22 *N. Y. S. R.* 697, 3 *L. R. A.* 683; *affirming* 48 *Hun* 615, 15 *N. Y. S. R.* 1016, *mem.*—DISTINGUISHED IN *Silberstein v. Houston, W. S. & P. F. R. Co.*, 117 *N. Y.* 293.

(2) *Illustrations.*—It appeared from the plaintiff's evidence that the deceased was a very careful driver; that at the time of the accident he had no reason to expect a train or engine; that the night was dark; that the engine approached silently without giving any signal and without any light on the tender which could be seen by the deceased. It was also shown that the watchman at the crossing gave him no warning. *Held*, that although the defendant's witnesses distinctly and positively contradicted the testimony of the plaintiff's witnesses, the question whether the deceased was guilty of contributory negligence was for the jury. *State v. Union R. Co.*, 42 *Am. & Eng. R. Cas.* 167, 70 *Md.* 69, 18 *Atl. Rep.* 1032.

In passing a street plaintiff passed over twenty-four tracks of different roads at night, and some distance beyond was struck by an engine upon another road, of which she had no knowledge. She saw the light of an engine, but supposed it was on another track, and continued a short distance and was struck. She testified that it was running rapidly without signals. There was no flagman or other signals. *Held*, that the question of whether she exercised ordinary care was for the jury. *Doyle v. Pennsylvania & N. Y. C. & R. Co.*, 54 *N. Y. S. R.* 719, 139 *N. Y.* 637, 34 *N. E. Rep.* 1063.

Plaintiff was driving on a street where there was a space of thirteen feet between the curb and the track of a dummy line. His horse took fright at the escape of steam from an engine and backed, bringing the wagon in collision with the cars, and plain-

tiff was thrown out and injured. He testified that his horse was accustomed to the dummy, and that he had frequently driven him near it without difficulty. *Held*, that it was for the jury to determine whether he was wanting in ordinary prudence. *Stamm v. Southern R. Co.*, 1 *Abb. N. Cas.* (N. Y.) 438.

In an action for an injury at a crossing by a boy twelve years old, the evidence showed that while attempting to cross the track he caught his foot in a frog, which was unblocked, and before he could extricate himself was struck by a train. He was unfamiliar with the surroundings, and the object and construction of a frog. *Held*, that the question of his contributory negligence was for the jury. *Friess v. New York C. & H. R. Co.*, 51 N. Y. S. R. 391, 67 *Hun* 205, 22 N. Y. *Supp.* 104.—QUOTING *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219. REVIEWING *Swift v. Staten Island R. T. R. Co.*, 123 N. Y. 645, 33 N. Y. S. R. 604.

219. When nonsuit should be ordered, or verdict for defendant directed.*—The question whether plaintiff was so plainly guilty of contributory negligence as that the court below should have granted a nonsuit, or new trial, is to be determined—as such questions must always be determined—by the particular circumstances of the case. *Strong v. Sacramento & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 273, 61 *Cal.* 326.

In an action against a company for injury at a crossing, where the evidence shows inexcusable negligence and carelessness on the part of plaintiff, the court should grant a nonsuit. *Sheffield v. Rochester & S. R. Co.*, 21 *Barb.* (N. Y.) 339.—DISTINGUISHED IN *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622. REVIEWED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. *Rep.* 820.

Where the suit is for an injury at a crossing, and the plaintiff's own evidence shows contributory negligence, the case should be taken from the jury and a verdict for the defendant ordered. *Thompson v. Flint & P. M. R. Co.*, 23 *Am. & Eng. R. Cas.* 289, 57 *Mich.* 300, 23 N. W. *Rep.* 820.

Where the action is for injuries received at a crossing, and by the conceded or undis-

puted facts some act or omission is established on the part of the plaintiff, which of itself constitutes negligence, the court should order a nonsuit, and a refusal to do so is error at law. But if the fact depends upon the credibility of witnesses, or upon inferences to be drawn from the circumstances proved, about which honest men might differ, then the plaintiff has a right to have the question submitted to the jury, and their decision is conclusive. *Hackford v. New York C. & H. R. Co.*, 53 N. Y. 654; *affirming* 13 *Abb. Pr. N. S.* 18, 43 *How. Pr.* 222, 6 *Lans.* 381.—FOLLOWED IN *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326; *Weber v. New York C. & H. R. Co.*, 67 N. Y. 587. REVIEWED IN *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.

It is only when the whole evidence on which plaintiff's case rests shows conclusively that he was careless, or when there is no evidence tending to show the contrary, that it is deemed to be the duty of the court to withdraw the case from the jury, or to direct a verdict for the defendant. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 *Am. & Eng. R. Cas.* 163, 20 *Atl. Rep.* 976.

Applying this principle, it was error to order a nonsuit, where it appeared that the view of plaintiff's decedent, who was killed at a railroad crossing, was obstructed by a blinding storm of snow on a cold day; that no regular train was due at that time from either direction; that the locomotive by which the decedent was killed, attached to a snow pilot, was passing unexpectedly and running at a high rate of speed; that its approach was quite noiseless; that no alarm-bell or whistle was sounded; and that there was a conflict of evidence as to the negligence of the decedent. *Valin v. Milwaukee & N. R. Co.*, 55 *Am. & Eng. R. Cas.* 247, 82 *Wis.* 1, 51 N. W. *Rep.* 1084.

220. Amount of proof necessary to compel submission to jury.—The court is not bound by the bare assertion of a party that he used his natural faculties of seeing and hearing before attempting to cross the track, to submit his case to the jury when it is manifestly untrue or it is shown that the observation was not opportunely made. *Smith v. New York C. & H. R. Co.*, 44 N. Y. S. R. 55, 63 *Hun* 624, 17 N. Y. *Supp.* 400; *affirmed* in 137 N. Y. 562, *mem.*, 50 N. Y. S. R. 933.—REVIEWING *Nash v. New York C. & H. R. Co.*, 34 N. Y. S. R. 788.

* See also *post*, 338, 350.
Undisputed evidence of contributory negligence justifies an order of nonsuit, see 42 *Am. & Eng. R. Cas.* 192, *abstr.*

In an action for injuries sustained by plaintiff from a passing train of defendant at a highway crossing *prima-facie* proof of negligence on the part of the defendant is sufficient to compel the judge to send the case to the jury, and *prima-facie* proof of contributory negligence on the part of the plaintiff is not sufficient to withdraw the case from the jury. *Kaminitsky v. North-eastern R. Co.*, 25 So. Car. 53.—QUOTING *Couch v. Charlotte, C. & A. R. Co.*, 22 So. Car. 562.

221. Instructing the jury.*—(1)

What charges are proper.—In an action for personal injuries at a crossing a charge which states the correct rules as to negligence, but ignores the evidence tending to show contributory negligence, is not therefore erroneous; the question of contributory negligence being defensive in its character and properly calling for an explanatory charge, which need not be given unless requested. *East Tenn., V. & G. R. Co. v. Clark*, 19 Am. & Eng. R. Cas. 345; 74 Ala. 443.

The jury had been told, in effect, that if plaintiff could have heard the locomotive in time to have avoided the consequences which followed he was guilty of contributory negligence. This charge was more strongly in favor of defendant than if they had been told that he should give way to the locomotive after he saw or heard it. *Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.

It is proper to inquire whether the plaintiff was guilty of such contributory negligence as would forfeit his right to recover of the company for the neglect of its servants; and where the evidence tends to show such negligence on the part of the plaintiff the jury should be instructed as to the law on that subject. *New Orleans, J. & G. N. R. Co. v. Mitchell*, 52 Miss. 808.

Where the carelessness of the plaintiff as well as that of the defendant operated directly to produce the injury complained of, the plaintiff has no right to recover. And in a case where the defendant is entitled to and requests a charge to that effect the refusal or neglect of the court to so instruct the jury, in unambiguous terms, is error for which a judgment in favor of the plaintiff will be reversed. *Pittsburg, Ft. W. & C. R. Co. v. Krichbaum*, 24 Ohio St. 119, 7 Am. Ry. Rep. 200.

(2) *What are improper and properly refused.*—It was proper for the court to refuse a charge to the jury requested by defendant on the ground that "it is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated, without notice of others that they may think important," since in determining the question of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon that question and not select one particular prominent fact or circumstance as controlling. *Grand Trunk R. Co. v. Ives*, 55 Am. & Eng. R. Cas. 159, 144 U. S. 408, 12 Sup. Ct. Rep. 679.

An instruction that if the whistle was not sounded nor the bell rung this was a circumstance tending to show want of contributory negligence is erroneous; as also is an instruction that if there is nothing in the evidence tending to show contributory negligence the jury may, without proof, infer there was none. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.

An instruction in an action for injuries at a crossing that "the want of care and prudence on the part of the plaintiff, if tending to cause the injury, will be taken into consideration by the jury in determining the liability of the company" is erroneous in failing to state the law of contributory negligence fully. *Spencer v. Illinois C. R. Co.*, 29 Iowa 55.

Where plaintiff testified that he did not look where he stepped; that the train at the time he stepped upon the track was about 600 feet away; that he had seen the train pass there every day for years and knew its rate of speed, and where it appeared that he would have had time to have passed over had there been no defect in the walk, the jury should not be told, as matter of law, that plaintiff should be charged with contributory negligence. *Retan v. Lake Shore & M. S. R. Co.*, 55 Am. & Eng. R. Cas. 97, 94 Mich. 146, 53 N. W. Rep. 1094.

In an action by one injured at a street crossing by a train running at an unlawful rate of speed, where there is controversy of fact as to whether plaintiff was guilty of contributory negligence, it is error to instruct that although the jury may believe the plaintiff was guilty of negligence in approaching the track, still, unless this negli-

* See also *post*, 351-360.

gence was in whole or in part the cause of the injury, the verdict should be for plaintiff. *Memphis & C. R. Co. v. Jobe*, 69 Miss. 452, 10 So. Rep. 672.

Where the action is to recover for injuries caused by a street-car striking plaintiff's wagon a charge "that if, as matter of fact, the plaintiff thought he had so stopped his wagon as to leave room for the defendant's car to pass and the defendant's driver also thought he had room to pass, and both were mistaken, the plaintiff cannot recover" is properly refused. *Gumb v. Twenty-third St. R. Co.*, 26 J. & S. (N. Y.) 1, 30 N. Y. S. R. 253, 9 N. Y. Supp. 316.

And a charge "that if plaintiff stopped his wagon just across the track without looking at all to see whether he had left room for the car to pass, and defendant's driver thought he had room to pass but misjudged the distance, plaintiff cannot recover" is properly refused. It was for the jury to say whether ordinary prudence required plaintiff to look, and it may have been negligence in the driver to think that he had room to pass. *Gumb v. Twenty-third St. R. Co.*, 26 J. & S. (N. Y.) 1, 30 N. Y. S. R. 253, 9 N. Y. Supp. 316.

And it was also proper to refuse a charge "that if the jury believed that plaintiff knew that his wheels were standing upon defendant's track and saw the car approaching at a rate of speed that rendered a collision imminent and he made no attempt to avoid that collision that he was negligent." *Gumb v. Twenty-third St. R. Co.*, 26 J. & S. (N. Y.) 1, 30 N. Y. S. R. 253, 9 N. Y. Supp. 316.

222. Violation of ordinance as to manner of driving teams.—In a city where an ordinance provided that any person having any cart or team of burden under his care should, when traveling in a street, "hold the reins of his horse or horses in his hand, or be in such a position or so near the team he is driving as to be able at all times to guide, restrain, and govern the same," a person standing in a cart, and driving the horse which drew it and at the same time leading by a strap in his hand another horse drawing another cart, attempted to pass over the track of a railroad at a place where it crossed at grade the street on which he was traveling, when the rear horse, becoming restive, rushed forward, so that both of the horses and carts were on the track, and in this position they were struck and injured by a train. In

an action against the railroad corporation for the injury—*held*, that the question whether the traveler was in the exercise of due care at the time of the collision was for the jury. *Eagan v. Fitchburg R. Co.*, 101 Mass. 315.

223. Driving too rapidly.—Where a person approaching a railway track, with knowledge that the view of an approaching train is to an extent obstructed, who heedlessly permits his team to trot, and makes no effort to look or listen for an approaching train for a distance of eighteen rods from the track, he is guilty of such contributory negligence as will prevent him from recovering. *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624, 17 N. W. Rep. 893.—*FOLLOWING Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153; *Haines v. Illinois C. R. Co.*, 41 Iowa 227; *Benton v. Central R. Co.*, 42 Iowa 192; *Starry v. Dubuque & S. W. R. Co.*, 51 Iowa 419; *Funston v. Chicago, R. I. & P. R. Co.*, 61 Iowa 452.—*APPROVED IN Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278. *DISTINGUISHED IN Lee v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 157, 80 Iowa 172.

Where the evidence showed that the railroad crossed the road at an oblique angle on a level with the highway; that the crossing was alled in with planks between the rails, except that the company had, unknown to the plaintiffs, removed one plank along the side of one of the rails, and had neglected to restore it, and that the rails projected above the planking about an inch or an inch and a half; that the plaintiffs were driving a steady horse at the rate of five or six miles an hour, and did not slacken speed at the crossing; and that when crossing the track the wheel of their cart caught in the space left between the planking and the rail, and they were upset and injured—the fact that the plaintiffs failed to slacken speed at the crossing does not, as matter of law, show negligence on their part, but the question is one of fact for the jury, and a verdict for the plaintiffs will not be disturbed. *Whalen v. Arcata & M. R. R. Co.*, 92 Cal. 669, 28 Pac. Rep. 833.

224. Driving over defective crossings.*—In an action for personal injuries sustained by plaintiff while attempting to drive a loaded wagon over the defendant's

* See also *ante*, 20.

track at the crossing of a highway, the fact that when such attempt was made the plaintiff knew that the crossing was defective is not of itself conclusive proof of contributory negligence, where it appears that the defect in the roadway was not necessarily dangerous. *St. Louis, I. M. & S. R. Co. v. Box*, 52 Ark. 368, 12 S. W. Rep. 757. —QUOTING *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73. —DISTINGUISHED IN *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389.

In such a case it is a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the track, and whether he used due care in doing so. *St. Louis, I. M. & S. R. Co. v. Box*, 52 Ark. 368, 12 S. W. Rep. 757.

Where a party sues for an injury at a crossing, claiming that the approach was too narrow, but where the evidence shows that it was more reasonable to attribute the injury to a defect in the seat of his wagon than to the narrowness of the approach, there can be no recovery. *Chicago, B. & Q. R. Co. v. Stamps*, 26 Ill. App. 219.

In a suit for damages to plaintiff's vehicle, where it appears that the track was out of repair, and in consequence the wagon broke down, and in that condition was run into by the train, and that the state of the road was known to the plaintiff at the time, it is proper to submit to the jury the question whether under the circumstances plaintiff was guilty of negligence, and also what care and caution he was bound to exercise. *Meyers v. Chicago, R. I. & P. R. Co.*, 59 Mo. 223, 8 Am. Ry. Rep. 473.

In an action for personal injuries sustained by plaintiff in being thrown from a loaded wagon, the hind wheel of which ran into a hole at a crossing on defendant's road, which the complaint alleged was caused by its negligence, defendant claimed that a defect in the wagon caused, or contributed to, the injury. It attempted to show that, in consequence of the alleged defect, in turning the wagon with a load upon it the next day after the accident it came near upsetting; this was excluded. *Held, error. Hoyt v. New York, L. E. & W. R. Co.*, 118 N. Y. 399, 23 N. E. Rep. 565, 29 N. Y. S. R. 48; *reversing 42 Hun 657*, 6 N. Y. S. R. 7.

To drive a loaded cart across a railroad

track where the ground is soft, and where the track is higher than the earth on either side, in consequence of which the carriage becomes fast and is struck by a train, is such contributory negligence as to bar a recovery, though it was a place where the driver had a right to cross. *Geunlich v. Germantown Branch R. Co.*, 9 Phila. (Pa.) 78.

225. Particular acts held to constitute contributory negligence.—

The rule of law requiring railroads to protect and guard excavations across highways, does not dispense with the obligation resting upon all persons using the highway to exercise ordinary care to avoid injury. One who negligently drives into such an excavation cannot claim damages because it has been left unguarded. *Shonhoff v. Jackson Branch R. Co.*, 97 Mo. 151, 10 S. W. Rep. 618.

Where a party is driving a gentle horse, but at such a rate of speed that he cannot avoid a collision with an approaching train, and fails to see it, though in the daytime, until just before the collision, he is guilty of such contributory negligence as to justify a peremptory nonsuit. *Martin v. New York C. & H. R. R. Co.*, 50 N. Y. S. R. 553, 66 Hun 636, 21 N. Y. Supp. 919.

To continue to unload a vessel after the master knows that the bottom of a dock is in such condition that his vessel is likely to be injured, is such negligence as to defeat a recovery for injuries occurring thereafter. *Washington v. Staten Island R. T. R. Co.*, 52 N. Y. S. R. 29, 22 N. Y. Supp. 599.

One stopping his wagon at a railroad warehouse so near the main track as to be in the way of a passing train, is guilty of such contributory negligence as would preclude his recovery for injury to his wagon from a train, although the train brakes were not so powerful as those in use on some other roads. *Murphy v. Wilmington & W. R. Co.*, 70 N. Car. 437.

A company permitted the planks at a highway crossing to become loose and the nails therein to stand above the surface. A large middle-aged lady approached the crossing with a young, active lady, and attempted to cross just in front of an approaching train. The young lady barely got safely across, and the other was killed. Her calico dress skirt was found torn at the bottom. A suit against the company was tried on the theory that she caught her

skirt on a board or nail, and was thus detained, but it appeared that her weight and strength would at once have torn the dress. *Held*, that her own contributory negligence must be taken as causing her death. *Cleveland, C. & St. L. R. Co. v. Arbaugh*, 47 Ill. App. 360.—*APPROVING* *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.

The plaintiff's conduct in running some distance towards an approaching train and neglecting to avail himself of avenues of escape which were open to him in every other direction, cannot be relieved of its negligent character by the statement that he thought he could reach a given point before the train did; nor can the railroad company be held liable for an injury resulting from plaintiff's grasping the hand-rail of a moving car, by the bare statement that he was so confused, when he reached the position into which his own judgment had led him, that his act was involuntary. *French v. Detroit, G. H. & M. R. Co.*, 89 Mich. 537, 50 N. W. Rep. 914.

Where servants in charge of logs and team see the smoke of an approaching engine while at a distance of a mile or a mile and a quarter from the crossing, and after they have abandoned an attempt to draw the logs off the track, and are preparing to unload them, it is their duty at once to unhitch the horses and signal the approaching train. *Frost v. Milwaukee & N. R. Co.*, 96 Mich. 470, 56 N. W. Rep. 19.

Where one going to his home is traveling upon a railroad track, and in order to avoid danger from an approaching train thereon gets onto a parallel track of another railroad company sixty feet in front of an engine approaching at the rate of fifteen to thirty miles per hour, and in an unobstructed view, and then proceeds to walk up the latter track until he is overtaken and killed by the engine thereon, he is guilty of contributory negligence, notwithstanding the fact that he was partially deaf and did not observe such engine; and his widow cannot recover damages for his death, even though it be shown that the engine (in violation of section 1047, Code of 1880) was running at a greater rate of speed than six miles an hour in an incorporated city, without sounding any alarm, and that neither brakeman nor engineer was on the lookout, but engaged in other duties on the engine. *Mobile & O. R. Co. v. Stroud* 31 Am. &

Eng. R. Cas. 443, 64 Miss. 784, 2 So. Rep. 171.

Plaintiff's own evidence showed that he approached the railroad track driving about ten miles an hour, when a strong wind was blowing against the train and a heavy snow falling. He knew that he was approaching the track and that trains frequently passed. *Held*, that it was his duty to have driven slowly and carefully, and to have carefully watched and listened for trains, and having failed to do so he was chargeable with contributory negligence. *Powell v. New York C. & H. R. R. Co.*, 2 Silv. App. 9, 109 N. Y. 613, mem., 15 N. E. Rep. 891, 14 N. Y. S. R. 74; *affirming* 38 Hun 640, mem.—*DISTINGUISHING* *Hart v. Erie R. Co.*, 3 Alb. L. J. 312; *Sherry v. New York C. & H. R. R. Co.*, 104 N. Y. 652, 5 N. Y. S. R. 574. *REFERRING TO* *Hackford v. New York C. & H. R. R. Co.*, 43 How. Pr. 222.

When, from the plaintiff's evidence, it appears that his horses were moving and were already across the track when he saw a train 390 feet away, approaching at the rate of 40 miles an hour, it is evident that if he had exercised the care he was bound to use under the circumstances he could have driven off the track before the train struck him; and as he must, therefore, have been guilty of contributory negligence, a verdict in his favor is contrary to the evidence. *Galveston, H. & S. A. R. Co. v. Porfert*, 37 Am. & Eng. R. Cas. 540, 72 Tex. 344, 10 S. W. Rep. 207.—*FOLLOWED* IN *International & G. N. R. Co. v. Dyer*, 75 Tex. 156, 13 S. W. Rep. 377.

220. Acts which do not show contributory negligence.—(1) Generally.—

The fact that a person attempts to pass over a railroad crossing on a highway after he has notice that it is unsafe, by reason of being out of repair, does not necessarily constitute negligence, nor is he necessarily bound absolutely to refrain from pursuing his course. This would depend upon the circumstances of the case. If, under the circumstances, he had reasonable cause, in the exercise of ordinary care and discretion, for believing that he could pass over in safety, and exercised due care in attempting to do so, he would not be guilty of negligence. In this case, under the evidence, these were questions of fact for the jury. *Kelly v. Southern Minn. R. Co.*, 6 Am. & Eng. R. Cas. 264, 28 Minn. 98, 9 N. W. Rep.

588. *Skjeggerud v. Minneapolis & St. L. R. Co.*, 38 Minn. 56, 35 N. W. Rep. 572.

The plaintiff was not guilty of contributory negligence in attempting to cross the track, although aware that the train was about due, where it appears that his view was unobstructed and the night was still and that he made the proper use of his ears and eyes; and he was unaware that the way was obstructed in whole or in part, or that there was any object before him calculated to frighten his horse; and that he had sufficient time to have crossed the track in safety under ordinary circumstances. *Palys v. Jewett*, 32 N. J. Eq. 302; *reversing* 30 N. J. Eq. 604.

To drive upon a railroad crossing at a slow trot is not in itself contributory negligence, but may be considered like any other circumstances in the case. *Totten v. New York, L. E. & W. R. Co.*, 32 N. Y. S. R. 765, 57 Hun 585, 10 N. Y. Supp. 572.

It cannot be said, as a matter of fact, that because a man thrown out of an upsetting cutter did not, within the space of a few seconds and within the distance of a few feet, let the lines go, this is such evidence of negligence contributory to the accident as would disentitle him to recover. *Carly v. London*, 43 Am. & Eng. R. Cas. 279, 18 Ont. 122.—*LIMITING* *Anderson v. Northern R. Co.*, 25 U. C. C. P. 301; *Hay v. Great Western R. Co.*, 37 U. C. Q. B. 456.

(2) *Illustrations*.—Plaintiff's intestate was driving across a railroad, and just as his horses were on the rails a train approached and he struck his horses to urge them forward, and either fell out or in attempting to jump was thrown out by the footboard of his wagon breaking, and was killed. Two other men jumped out of the wagon, one of whom was heavier than the deceased, without the footboard breaking. There was evidence that it was defective, but none that he knew it, and it had been in constant use for some time. *Held*, not sufficient to show contributory negligence in using the footboard. *McIntosh v. Chicago, M. & St. P. R. Co.*, 36 Fed. Rep. 661.

Defendant company was laying a track across a street, and at night placed barriers to protect persons in crossing the street, but the ends of some of the rails projected beyond the barriers. Plaintiff's testator fell over the ends of the rails and was killed. *Held*, that the fact that he was not at a regular crossing was not evidence of

contributory negligence. He had a right to cross where he chose, if he used due care. *Woodman v. Metropolitan R. Co.*, 38 Am. & Eng. R. Cas. 484, 149 Mass. 335, 21 N. E. Rep. 482, 4 L. R. A. 213.

Decedent was seen about to cross a railway track in a village at a time when a train was approaching from one direction and one backing towards her from the other direction. She was soon after found dead outside the street limits on railroad grounds, having been run over by the backing train. *Held*, that her being found where she was, outside the street limits, did not of itself make out against her a case of contributory negligence. *Hassenyer v. Michigan C. R. Co.*, 6 Am. & Eng. R. Cas. 59, 48 Mich. 205, 12 N. W. Rep. 155, 42 Am. Rep. 470.

A man was killed while trying to drive across a railway track. *Held*, that in the absence of any knowledge as to what was in his mind, he could not be found negligent unless no sensible explanation of his conduct was reasonably possible. *Staal v. Grand Rapids & I. R. Co.*, 57 Mich. 239, 23 N. W. Rep. 795.

That a traveler jumped from his vehicle when in imminent danger of colliding with an approaching train at a crossing—*held*, not to bar a recovery against the railroad corporation, although he might have escaped injury had he remained quiet. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

In an action against a railroad company for personal injuries caused by a descending gate, plaintiff testified that he first saw the gate when it was about 18 inches above his head and a little in front of him; that he was going fast and continued to advance, but before he could clear the gate it fell upon him and inflicted the injury. *Held*, that this evidence did not show contributory negligence, as he might well judge that the safest way to avoid the injury was to hasten forward. *Keitt v. Staten Island R. T. R. Co.*, 75 Hun (N. Y.) 579, 27 N. Y. Supp. 847.

Knowledge of existing danger is not, *per se*, negligence; but it is a fact to be weighed by the triers as bearing upon the question of negligence; thus, in an action to recover for injuries received on the highway, it appeared that from a certain point there were two highways of about equal length leading to the place where the plaintiff wished to go; that one was very near the railroad and the other more remote; that the plaintiff,

being acquainted with both roads, and knowing that he was liable to meet a train of cars about that time, took the one nearest to the railroad, but he did not know of its insufficiency; that his horse became frightened at an approaching train, and that he was injured by reason of want of repair of the highway. *Held*, that the plaintiff had a right to presume that the highway was sufficient; and that his knowledge did not reach the proximate cause of the injury, and so did not contribute to it. *Templeton v. Montpelier*, 56 Vt. 328.

227. Pleadings — Necessary averments in complaint.*—A complaint against a railroad company to recover damages for an injury received at a crossing, and alleged to have been "caused by the reckless, negligent, and wilful conduct of the defendant's employés" in propelling a locomotive backwards over the crossing, the track being hidden from view by intervening buildings, at a dangerous rate of speed, without giving warning by bell or whistle, is not good as charging a wilful injury; and there being no averment negating contributory negligence, it is bad on demurrer. *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. Rep. 807.

Where, by statute, the company must give warning at crossings by bell or whistle, the plaintiff suing for injuries received at a crossing need not negative contributory negligence, when it appears the bell was not rung nor the whistle sounded, though the train was going at an unusually rapid rate. *Pearl v. Grand Trunk R. Co.*, 19 Am. & Eng. R. Cas. 239, 10 Ont. App. 191.—DISTINGUISHING *Davey v. London & S. W. R. Co.*, 11 Q. B. D. 213. REVIEWING *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1155.

228. Special findings as to.—In an action against a railway company for personal injuries received in a collision at a highway crossing the jury found specially that the whistle of the defendant's engine was sounding at the whistling-post (about half a mile from the crossing); that the bell was rung continuously from that place to the crossing; that the engine was going forty-five miles an hour; that the plaintiff was driving three and one half miles an hour; that an engine could be seen when 2600 feet distant from the crossing, from

any point on the highway between 200 and 100 feet from the crossing; and that from a point twenty feet from the crossing an engine could be seen when 800 feet away. *Held*, that these findings were not inconsistent with a further finding that the plaintiff was not guilty of any contributory negligence. *Hahn v. Chicago, M. & St. P. R. Co.*, 78 Wis. 396, 47 N. W. Rep. 620.

No weight can be given to a finding in the special verdict that the defendants' failure to have a light or a flagman at the crossing, to warn the plaintiff of the approaching locomotive, was negligence. The jury were not competent to determine that proposition. *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. Rep. 665.—FOLLOWING *Heddes v. Chicago & N. W. R. Co.*, 74 Wis. 239; *Winstanley v. Chicago, M. & St. P. R. Co.*, 72 Wis. 375. QUOTING *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219.

But the defendants' negligence in failing to provide proper means for securing the safety of persons at the crossing being conclusively established, the court should base its judgment upon the existence of such negligence, although there is no valid finding to that effect in the special verdict. *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. Rep. 665.

229. Burden of proof.*—Contributory negligence is not a matter of defense, and the plaintiff must show affirmatively, by pleading and proof, that his fault or negligence did not contribute to his injury, before he is entitled to recover therefor. *Cincinnati, H. & I. R. Co. v. Butler*, 23 Am. & Eng. R. Cas. 262, 103 Ind. 31, 2 N. E. Rep. 138. *Wheeler v. Boston & A. R. Co.*, 16 Am. & Eng. R. Cas. 315, 135 Mass. 225.—QUOTING *Chaffee v. Boston & L. R. Corp.*, 104 Mass. 108.—DISTINGUISHED IN *Van Ostran v. New York C. & H. R. Co.*, 35 Hun (N. Y.) 590; *Boss v. Providence & W. R. Co.*, 15 R. I. 149.—*Beisegel v. New York C. R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 29.

The plaintiff in order to recover must show not only the negligence of the defendant, the injury, and that plaintiff was without fault, but that the injury was caused by defendant's negligence. *Willoughby v. Chicago & N. W. R. Co.*, 37 Iowa 432.

And a charge to the jury, that "the plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on

* See also *post*, 334.

* See also *ante*, 102; *post*, 337.

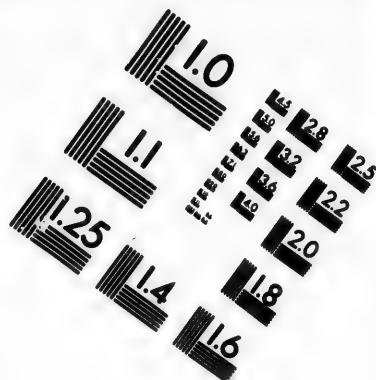
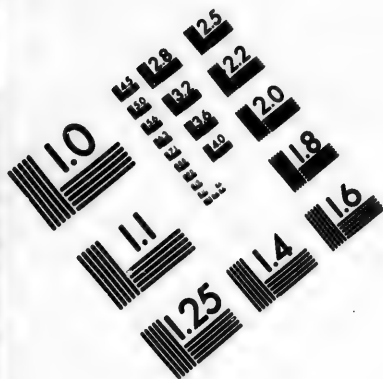
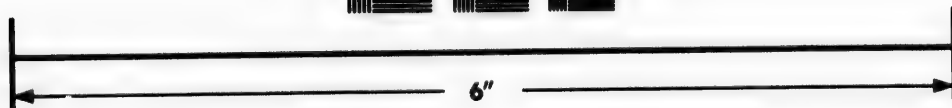
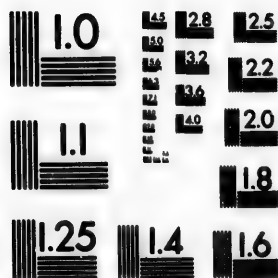


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the part of the defendant and of resulting injury to herself; and if she does this she is entitled to recover, unless the defendant produce evidence sufficient to rebut the presumption," is erroneous. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.

The burden of proving contributory negligence rests upon the defendant, unless the plaintiff, in making out his case, prove, or give evidence tending to prove, that he was guilty of such contributory negligence; and when there is no evidence upon the subject, it is the duty of the court to assume that the plaintiff was not guilty of such contributory negligence, and so instruct the jury. *Smith v. Chicago, St. P. R. Co.*, (S. Dak.) 56 Am. & Eng. R. Cas. 123, 55 N. W. Rep. 717. *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157.—FOLLOWED IN *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387. QUOTED IN *Reading & C. R. Co. v. Ritchie*, 102 Pa. St. 425.

In an action for killing a man at a crossing, but one witness testified as to seeing the occurrence, whose evidence tended to show negligence in the management of the train, and due care on the part of the deceased; but his whole account of the transaction and of his subsequent conduct was so incredible as to be unworthy of belief. *Held*, that the burden of proof resting on the plaintiff was not sustained. *Rainey v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 677, 23 N. Y. Supp. 80, 68 Hun 495.

Where, in an action against a railroad company to recover damages for an injury sustained by a collision with cars standing on the track in a public highway, the accident occurring in the daytime, in the view of witnesses who testified to all the particulars, the jury were instructed that, if there was negligence on the part of the plaintiff which contributed to the disaster, he was not entitled to recover, and by the pleadings and the testimony to prove negligence of the plaintiff offered by the defendant, the question of negligence was fully raised—*held*, that it was immaterial upon whom the onus of proving or disproving negligence was cast by the court, as it was for the jury to determine, under the circumstances, whether or not the plaintiff had been guilty of inexcusable negligence. *Pennsylvania R. Co. v. McTigue*, 46 Pa. St. 316.

230. The fact of a collision is prima facie evidence of.—Where a

party crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.—APPROVED IN *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97.

The fact of a collision at a crossing, between a train engine and a traveler, is not conclusive evidence that the traveler was wanting in due care. *Cleaves v. Pigeon Hill Granite Co.*, 145 Mass. 541, 5 N. Eng. Rep. 507, 14 N. E. Rep. 646.

2. Duty to Stop, Look, and Listen.*

231. Generally.—The presence of a railroad track upon which a train may at any time pass is notice of danger, and it is the duty of a person about to cross such road, on a public highway, to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution. *Mann v. Belt R. & S. Y. Co.*, 128 Ind. 138, 26 N. E. Rep. 819. *Matta v. Chicago & W. M. R. Co.*, 32 Am. & Eng. R. Cas. 71, 69 Mich. 109, 13 West. Rep. 717, 37 N. W. Rep. 54. *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594. *Gardner v. Detroit, L. & N. R. Co.*, 97 Mich. 240, 56 N. W. Rep. 603. *Brown v. Milwaukee & St. P. R. Co.*, 22 Minn. 165, 19 Am. Ry. Rep. 298.—FOLLOWED IN *Smith v. Minneapolis & St. L. R. Co.*, 26 Minn. 419; *Rheiner v. Chicago, St. P., M. & O. R. Co.*, 36 Minn. 170.

Persons about to cross are bound to make use of the sense of hearing as well as that of sight; and if one cannot be made available the obligation to use the other is the stronger to ascertain, before attempting to make the crossing, whether or not a train is in dangerous proximity; and if one neglects to do this, but carelessly ventures upon the track and is injured, it must be at his own risk. Such conduct is sufficient of itself to defeat a recovery. *Louisville,*

* See also CARRIAGE OF PASSENGERS, 303, 453; CHILDREN, ETC., 82.

Duty of travelers to stop, look, and listen, see notes, 45 AM. & ENG. R. CAS. 196; 35 *Id.* 325; 90 AM. DEC. 780; 7 L. R. A. 318. See also 42 AM. & ENG. R. CAS. 152, *abstr.*

N. A. & C. R. Co. v. Stommel, 126 Ind 35, 25 N. E. Rep. 863.

232. Pennsylvania rule requiring one to stop as well as to look and listen.*—The failure to stop, look, and listen immediately before crossing a railroad track is negligence *per se*, and this is for the court. The rule is unbending. *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 6 Am. Ry. Rep. 158.—APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457. DISTINGUISHED IN *Pennsylvania R. Co. v. Ackerman*, 74 Pa. St. 265; *Pennsylvania R. Co. v. White*, 88 Pa. St. 327; *Baughman v. Shenango & A. R. Co.*, 6 Am. & Eng. R. Cas. 51, 92 Pa. St. 335, 37 Am. Rep. 690; *Philadelphia & R. R. Co. v. Carr*, 99 Pa. St. 505; *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. St. 506. FOLLOWED IN *Henze v. St. Louis, K. C. & N. R. Co.*, 2 Am. & Eng. R. Cas. 212, 71 Mo. 636; *Whitman v. Pennsylvania R. Co.*, 156 Pa. St. 175. NOT FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1; *Plummer v. Eastern R. Co.*, 6 Am. & Eng. R. Cas. 165, 73 Me. 591. QUOTED IN *Beyel v. Newport News & M. V. R. Co.*, 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532; *Reading & C. R. Co. v. Ritchie*, 102 Pa. St. 425. REVIEWED IN *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114; *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.—*Ehrisman v. East Harrisburg City Pass. R. Co.*, 51 Am. & Eng. R. Cas. 190, 150 Pa. St. 180, 24 Atl. Rep. 596, 30 W. N. C. 373, 23 Pittsb. L. J. N. S. 73, 9 Lanc. L. Rev. 356. *Myers v. Baltimore & O. R. Co.*, 150 Pa. St. 386, 24 Atl. Rep. 747.

But where there is no direct evidence that the traveler did not stop, look, and listen, the presumption of law that he performed his duty will prevail; yet where there is direct, affirmative, and credible evidence to the contrary the presumption of law is rebutted, and will give way to the actual truth. *Reading & C. R. Co. v. Ritchie*, 19 Am. & Eng. R. Cas. 267, 102 Pa. St. 425.—QUOTING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504; *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 168.—QUOTED AND FOLLOWED

IN *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417.

The rule that a person before crossing a railroad must stop, look, and listen, applies equally to persons walking as to persons driving, and a failure to stop is not merely evidence of negligence, but is negligence *per se*. *Aiken v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 571, 130 Pa. St. 380, 18 Atl. Rep. 619.

The instinct of self-preservation might be trusted to keep a traveler from getting in front of a train that he knew was approaching. The reason of the rule which requires a man to stop, look, and listen, before crossing, is that by such action he may inform himself whether a train is approaching or not. *Ash v. Wilmington & N. R. Co.*, 148 Pa. St. 133, 23 Atl. Rep. 898.

While the law does not prescribe that in all cases a man must stop, look, and listen before crossing a private siding, it does require that he shall exercise ordinary care. It is his duty to see if the siding is in actual use at the time he approaches it, and a failure to do this is contributory negligence. *Ash v. Wilmington & N. R. Co.*, 148 Pa. St. 133, 23 Atl. Rep. 898.

233. Applies to street crossings where gates are erected.—The rule requiring one about to cross a railroad "to stop, look, and listen," applies to crossings in cities and towns as well as the country, and it is so even where safety-gates are maintained, but seen up. So a member of a fire department was held guilty of such contributory negligence as to prevent a recovery, where he drove rapidly on the track and was injured without observing the rule. *Greenwood v. Philadelphia, W. & B. R. Co.*, 124 Pa. St. 572, 17 Atl. Rep. 188.—DISAPPROVED IN *Hollinger v. Canadian Pac. R. Co.*, 21 Ont. 705. QUOTED IN *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

234. Presumption that one killed stopped, looked, and listened.*—The legal presumption is that a person killed at a railroad crossing did stop, and look, and listen, and will prevail in the absence of direct testimony on the subject. But where there is affirmative, direct, and creditable testimony to the contrary, this presumption is rebutted. *Mynning v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 665, 64 Mich.

* Failure to stop and look for trains at a crossing is contributory negligence, see note, 23 AM. & ENG. R. CAS. 261.

Stopping, looking, and listening; presumption as to, see note, 39 AM. & ENG. R. CAS. 615.

3 D. R. D.—36.

* See also *post*, 341.

93, 31 *N. W. Rep.* 147. *Glascock v. Central Pac. R. Co.*, 73 *Cal.* 137, 14 *Pac. Rep.* 518. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 *Am. & Eng. R. Cas.* 163, 20 *Atl. Rep.* 976. *McBride v. Northern Pac. R. Co.*, 42 *Am. & Eng. R. Cas.* 146, 19 *Oreg.* 64, 23 *Pac. Rep.* 814. *Schum v. Pennsylvania R. Co.*, 107 *Pa. St.* 8.—DISTINGUISHING *Carroll v. Pennsylvania R. Co.*, 12 *W. N. C.* 348. QUOTING *McCully v. Clark*, 40 *Pa. St.* 406.—FOLLOWED IN *Pennsylvania R. Co. v. Peters*, 30 *Am. & Eng. R. Cas.* 607, 116 *Pa. St.* 206, 9 *Atl. Rep.* 317. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Priest*, 50 *Kan.* 16; *Petty v. Hannibal & St. J. R. Co.*, 88 *Mo.* 306.—*Pennsylvania R. Co. v. Mooney*, 39 *Am. & Eng. R. Cas.* 61, 126 *Pa. St.* 244, 17 *Atl. Rep.* 590.—QUOTING *Marland v. Pittsburg & L. E. R. Co.*, 123 *Pa. St.* 487.

There were no witnesses to the accident at the crossing. It was shown, however, that decedent had crossed the track at the same place in the morning, and had then stopped, and looked, and listened. A traveler at a crossing three fourths of a mile away, who observed all proper precautions, barely escaped injury by the same engine. At the time of the accident no train was due. *Held*, that under the rule that when, upon an examination of all the circumstances attending an accident, nothing is found in the conduct of the plaintiff to which negligence can fairly be imputed, the mere absence of fault may justify the jury in finding due care, there was sufficient evidence to support a finding that decedent was not guilty of contributory negligence. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 *Am. & Eng. R. Cas.* 163, 20 *Atl. Rep.* 976.

235. Not in force in Canada.—The rule, "Stop, look, and listen," as required by the Pennsylvania state courts to persons about to cross a railway track, is not in force in Canada and is not one that should be adopted. *Hollinger v. Canadian Pac. R. Co.*, 21 *Ont.* 705.—DISAPPROVING *North Pa. R. Co. v. Heileman*, 49 *Pa. St.* 60; *Greenwood v. Philadelphia, W. & B. R. Co.*, 114 *Pa. St.* 572.

236. Applied in Maryland and Michigan.*—It is the duty of travelers, before crossing the tracks of a railroad, to

stop and listen for the approach of a train, and the absence of a flagman or of signals given by the train does not excuse the want of this precaution. *Maryland C. R. Co. v. Neubeur*, 19 *Am. & Eng. R. Cas.* 261, 62 *Md.* 391.

An adult in full possession of his faculties, without stopping to look, attempted to cross a railroad track within from three to six feet of an approaching engine, which was running backward at the rate of from ten to fifteen miles an hour, and was struck by the tender of the engine and killed. The deceased lived within a short distance of the place where the accident occurred, and its surroundings were well known to him. *Held*, that the deceased was guilty of contributory negligence as a matter of law, and a recovery could not be had against the railroad company; that, conceding that the company was also guilty of negligence, this would not affect the case in the absence of evidence to show that the injury sustained was the direct consequence of such negligence. *State v. Baltimore & O. R. Co.*, 73 *Md.* 374, 21 *Atl. Rep.* 62.

When from the circumstances of the case the conclusion is irresistible that if the deceased had stopped a moment, or looked down the track without stopping, he could have seen the headlight of the locomotive, but did not, then he was properly found guilty of contributory negligence. *Kwiatkowski v. Grand Trunk R. Co.*, 70 *Mich.* 549, 38 *N. W. Rep.* 463.—DISTINGUISHING *Mynning v. Detroit, L. & N. R. Co.*, 64 *Mich.* 102, 31 *N. W. Rep.* 151.—QUOTED IN *Gardner v. Detroit, L. & N. R. Co.*, 97 *Mich.* 240.

Failing to stop a team and look and listen for an approaching train is such contributory negligence as will bar a recovery. *Shufelt v. Flint & P. M. R. Co.*, 96 *Mich.* 327, 55 *N. W. Rep.* 1013.—QUOTING *Culhane v. New York C. & H. R. R. Co.*, 60 *N. Y.* 137.

237. The rule does not apply to passengers.*—The obligation which rests upon a traveler on the highway to stop, look, and listen before crossing a railroad track does not apply to a passenger going from the train to the depot or *vice versa*. *Denver & R. G. R. Co. v. Hodgson*, 18 *Colo.* 117, 31 *Pac. Rep.* 954. *Klein v. Jewett*, 26 *N. J. Eq.* 474; *affirmed in* 27 *N. J. Eq.* 550.—DISTINGUISHED IN *De Kay v. Chicago, M. & St. P. R. Co.*, 39 *Am. & Eng. R. Cas.*

* Injuries at crossings. Application of rule requiring persons to stop, look, and listen, see 49 *AM. & ENG. R. CAS.* 442, *abstr.*

* See also *CARRIAGE OF PASSENGERS*, 453.

463, 41 Minn. 178, 4 L. R. A. 632.—*Terry v. Jewett*, 78 N. Y. 338; *affirming* 17 Hun 395. —FOLLOWED IN *Brassell v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 380, 84 N. Y. 241.

Or going from car to car. *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.

238. Not required as a rule of law.

—The omission of a person approaching a railway crossing to stop, look, or listen for a coming train does not necessarily and as a matter of law constitute negligence. *Toledo, St. L. & K. C. R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; *reversing* 31 Ill. App. 563. *Chicago & E. I. R. Co. v. Tilton*, 26 Ill. App. 362.—QUOTING *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 262.—*Laverenz v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. Cas. 274, 56 Iowa 689, 10 N. W. Rep. 268. *Houston & T. C. R. Co. v. Wilson*, 60 Tex. 142.—QUOTED IN *Gulf, C. & S. F. R. Co. v. Anderson*, 42 Am. & Eng. R. Cas. 160, 76 Tex. 244, 13 S. W. Rep. 196.—*Olsen v. Oregon S. L. & U. N. R. Co.*, 9 Utah 129, 33 Pac. Rep. 623.

The rule is not applied inflexibly in all cases without regard to age or other circumstances. *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417, 15 Am. Ry. Rep. 119.—APPLIED IN *Endress v. Lake Shore & M. S. R. Co.*, 19 N. Y. S. R. 481, 2 N. Y. Supp. 719. FOLLOWED IN *Farry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; *Collis v. New York C. & H. R. R. Co.*, 71 Hun (N. Y.) 504. REVIEWED AND APPLIED IN *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680.

Where the evidence shows that a person in driving on a track at a crossing recognized it as a place of danger, and in other respects used ordinary care, it is not contributory negligence to fail to stop. *Illinois C. R. Co. v. Fishell*, 32 Ill. App. 41.

239. Application of rule depends on the facts of the case.—No invariable rule can be predicated upon the mere fact of failing to look or listen; but a jury, properly instructed as to the legal duty in respect to care and caution of a person approaching a railway crossing, must draw from such act, in connection with all the attendant circumstances, the proper conclusion as to whether he is guilty of negligence or not. *Terre Haute & I.*

R. Co. v. Voelker, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20. *Chicago & A. R. Co. v. Barber*, 15 Ill. App. 630. *Terre Haute & P. R. Co. v. Barr*, 31 Ill. App. 57. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837. *Lyman v. Boston & M. R. Co.*, (N. H.) 45 Am. & Eng. R. Cas. 163, 20 Atl. Rep. 976. *Texas & P. R. Co. v. Anderson*, 2 Tex. App. (Civ. Cas.) 161.

A failure to look or listen, especially when it affirmatively appears that looking or listening might have enabled the party to see the train, is evidence tending to show negligence, but it is not conclusive evidence. There may be circumstances excusing the party from looking or listening, so that the mere failure to look or listen cannot be negligence *per se*. *Chicago & N. W. R. Co. v. Dunleavy*, 39 Am. & Eng. R. Cas. 381, 129 Ill. 132, 22 N. E. Rep. 15; *affirming* 27 Ill. App. 117.—QUOTED IN *Cleveland, C., C. & St. L. Co. v. Doerr*, 41 Ill. App. 530.

While the failure of a person attempting to cross a railway track to pause and look for approaching trains may be negligence, as a matter of fact, in a particular case, yet it is manifest that it must at last depend upon the circumstances shown; and the jury must, in the first instance, say, as a matter of fact, whether it was necessary to the exercise of ordinary care. *Chicago & A. R. Co. v. Adler*, 39 Am. & Eng. R. Cas. 666, 129 Ill. 335, 21 N. E. Rep. 846; *affirming* 28 Ill. App. 102.

240. Not bound to stop.—Though as a rule of law a person approaching a railroad crossing must look and listen, there is no rule of law requiring a person approaching a crossing to stop still. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ill. App. 250, 29 N. E. Rep. 790.

It is not necessarily the duty of a traveler about to cross a railway track upon a highway to stop his team. He is only required to exercise such care and caution as a reasonable person of ordinary prudence and skill would exercise under the same or similar circumstances. *Reed v. Chicago, St. P., M. & O. R. Co.*, 74 Iowa 188, 37 N. W. Rep. 149.

It is not, as matter of law, negligence for a person approaching a railroad in a carriage, upon a highway, not to stop; his omission to do so is a fact to be submitted to the jury. *Kellogg v. New York C. & H.*

R. R. Co., 79 *N. Y.* 72.—APPLIED IN *Parsons v. New York C. & H. R. R. Co.*, 37 *Hun* (N. Y.) 128. FOLLOWED IN *Salter v. Utica & B. R. R. Co.*, 8 *Am. & Eng. R. Cas.* 437, 88 *N. Y.* 42.

It cannot be declared, as a matter of law, that a footman is bound, before crossing a railway track, to stop in order to look and listen for trains. That rule is applicable only to persons traveling in wagons or other vehicles which make a noise that would necessarily interfere with their hearing. *Zimmerman v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 191, 71 *Mo.* 476.—DISTINGUISHING *Kennayde v. Pacific R. Co.*, 45 *Mo.* 255; *Ernst v. Hudson River R. Co.*, 35 *N. Y.* 27.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Phillips*, 31 *Am. & Eng. R. Cas.* 432, 112 *Ind.* 59.

When a traveler on the streets of a city approaches a street railway operated by cable—in this cause he knew that the railway was being thus operated—it cannot, as a matter of law, be ordinarily regarded as his duty to stop, but he is bound to make a fair exercise of his faculties before driving upon a point of danger, and, to this end, he is bound to listen for the customary signal, and to look for the approach of trains, unless his view is obstructed; and a failure so to do will constitute contributory negligence upon his part, if he is injured in consequence. *Smith v. Citizens' R. Co.*, 52 *Mo. App.* 36.

241. — unless circumstances demand it.—An instruction that it is not necessarily the duty of a traveler approaching a railroad crossing to stop and listen before stepping upon the track, and that whether it is necessary and proper for him to stop depends on the circumstances of the case, is not erroneous. *Shaber v. St. Paul, M. & M. R. Co.*, 2 *Am. & Eng. R. Cas.* 185, 28 *Minn.* 103, 9 *N. W. Rep.* 575. *Garland v. Chicago & N. W. R. Co.*, 8 *Ill. App.* 571.

Ordinarily a person approaching a railroad crossing should both look and listen, and, if necessary, stop his team and listen for an approaching train. *Nosler v. Chicago, B. & Q. R. Co.*, 73 *Iowa* 268, 34 *N. W. Rep.* 850.

It is the duty of one desiring to cross a railroad to use his powers of hearing and of vision to ascertain whether or not there is likely to be an approaching train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision

then the passer need not stop, but must use both these faculties; if there is such obstruction, then it is his duty to stop and both look and listen; and if he neglects to use these precautions and a collision takes place, compensation cannot be given, unless it was caused by the gross negligence or wrongful conduct of the employes conducting the railroad operations. *Tucker v. Duncan*, 6 *Am. & Eng. R. Cas.* 268, 4 *Woods* (U. S.) 652, 9 *Fed. Rep.* 867.

242. Duty to look and listen.*—Ordinary prudence requires one who enters upon a railroad crossing to use his senses for the purpose of ascertaining whether he may cross in safety. *Abbett v. Chicago, M. & St. P. R. Co.*, 30 *Minn.* 482, 16 *N. W. Rep.* 266.

A traveler along a public highway which crosses the track of a railroad is held to the exercise of proper precaution to avoid injury; in his approach to such crossing it is incumbent on him to both look and listen for any train that may be approaching. *Chicago & A. R. Co. v. Jacobs*, 63 *Ill.* 178, 7 *Am. Ry. Rep.* 125.—FOLLOWING *Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 75; *Toledo, P. & W. R. Co. v. Riley*, 47 *Ill.* 514; *Beisiegel v. New York C. R. Co.*, 40 *N. Y.* 9; *North Pa. R. Co. v. Heileman*, 49 *Pa. St.* 60.—FOLLOWED IN *Chicago & A. R. Co. v. Jacobs*, 63 *Ill.* 180, *n.* QUOTED IN *Chicago & N. W. R. Co. v. Gertsen*, 15 *Ill. App.* 614.—*Denver & R. G. R. Co. v. Ryan*, 17 *Colo.* 98, 28 *Pac. Rep.* 79. *Chicago, R. I. & P. R. Co. v. Fitzsimmons*, 40 *Ill. App.* 360.—QUOTING *Chicago, M. & St. P. R. Co. v. Halsey*, 133 *Ill.* 248, 23 *N. E. Rep.* 1028; *Granger v. Boston & A. R. Co.*, 146 *Mass.* 276.—*Herrlich v. Louisville, N. O. & T. R. Co.*, 44 *La. Ann.* 280, 10 *So. Rep.* 628.—DISTINGUISHING *Curley v. Illinois C. R. Co.*, 40 *La. Ann.* 810. QUOTING *Artz v. Chicago, R. I. & P. R. Co.*, 34 *Iowa* 160; *White v. Vicksburg, S. & P. R. Co.*, 42 *La. Ann.* 990.—*Allen v. Maine C. R. Co.*, 82 *Me.* 111, 19 *Atl. Rep.* 105.—DISTINGUISHED IN *Piper v. Chicago, M. & St. P. R. Co.*, 77 *Wis.* 247.—*Rheiner v. Chicago, St. P., M. & O. R. Co.*, 36 *Minn.* 170, 30 *N. W. Rep.* 548.—DISTINGUISHING *Loucks v. Chicago, M. & St. P. R. Co.*, 31 *Minn.* 526, 18 *N. W. Rep.* 651; *Hutchinson v. St. Paul, M. & M. R. Co.*, 32 *Minn.* 398, 21 *N. W. Rep.* 212. FOLLOWING

* Duty of traveler approaching railroad track, see notes, 2 *AM. & ENG. R. CAS.* 226; 3 *L. R. A.* 594; 9 *Id.* 162.

Donaldson v. Milwaukee & St. P. R. Co., 21 Minn. 293; Brown v. Milwaukee & St. P. R. Co., 22 Minn. 165; Abbott v. Chicago, M. & St. P. R. Co., 30 Minn. 482, 16 N. W. Rep. 266.—*Zimmerman v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191, 71 Mo. 476.—APPROVED IN Taylor v. Missouri Pac. R. Co., 86 Mo. 457. FOLLOWED IN Maxey v. Missouri Pac. R. Co., 113 Mo. 1.—*Easley v. Missouri Pac. R. Co.*, 113 Mo. 236, 20 S. W. Rep. 1073. *Gulf, C. & S. F. R. Co. v. Dodson*, 3 Tex. App. (Civ. Cas.) 466.

A person about to pass a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight—and, if either sense cannot be rendered available, the obligation to use the other is the stronger—to ascertain, before attempting to cross, whether a train is in dangerous proximity. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.—APPROVED IN Haines v. Illinois C. R. Co., 41 Iowa 227. QUOTED IN Durbin v. Oregon K. & N. Co., 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5, 11 Am. St. Rep. 778, 17 Pac. Rep. 5.

While it is the duty of a traveler on a public highway crossing a railway to use his eyes and ears as an ordinarily prudent person would under similar circumstances, yet he is not bound to anticipate an act of negligence on the part of another. *O'Connor v. Missouri Pac. R. Co.*, 32 Am. & Eng. R. Cas. 61, 94 Mo. 150, 7 S. W. Rep. 106, 13 West. Rep. 587.—APPROVED IN Lynch v. Metropolitan St. R. Co., 112 Mo. 420.

The fact that another person who was in company with the deceased looked and listened, but did not hear or see the approaching train, does not establish that he would have failed also had he looked and listened. *Wiwrowski v. Lake Shore & M. S. R. Co.*, 124 N. Y. 420, 26 N. E. Rep. 1023, 36 N. Y. S. R. 405; reversing 58 Hun 40, 33 N. Y. S. R. 666, 11 N. Y. Supp. 361.

The court, in charging the jury in an action for injury at a crossing, observed: "I will not say to you that the plaintiff should have looked east along the track. I will only say that he was obliged to use his sense of sight in a reasonable manner; and it is for you to say whether he ought to have looked to the east along the track or not before he attempted to cross." If it appear that by looking he could have run and

avoided the danger, it was his duty to look; and, in such case, the court should have charged, as matter of law, that it was his duty to look. *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66.

243. What should be done is for jury.—There is no statute or fixed rule of law prescribing exactly what a party must do who is approaching a railroad crossing. He is held to such precautions as a prudent man would use under the same circumstances; but whether he should stop and look and listen for trains, is a question of fact to be decided from all of the circumstances of the case. *Gulf, C. & S. F. R. Co. v. Anderson*, 42 Am. & Eng. R. Cas. 160, 76 Tex. 244, 13 S. W. Rep. 196.—FOLLOWING Missouri Pac. R. Co. v. Lee, 70 Tex. 501. QUOTING Houston & T. C. R. Co. v. Wilson, 60 Tex. 143; Texas & P. R. Co. v. Chapman, 57 Tex. 82.

The court cannot specify what acts would have been prudent on the part of one about to cross a railway track, or what imprudent. The jury must be left to connect the facts in their own way, to reason for themselves, and to form their own conclusions from the evidence without the aid of the court as to whether due care appears or the want of it which is negligence. *Galveston, H. & S. A. R. Co. v. Porfert* 37 Am. & Eng. R. Cas. 540, 72 Tex. 344, 10 S. W. Rep. 207. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346.—APPROVING Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540.—*Texas & P. R. Co. v. Chapman*, 57 Tex. 75.—QUOTED IN *Gulf, C. & S. F. R. Co. v. Anderson*, 42 Am. & Eng. R. Cas. 160, 76 Tex. 244, 13 S. W. Rep. 196.—*Gulf, C. & S. F. R. Co. v. Anderson*, 42 Am. & Eng. R. Cas. 160, 76 Tex. 244, 13 S. W. Rep. 196.—FOLLOWED IN *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. Rep. 377.

According to the rule of the Texas courts, except in case of failure to perform a statutory duty, negligence is very rarely a question of law, and it is not error for the court to omit to instruct the jury that it was the duty of plaintiffs, as they approached the track, to look and listen for trains, if a charge as to the contributory negligence of the plaintiffs has been given in general terms. *Gulf, C. & S. F. R. Co. v. Greenlee*, 35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129.

244. Duty of one driving team or cattle to dismount and go to track to look and listen.—The law does not require one when about to drive on a track to stop his team, get down, and go on or near the track on foot to look for trains; and a failure to do so is not contributory negligence. *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269.—DISTINGUISHING *Rothe v. Milwaukee & St. P. R. Co.*, 21 Wis. 256.—DISTINGUISHED IN *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278. REVIEWED IN *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.—*Pittsburgh, C. & St. L. R. Co. v. Wright*, 6 Am. & Eng. R. Cas. 114, 80 Ind. 236. *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. St. 506, 21 All. Rep. 140.—DISTINGUISHING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

Where one is driving on a highway and nearing a railroad track he is bound to look and listen for trains, but he is not bound to abandon his duty in other matters, to stop his team, or select some particular place where the view is not obstructed; but he has a right to presume that if a train is approaching he will be properly warned by signals. *St. Louis, V. & T. H. R. Co. v. Faits*, 23 Ill. App. 498.

The mere fact that a person on horseback, engaged in driving cattle along a highway towards a railway crossing, did not ride forward as the cattle approached the same, and look for coming trains, is not conclusive evidence of negligence on the part of such person. *Tuthill v. Northern Pac. R. Co.*, 50 Minn. 113, 52 N. W. Rep. 384.

The rule requiring one when crossing a track to use his eyes and ears, does not require the traveler to stop, or, if he is with a team, to get out and leave his vehicle and go to the track, or to stand up and go upon the track in that position, in order to obtain a better view. *Davis v. New York C. & H. R. R. Co.*, 47 N. Y. 400, 2 Am. Ry. Rep. 394.—DISTINGUISHED IN *Gillespie v. Newburgh*, 54 N. Y. 468. QUOTED IN *Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 150. REVIEWED IN *Ingersoll v. New York C. & H. R. R. Co.*, 6 T. & C. (N. Y.) 416, 4 Hun 277, mem.

Where one is approaching a crossing where the view of trains is obstructed by buildings, and other noises might prevent the hearing of an approaching train, and a flagman, who is usually at the station, is

absent, it cannot be said as a matter of law that it is his duty to stop his horse and go forward on foot to see if trains are approaching. *Dolan v. Delaware & H. Canal Co.*, 71 N. Y. 285.

The court charged: "If, under the circumstances, an ordinarily prudent and cautious man would have got out of his wagon and approached the track at the head of the horses until he was in a position where he could look along the track far enough to see that he was in no danger from an approaching train, it was the duty of plaintiff's driver to do so, and if his neglect to do so contributed to the injury complained of, plaintiff cannot recover." Held, to be correct. *Pennsylvania R. Co. v. Ackerman*, 74 Pa. St. 205, 7 Am. Ry. Rep. 165.—DISTINGUISHING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

245. Care to be observed, generally.*—It is the duty of a person driving across a railway track to use care and caution to see whether a train is approaching, and the omission to do so is contributory negligence. *Johnston v. Northern R. Co.*, 34 U. C. Q. B. 432.—DISTINGUISHING *Bilbee v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 584. QUOTING *Stubbley v. London & N. W. R. Co.*, L. R. 1 Ex. 18; *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 177; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 264; *Pennsylvania R. Co. v. Beale*, 9 U. C. L. J. N. S. 299.—FOLLOWED IN *Miller v. Grand Trunk R. Co.*, 25 U. C. C. P. 389. NOT FOLLOWED IN *Wilton v. Northern R. Co.*, 5 Ont. 490.

Persons about to cross a railroad are bound to know that it is a place of danger, and must approach it as such; they must look about them and see if there is danger, and not go recklessly upon the road, but take proper precautions to avoid accidents. *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.—FOLLOWED IN *Chicago & A. R. Co. v. Jacobs*, 63 Ill. 178.

The greater the danger the more care is required by ordinary prudence, on the part of the passer-by and the railroad company, the one to avoid and the other to prevent injury. *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 3 Am. & Eng. R. Cas. 502, 78 Ind. 373, 41 Am. Rep. 580.

A request to charge that "the precise

* See also *ante*, 193; *post*, 287.

Prudence or care required of persons about to cross railroad track, see note, 8 Am. St. Rep. 813.

thing which every person is bound to do before stepping upon a railroad track is that which every prudent man would do under like circumstances; if prudent men would look and listen, so must everyone else, or take the consequences, so far as the consequences might have been avoided by that means," is legal and applicable, and should be complied with. *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. Rep. 49.—APPROVING *Richmond & D. R. Co. v. Howard*, 79 Ga. 53.

Mental absorption, or reverie, induced by grief or business, will not excuse the omission of the duty to look and listen. *Mann v. Belt R. & S. Y. Co.*, 128 Ind. 138, 26 N. E. Rep. 819.

It is the duty of all highway travelers to keep a due lookout, and if they do not choose to heed what they ought to heed, they must bear the consequences. *Potter v. Flint & P. M. R. Co.*, 62 Mich. 22, 28 N. W. Rep. 714.

All the law requires of a person about to cross a railroad track at a public highway is to use ordinary care to avoid injury. *Cleveland, C. & I. R. Co. v. Harrington*, 49 Am. & Eng. R. Cas. 358, 131 Ind. 426, 30 N. E. Rep. 37.

The ordinary care required of a traveler upon a highway approaching a railroad crossing demands that he shall make a vigilant use of his senses; that he shall look in every direction from which danger may be apprehended, and at the same time attentively listen for any signals or evidences of an approaching train. *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451.—APPLIED IN *Elliott v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

Ordinary care in selecting a place to look and listen would not absolve him from negligence fatal to a recovery, if he failed to use ordinary care in approaching and crossing the track after he looked and listened. *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 98 Mo. 183, 11 S. W. Rep. 569.

The degree of care required by the law of a person crossing the track of a railroad depends upon the maturity and capacity of the individual, and all the surrounding circumstances. If there is any doubt as to the facts or the inferences to be drawn from them, the question must be submitted to the jury. *Swift v. Staten Island R. T. R. Co.*, 45 Am. & Eng. R. Cas. 180, 123 N. Y.

645, 3 *Silv. App.* 184, 25 N. E. Rep. 378, 33 N. Y. S. R. 604; *affirming* 52 Hun 614, 24 N. Y. S. R. 359, 1 *Silv. Sup. Ct.* 375, 5 N. Y. Supp. 316.—FOLLOWED IN *Collis v. New York C. & H. R. R. Co.*, 71 Hun (N. Y.) 504.

When a person about to cross a railroad track, under a given state of circumstances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words, when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631.—APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457.

It was plaintiff's duty to look and listen for approaching trains with the care of an ordinarily prudent man; if he failed to do so, he cannot recover, unless, when defendant saw him, or should have seen him, it failed to use proper means to avoid the accident. *Norfolk & W. R. Co. v. Burge*, 32 Am. & Eng. R. Cas. 101, 84 Va. 63, 4 S. E. Rep. 21.—DISTINGUISHED IN *New York, P. & N. R. Co. v. Cooper*, 37 Am. & Eng. R. Cas. 33, 85 Va. 939.

A driver may be in the exercise of reasonable care although he is lying down upon his load, wrapped up in blankets. *Parish v. Eden*, 62 Wis. 272, 22 N. W. Rep. 399.

The fact that one, in attempting to cross a railroad, does not, at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive evidence of a want of due care on his part. But his omission to do so is to be submitted to the jury. *Plummer v. Eastern R. Co.*, 6 Am. & Eng. R. Cas. 165, 73 Me. 591.—NOT FOLLOWING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.—*Chaffee v. Boston & L. R. Co.*, 104 Mass. 108.—DISTINGUISHED IN *Ormsbee v. Boston & P. R. Co.*, 14 R. I. 102, 51 Am. Rep. 354. QUOTED IN *Wheelwright v. Boston & A. R. Corp.*, 16 Am. & Eng. R. Cas. 315, 135 Mass. 225; *Creamer v. West End St. R. Co.*, 156 Mass. 320.

246. Must be vigilant and cautious.—A person who attempts to cross a railway track is required to make a vigilant use of his eyes and ears in looking and listening to ascertain whether a train is approaching, and if he does not do so, he is guilty of negligence. *Bunn v. Delaware,*

L. & W. R. Co., 6 *Hun* (N. Y.) 303. *Parsons v. New York C. & H. R. R. Co.*, 37 *Hun* (N. Y.) 128.—APPLYING *Mitchell v. New York C. & H. R. R. Co.*, 2 *Hun* 535; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Cordell v. New York C. & H. R. R. Co.*, 75 N. Y. 330; *Kellogg v. New York C. & H. R. R. Co.*, 79 N. Y. 72; *Becht v. Corbin*, 92 N. Y. 658.

A person about to cross a city street has to protect himself not only against cars, but other vehicles that may be used on the street, and while he is bound to be vigilant and cautious, it cannot be said, as a matter of law, that he is guilty of contributory negligence because he fails to see an approaching car. *Brown v. Seventy-third St. R. Co.*, 21 N. Y. S. R. 475, 4 N. Y. Supp. 192.

It is not sufficient, in order to discharge the obligations which rest upon a person attempting to cross a railroad track, to show that his head was turned in one direction or another. There must be some evidence tending to show that the deceased not only turned his head, but used his eyes for the purpose of detecting an approaching train. *Burke v. New York C. & H. R. R. Co.*, 57 N. Y. S. R. 73 *Hun* 32, 25 N. Y. Supp. 1009.

When the vision of the traveler is so unobstructed along the track that he can easily discover an approaching train, or the circumstances are such that his sense of hearing, if used, must apprise him of the same fact in time to escape it, it will be presumed, under ordinary circumstances, in case of collision that he did not look or listen, or, if so, that he heedlessly disregarded the knowledge thus obtained. In either of these cases, as a general rule, no action can be maintained. *Brown v. Milwaukee & St. P. R. Co.*, 22 *Minn.* 165, 19 *Am. Ry. Rep.* 298.

It was proper to refuse to charge that the plaintiff, in order to avoid danger, should "exercise her senses as fully as possible," and to instruct the jury that plaintiff's duty required her to "exercise her senses as an ordinarily prudent and careful person." *Chicago, St. L. & P. R. Co. v. Spilber*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 N. E. Rep. 280.

The court told the jury that he would leave it to them whether or not the instinct of self-preservation would prevent a man from attempting to cross a railroad if he

saw that the engine was bound to reach the point of crossing before he could cross, adding that it was for the jury to find whether plaintiff took the precautions of a prudent man before attempting to cross the track, and that the law exacted of him in such case a vigilant use of his senses to look both ways and to listen. *Held*, that the instruction was proper. *Shaw v. Jewett*, 6 *Am. & Eng. R. Cas.* 111, 86 N. Y. 616.

247. Extent of care—Not bound to see or hear.—One about to cross a track at a public crossing is not required to stop, fasten his horse at some point considerably distant from the track, and from thence to make a reconnoissance of the situation afoot. *Strong v. Sacramento & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 273, 61 *Cal.* 326.

While a person approaching a railroad crossing on a highway is bound to make every reasonable effort to see an approaching train, he is not, as a matter of law, bound to see it; and the question whether he has used due caution is for the jury. *Greany v. Long Island R. Co.*, 24 *Am. & Eng. R. Cas.* 473, 101 N. Y. 419, 5 N. E. Rep. 425; *affirming* 31 *Hun* 173.—DISTINGUISHED IN *Woodard v. New York, L. E. & W. R. Co.*, 106 N. Y. 369; *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831. QUOTED IN *Beckwith v. New York C. & H. R. R. Co.*, 54 *Hun* 446, 28 N. Y. S. R. 292; *Petrie v. New York C. & H. R. R. Co.*, 49 N. Y. S. R. 279, 66 *Hun* 282, 21 N. Y. Supp. 159.

A person approaching a crossing is not bound absolutely to see or hear an approaching train, but he is required to look and listen, and if, by the exercise of such care as an ordinarily careful and prudent person would use, he can discover the approach of a train, his failure to do so is contributory negligence. *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831.

The duty imposed upon persons to look and listen for trains before attempting to cross a track is not adequately discharged by merely looking as a crossing is approached and then going blindly forward when it is reached. *Fowler v. New York C. & H. R. R. Co.*, 74 *Hun* (N. Y.) 141, 26 N. Y. Supp. 218, 56 N. Y. S. R. 307.

It is the duty of one lawfully attempting to cross a railroad to stop and look both ways and listen for approaching trains; but positive evidence that he observed such precautions is not necessary. *Lehigh Valley R. Co. v. Hall*, 61 *Pa. St.* 361.

Though plaintiff testified that his hearing was good he could not be charged with contributory negligence on the mere ground that others at a greater distance from the train than he was heard it approaching. *Lee v. Chicago, R. I. & P. R. Co.*, 45 *Am. & Eng. R. Cas.* 157, 80 *Iowa* 172, 45 *N. W. Rep.* 739.

It does not necessarily follow from the fact that a skilled engineer can demonstrate that, from a given point in a highway, the track of a railroad is visible for any distance that an individual in charge of a team approaching the track is negligent because from the point specified he does not see a train approaching at great speed in time to avoid a collision. *Massoth v. Delaware & H. Canal Co.*, 64 *N. Y.* 524; *affirming* 6 *Hun* 314.

The defendant asked the court to instruct the jury that if they believed the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track his failure to see the train was negligence on his part and he was not entitled to recover. The court refused the point, instructing the jury that the question was not alone whether the plaintiff could have seen the coming train at the indicated distance from the track, but whether when at that distance he looked and listened for it, and whether it was so plain that at that distance he could and would have seen it if he had looked, and that his not seeing it was proof that he did not look. *Held*, that the instruction was proper. *Shaw v. Jewett*, 6 *Am. & Eng. R. Cas.* 111, 86 *N. Y.* 616.

248. Mutual care to be observed.*

—The mutual rights and obligations of persons running trains and of persons crossing the track on highways demand of both proper care to avoid injury. The right of each to use the crossing is mutual, but the obligation resting upon each to use proper care and diligence increases as the highway becomes more crowded. *Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 74.—FOLLOWED IN *Chicago & E. I. R. Co. v. Roberts*, 44 *Ill.* App. 179. QUOTED IN *Gothard v. Alabama G. S. R. Co.*, 67 *Ala.* 114.

While railroads are held to strict observance of all precautions necessary for the protection of the public in crossing the crowded streets of cities, there is also an

obligation on the part of the public to be vigilant and attentive when passing such crossings. *White v. Vicksburg, S. & P. R. Co.*, 42 *La. Ann.* 990, 8 *So. Rep.* 475.—QUOTED IN *Herlich v. Louisville, N. O. & T. R. Co.*, 44 *La. Ann.* 280.

Where both the railroad and the public have a right to use the street the duty of the company to look out for persons on the track is just as great as the duty of a traveler to look out for the trains; the difference being that an individual must give way to a train, which in the nature of things cannot be stopped instantly. *Eswin v. St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577.

While it is the duty of travelers about to cross a railroad track to exercise proper care and caution by using their sense of sight and hearing, it is likewise the duty of those to whom is committed the control and supervision of the movements of the train to exercise such care and caution at such crossings and to give the warning signals so as to prevent injury to those traveling on the highway. *McBride v. Northern Pac. R. Co.*, 42 *Am. & Eng. R. Cas.* 146, 19 *Oreg.* 64, 23 *Pac. Rep.* 814.

249. Looking "straight ahead"

not sufficient.—Where a plaintiff sues for an injury at a crossing, and testifies that he looked "straight ahead," a nonsuit should be allowed, if there is no evidence showing that he looked in other directions or used other precautions, or stopped and listened for trains. *Sutherland v. New York C. & H. R. R. Co.*, 9 *J. & S. (N. Y.)* 17.

Plaintiff was driving a team of young, spirited horses, one of which was shown to be afraid of the cars, and collided with a train in driving across a railroad at a rapid rate of speed. The evidence showed that he looked neither to the right nor left, apparently absorbed in the attempt to control his team, though signals of the approaching train were given. *Held*, that a nonsuit was properly allowed on the ground of contributory negligence. (Talcott, J., dissenting.) *Morse v. Erie R. Co.*, 65 *Barb. (N. Y.)* 490.

The plaintiff being in a cab, approached a railway crossing, where a train could be seen at a distance of three quarters of a mile. The driver, however, who knew the crossing well, did not look out at all until within about twenty yards of the track, and then only straight in front of him. He did

* See *ante*, 8, 196.

not see the train, which was a very long one, consisting of twenty passenger cars and two engines, until the horses' feet were on the rails, and it was within seventy feet, and he then tried to cross in front of it, but the cab was struck and overturned. The plaintiff from within had seen the train approaching, and called to the driver to stop, but a man sitting on the box with him urged him to go on, which he did. *Held*, that the driver's negligence was so far the cause of the accident that the plaintiff could not recover, notwithstanding the defendants' neglect of their statutory obligation to have a fence and gate at the crossing, with an attendant to watch it. *Nicholls v. Great Western R. Co.*, 27 U. C. Q. B. 382.—QUOTING *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 16.

250. Failure to look and listen is negligence.*—Upon approaching a railway crossing, a person failing to look and listen for approaching trains before attempting to walk or drive across the track must be deemed guilty of unusual and culpable contributory negligence. *Chicago & N. W. R. Co. v. Dimick*, 2 Am. & Eng. R. Cas. 201, 96 Ill. 42. *St. Louis, A. & T. H. R. Co. v. Pflugmacher*, 9 Ill. App. 300. *State v. Maine C. R. Co.*, 77 Me. 538, 1 Atl. Rep. 673. *State v. Baltimore & O. R. Co.*, 69 Md. 494, 16 Atl. Rep. 210. *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440; reversing 39 How. Pr. 407, 6 Robt. 93, 297; affirming 1 *Sweeney* 506.—FOLLOWING *Ernst v. Hudson River R. Co.*, 36 How. Pr. 84; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.—*Morse v. Erie R. Co.*, 65 Barb. (N. Y.) 490. *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; affirmed in 24 How. Pr. 609.—FOLLOWED IN *Thrings v. Central Park R. Co.*, 7 Robt. (N. Y.) 616. QUOTED IN *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5, 11 Am. St. Rep. 778, 17 Pac. Rep. 5. REVIEWED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.—*Louisville & N. R. Co. v. Howard*, 90 Tenn. 144, 19 S. W. Rep. 116. *Norfolk & W. R. Co. v.*

Stone, 88 Va. 310, 13 S. E. Rep. 432.—FOLLOWING *Southwest Imp. Co. v. Andrew*, 86 Va. 279. QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697. QUOTING AND FOLLOWING *Mark v. Petersburg R. Co.*, 88 Va. 1.

A traveler approaching a railroad with the intention of crossing is bound to know that to attempt to cross near and in front of a moving train involves danger; and if he does not look and listen the court will draw the inference that his act contributed to the injury. *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. Rep. 616, 29 N. E. Rep. 775.

That such person's attention was diverted by the passage of a train on another track is no excuse for not looking. *Woodard v. New York, L. E. & W. R. Co.*, 32 Am. & Eng. R. Cas. 137, 106 N. Y. 369, 13 N. E. Rep. 424, 11 N. Y. S. R. 169, 9 Cent. Rep. 293; reversing 35 Hun 667, mem.

Nor will the fact that he—being familiar with the dangerous character of the railroad crossing—had forgotten that he was in the vicinity of the crossing, excuse the neglect to look and listen. *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627.—QUOTING *Runyan v. Central R. Co.*, 25 N. J. L. 556.

But the fact that he does not, at the instant of stepping upon the track, look to ascertain if a train is approaching, is not conclusive of want of due care on his part. *Chicago & E. I. R. Co. v. Hedges*, 25 Am. & Eng. R. Cas. 550, 105 Ind. 398, 7 N. E. Rep. 801.

Neglect to look for approaching trains before crossing the track is negligence, unless obstructions prevent a view of the track, or unless some act of the company or of its agents has put one off his guard, and induced him to believe that he can cross in safety without using this precaution. *Abbott v. Chicago, M. & St. P. R. Co.*, 30 Minn. 482, 16 N. W. Rep. 266.—DISTINGUISHED IN *Sweeney v. Minneapolis & St. L. R. Co.*, 22 Am. & Eng. R. Cas. 302, 33 Minn. 153. FOLLOWED IN *Rheiner v. Chicago, St. P., M. & O. R. Co.*, 36 Minn. 170.

251. Where looking or listening would have shown an approaching train.—Ordinary care and prudence require a person who is about to cross a track at a crossing to look and listen for a train, when by looking he could see, and by listening he could hear, an approaching train; and the omission to do either would be such

* Contributory negligence of travelers injured at crossings, see notes, 45 AM. & ENG. R. CAS. 184; 11 L. R. A. 388; 3 Id. 595; 55 AM. & ENG. R. CAS. 293, abstr.; 35 Id. 363, abstr.; 35 Id. 377, abstr.

Reckless assumption of risk by persons crossing railroad track, see note, 9 L. R. A. 162.

negligence on his part as to prevent a recovery for an injury, provided his perilous condition was not and could not have been, by exercise of ordinary diligence, discovered in time to avoid injuring him. *Donohue v. St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 673, 91 *Mo.* 357, 2 *S. W. Rep.* 424, 3 *S. W. Rep.* 848.—QUOTING *Werner v. Citizens' R. Co.*, 81 *Mo.* 374.—QUOTED IN *White v. Wabash Western R. Co.*, 34 *Mo. App.* 57.

A person approaching a railroad crossing is required to make a vigilant use of his eyes and ears; and if by thus looking and listening while approaching, the vicinity of an approaching train may be discovered in time to avoid a collision, the omission to do so is such contributory negligence as will bar a recovery. *Davis v. New York C. & H. R. R. Co.*, 47 *N. Y.* 400, 2 *Am. Ry. Rep.* 394. *Boyd v. Wabash Western R. Co.*, 105 *Mo.* 371, 16 *S. W. Rep.* 909.—FOLLOWED IN *Maxey v. Missouri Pac. R. Co.*, 113 *Mo.* 1.—*McAdoo v. Richmond & D. R. Co.*, 41 *Am. & Eng. R. Cas.* 524, 105 *N. Car.* 140, 11 *S. E. Rep.* 316. *Missouri Pac. R. Co. v. Burnett*, 3 *Tex. App. (Civ. Cas.)* 287.—QUOTING *Galveston, H. & S. A. R. Co. v. Bracken*, 59 *Tex.* 71.—*Williams v. Chicago, M. & St. P. R. Co.*, 23 *Am. & Eng. R. Cas.* 274, 64 *Wis.* 1, 24 *N. W. Rep.* 422.

And in such a case the court may properly take the case from the jury on the ground of contributory negligence. *Straugh v. Detroit, L. & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 164, 65 *Mich.* 706, 9 *West. Rep.* 592, 36 *N. W. Rep.* 161.

And grant a nonsuit. *Brooks v. Buffalo & N. F. R. Co.*, 1 *Abb. App. Dec. (N. Y.)* 211, 27 *Barb.* 532; *affirming* 25 *Barb.* 600.

Or else instruct the jury that one so injured was guilty in the eyes of the law of contributory negligence. *Chicago, M. & St. P. R. Co. v. White*, 46 *Ill. App.* 446. *Gardner v. Detroit, L. & N. R. Co.*, 97 *Mich.* 240, 56 *N. W. Rep.* 603. *Grippen v. New York C. R. Co.*, 40 *N. Y.* 34.—FOLLOWING *Wilds v. Hudson River R. Co.*, 24 *N. Y.* 430. REVIEWING *Stubley v. London & N. W. R. Co.*, L. R. 1 *Ex.* 13.—FOLLOWED IN *Hewett v. New York C. R. Co.*, 3 *Lans. (N. Y.)* 83. QUOTED IN *Mynning v. Detroit, L. & N. R. Co.*, 28 *Am. & Eng. R. Cas.* 665, 64 *Mich.* 93; *Heaney v. Long Island R. Co.*, 9 *N. Y. S. R.* 707; *Haywood v. New York C. & H. R. R. Co.*, 13 *N. Y. Supp.* 177.—*Dascomb v. Buffalo & S. L. R. Co.*, 27 *Barb.*

(*N. Y.*) 221; *affirmed* in 24 *How. Pr.* 609. *Schofield v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 353, 114 *U. S.* 615, 5 *Sup. Ct. Rep.* 1125.

Plaintiff was held guilty of contributory negligence in attempting to cross a track without looking to see if a train was approaching, his opportunities for seeing the train being as good as those of witnesses who saw him drive upon the track, when the train was approaching, as if it were not coming. *Gula v. Lake Shore & M. S. R. Co.*, 81 *Mich.* 291, 45 *N. W. Rep.* 821.—DISTINGUISHING *Breckenfelder v. Lake Shore & M. S. R. Co.*, 79 *Mich.* 560.

Plaintiff was injured at a crossing where a train could have been seen when he was twenty-six feet from the track and the locomotive one hundred and seventy feet away; but according to the rate of speed they both were going it was one hundred and thirty feet away. He testified that he did not see the train until his horses stopped of their own accord, just as they stepped on the track. *Held*, that his failure to look was contributory negligence. *Bomboy v. New York C. & H. R. R. Co.*, 47 *Hun (N. Y.)* 425, 14 *N. Y. S. R.* 291.—DISTINGUISHING *Greany v. Long Island R. Co.*, 101 *N. Y.* 419; *Sherry v. New York C. & H. R. R. Co.*, 104 *N. Y.* 652. FOLLOWING *Woodard v. New York, L. E. & W. R. Co.*, 106 *N. Y.* 369.

252. Illustrations.—(1) *Generally.*—Two railroads ran parallel and crossed a highway a short distance from each other. Plaintiff was driving on the highway and crossed the first track that he approached without looking or listening for trains, just in time to avoid a collision; but his mules became unmanageable and ran onto the second track and collided with a train. *Held*, that his contributory negligence in crossing the first track would defeat a recovery. *Pence v. Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 366, 63 *Iowa* 746, 19 *N. W. Rep.* 785.

Where it appeared that plaintiff, before stepping upon the first track, looked both ways, but did not look again towards the west, from which direction he knew a train was due; that he crossed the first and second tracks and walked east, between the second and third tracks, so near the latter that he was struck by the train; and that the rumble of the approaching train was distinctly heard by other people in the

vicinity—held, that he was guilty of contributory negligence. *Scott v. Pennsylvania R. Co.*, 130 N. Y. 679, 3 Silv. App. 624, 29 N. E. Rep. 289, 41 N. Y. S. R. 712; reversing 56 Hun 640, 30 N. Y. S. R. 843, 9 N. Y. Supp. 189.

Plaintiff, who lived near by and was familiar with the crossing, drove on the track and stopped his team and was soon struck by a train which he might have seen before going on the track, if he had looked. Held, such contributory negligence as to make it the duty of the court to grant a nonsuit. *Brooks v. Buffalo & N. F. R. Co.*, 1 Abb. App. Dec. (N. Y.) 211, 27 Barb. 532, n.; affirming 25 Barb. 600.

One who is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look, and listen, must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger. *Myers v. Baltimore & O. R. Co.*, 150 Pa. St. 386, 24 Atl. Rep. 747.

The court below, without a jury, found for the defendant on account of plaintiff's contributory negligence in driving a restless horse, heavily loaded, on the track without looking and listening for approaching trains, though the conductor saw plaintiff when 200 yards away, in time to have stopped the train and avoided the collision, claiming that he thought plaintiff had control of his horse and would get off the track in time. The judgment was affirmed by a divided court. *Robertson v. Halifax Coal Co.*, 22 Nov. Sc. 84.

(2) *Injuries resulting in death.*—Where a person familiar with the crossing is riding in a wagon drawn by a team under his control, and from the point where the wagon road turns to cross the track, distant about four rods, an approaching train is plainly visible for a distance sufficient to enable him to check his team before crossing, and he does not look in the direction of the approaching train, but keeps his head averted to the opposite direction, and drives upon the track, where he is killed, he is guilty of contributory negligence. *Chicago, B. & Q. R. Co. v. Van Patten*, 74 Ill. 91.

Plaintiff's intestate was killed while attempting to cross a track in the daytime, where the track was straight for five hundred feet, and an approaching train could be seen for a much greater distance. Only

one witness saw the accident and he testified that the deceased passed through a fence sixteen feet from the nearest rail, and that he walked rapidly onto the track. Held, that the jury should have been instructed that the evidence would not warrant a finding that he was in the exercise of due care. *Tully v. Fitchburg R. Co.*, 14 Am. & Eng. R. Cas. 682, 134 Mass. 499.—QUOTING *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *Allyn v. Boston & A. R. Co.*, 105 Mass. 77.

In an action for the killing of a girl aged 17—held, if the girl was struck by defendant's locomotive at the crossing of a public highway, as was alleged, that the evidence showed contributory negligence in that the girl did not look or listen before going upon the track; or if she did, that she recklessly disregarded knowledge which she must have obtained as to the coming train. *Studley v. St. Paul & D. R. Co.*, 48 Minn. 249, 51 N. W. Rep. 115.

Where a person is killed at a crossing, and the evidence shows that the approaching train could have been seen three hundred feet away, when he was thirty-three feet from the track, he will be presumed to be guilty of contributory negligence in failing to look. *Burke v. New York C. & H. R. R. Co.*, 25 N. Y. Supp. 1009, 73 Hun 32.

Plaintiff's intestate was killed at a crossing in the daytime, where he was familiar with the surroundings and the manner of moving trains. He was struck by a car which was being "kicked" down a switch and was not moving over four miles an hour, and which could have been seen for a considerable distance. The facts showed that he either saw the car and undertook to pass in front of it, or did not look. Held, that he was chargeable with contributory negligence, and a submission of the case to the jury was error. *Woodard v. New York, L. E. & W. R. Co.*, 32 Am. & Eng. R. Cas. 137, 106 N. Y. 369, 13 N. E. Rep. 424, 11 N. Y. S. R. 169, 9 Cent. Rep. 293; reversing 35 Hun 667, mem.—DISTINGUISHING *Greany v. Long Island R. Co.*, 101 N. Y. 419.—APPLIED IN *Callaghan v. Delaware, L. & W. R. Co.*, 52 Hun (N. Y.) 276, 22 N. Y. S. R. 594, 5 N. Y. Supp. 285. DISTINGUISHED IN *Oldenburg v. New York C. & H. R. R. Co.*, 124 N. Y. 414. FOLLOWED IN *Bomboy v. New York C. & H. R. R. Co.*, 47 Hun (N. Y.) 425. REVIEWED IN *Howard v. Northern C. R. Co.*, 17 N. Y. S. R. 190.

One who attempts to cross a railway track in full view of an approaching engine, and is struck and killed, is guilty of contributory negligence, and his widow has no cause of action against the company. *Kelly v. Pennsylvania R. Co.*, (Pa.) 8 Atl. Rep. 856.

253. — negligence per se.—It is negligence *per se* for a person to cross a railroad track without first looking and listening for coming trains, if there is an opportunity for doing so. *Lesan v. Maine C. R. Co.*, 23 Am. & Eng. R. Cas. 245, 77 Me. 85. *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. Rep. 105.

Much more is it negligence in one seeing the locomotive and train, and knowing of its proximity, to step in upon the track just before the engine, but a few feet from it. If under way, and the person saw and knew that the train was approaching, such act on his part would be negligence *per se*, as matter of law. So if in fact under way, but not observed by him to be approaching, his want of attention in not making proper observation for his safety, would likewise be negligence which would bar his right of recovery for an injury caused by the moving train. *Conway v. Troy & B. R. Co.*, 1 N. Y. S. R. 587, 41 Hun 639.

A person about to cross a railroad track is bound to recognize the danger, and make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk, and such conduct should be pronounced negligence by the courts, as matter of law. (McGrath, J., dissenting, and citing many cases.) *Grostick v. Detroit, L. & N. R. Co.*, 49 Am. & Eng. R. Cas. 332, 90 Mich. 594, 51 N. W. Rep. 667.

If his view is unobstructed, he may have no occasion to listen. But if his view is obstructed, then it is his duty to listen, and to listen carefully. *Chase v. Maine C. R. Co.*, 78 Me. 346, 5 Atl. Rep. 771.

It is negligence *per se* to attempt to cross a railroad track in a thronged city without looking and listening. *Chicago & N. W. R. Co. v. Gertsen*, 15 Ill. App. 614.—QUOTING *Chicago & A. R. Co. v. Jacob*, 63 Ill. 179; *Chicago & N. W. R. Co. v. Dimick*, 96 Ill. 45; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102; *Havens v. Erie R. Co.*, 41 N. Y. 296.

But one is not guilty of negligence *per se*

simply because he might have seen the moving cars at another crossing, where there were several tracks, and the evidence was conflicting as to whether he could have discovered that the cars were on the track which led to the crossing which he was approaching. *Scott v. Wilmington & W. R. Co.*, 96 N. Car. 428, 2 S. E. Rep. 151.

In an action for an injury received at a railroad crossing, it is not error for the court to refuse to instruct the jury, that the act of going upon a railroad track at a crossing without looking or listening for approaching trains is negligence *per se*, and that such conduct constitutes contributory negligence which will bar a recovery. The question is one for the jury. *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20.—APPROVED IN *Chicago, M. & St. P. R. Co. v. Wilson*, 133 Ill. 55.

254. Such failure defeats a recovery.*—(1) *Rule stated.*—It is the duty of a traveler in the full enjoyment of his faculties of hearing and seeing upon a highway approaching a railroad crossing, before he attempts to pass or drive over, to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and if by a proper use of his faculties he could have discovered the approach of a train and so have escaped injury, and fails to do so and is injured, he is chargeable with contributory negligence, and cannot maintain an action against the company. *Salter v. Utica & B. R. Co.*, 75 N. Y. 273; reversing 13 Hun 187.—FOLLOWED IN *Kellogg v. New York C. & H. R. Co.*, 79 N. Y. 72. QUOTED IN *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5.—*Georgia Pac. R. Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230. *Lang v. Holliday Creek R. & C. M. Co.*, 49 Iowa 469. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346. *Wabash, St. L. & P. R. Co. v. Neikirk*, 15 Ill. App. 172. *Haines v. Illinois C. R. Co.*, 41 Iowa 227.—APPROVING *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Harty v. Central R. Co.*, 42 N. Y. 468; *Barker v. Savage*, 45 N. Y. 193; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Allyn v. Boston & A. R.*

* Right to recover for injuries at crossings, as affected by contributory negligence, see note, 49 AM. & ENG. R. CAS. 385.

Co., 105 Mass. 78; *Ince v. East Boston Ferry Co.*, 106 Mass. 149; *Bancroft v. Boston & W. R. Corp.*, 97 Mass. 275; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 365; *McCall v. New York C. R. Co.*, 54 N. Y. 642; *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 13. FOLLOWING *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 154; *Dodge v. Burlington, C. R. & M. R. Co.*, 34 Iowa 276.—DISTINGUISHED IN *Lee v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 157, 80 Iowa 172. FOLLOWED IN *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624.—*Clark v. Missouri Pac. R. Co.*, 35 Kan. 350, 11 Pac. Rep. 134.—FOLLOWING *Union Pac. R. Co. v. Adams*, 33 Kan. 427.—QUOTED IN *Wichita & W. R. Co. v. Davis*, 32 Am. & Eng. R. Cas. 65, 37 Kan. 743, 16 Pac. Rep. 78.—*Wichita & W. R. Co. v. Davis*, 32 Am. & Eng. R. Cas. 65, 37 Kan. 743, 16 Pac. Rep. 78.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16.—*Wright v. Boston & M. R. Co.*, 2 Am. & Eng. R. Cas. 121, 129 Mass. 440. *Mynning v. Detroit, L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 665, 64 Mich. 93, 31 N. W. Rep. 147.—DISTINGUISHED IN *Kwiatkowski v. Grand Trunk R. Co.*, 70 Mich. 549.—*Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535. *Blaker v. New Jersey Midland R. Co.*, 30 N. J. Eq. 240, 18 Am. Ry. Rep. 81.—QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U.S. 702.—*Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.—QUOTING *Wilds v. Hudson River R. Co.*, 29 N. Y. 325.—*Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 23 How. Pr. 492; *reversing* 33 Barb. 503.—DISTINGUISHED IN *Riche, v. Missouri Pac. R. Co.*, 7 Mo. App. 150. FOLLOWED IN *Grippen v. New York C. R. Co.*, 40 N. Y. 34. QUOTED IN *Peck v. New York, N. H. & H. R. Co.*, 14 Am. & Eng. R. Cas. 633, 50 Conn. 379.—*Cleveland, C. & I. R. Co. v. Elliott*, 28 Ohio St. 340. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172. *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60.—APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457. DISAPPROVED IN *Hollinger v. Canadian Pac. R. Co.*, 21 Ont. 705. DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106; *Baughman v. Shenango & A. R. Co.*, 6 Am. & Eng. R. Cas. 51, 92 Pa. St. 335, 37 Am. Rep. 690. FOLLOWED IN *Chicago & A. R. Co. v. Jacobs*, 63 Ill. 178. QUOTED IN *Baltimore & O. R. Co. v. Hobbs*, (Md.) 19 Am. & Eng. R. Cas. 337; *New York, P. & N. R.*

Co. v. Kellam, 32 Am. & Eng. R. Cas. 114, 83 Va. 851. REVIEWED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357.—*Hughes v. Galveston, H. & S. A. R. Co.*, 34 Am. & Eng. R. Cas. 66, 67 Tex. 595, 4 S. W. Rep. 219.—APPLIED IN *Artus v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177.—*Galveston, H. & S. A. R. Co. v. Bracken*, 14 Am. & Eng. R. Cas. 691, 59 Tex. 71. *Beyel v. Newport News & M. V. R. Co.*, 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532.

And this rule applies although the railroad company fails to give the proper cautionary signals. *Damrill v. St. Louis & S. F. R. Co.*, 27 Mo. App. 202.—FOLLOWING *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 86. QUOTING *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80.

But the traveler is not bound to make inquiry as to the schedules or the time when trains are expected to pass. *South & N. Ala. R. Co. v. Thompson*, 62 Ala. 494.

The fact, however, that a train is behind time does not relieve the traveler of this duty of care and caution; railroad corporations have the right to run trains at all times, and those having occasion to cross their tracks are entitled to no exemption from care and vigilance because trains are irregular or extra trains are put on. *Salter v. Utica & B. R. Co.*, 75 N. Y. 273; *reversing* 13 Hun 187.

(2) *Its extent and limits.*—It is the duty of a person approaching, crossing, or standing upon a track where cars are being run to look out for approaching cars, and if he fails to do so, he is, *prima facie*, guilty of such negligence as will prevent his recovery for injuries occasioned to him while so crossing or standing upon the track by the mere carelessness, negligence, or unskillfulness of the employés of the company, not amounting to wilfulness on their part; and this presumption of negligence can only be rebutted by facts or circumstances showing that it was not reasonably practicable to make or keep such lookout, or such as would ordinarily induce persons of common prudence to omit that precaution. *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670.—DISTINGUISHED IN *Cleveland, C. & I. R. Co. v. Schneider*, 35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678.

If plaintiff is driving a team across the

track, the same principle requires him to so use his faculties of hearing and seeing in managing his team as to keep out of danger. *Salter v. Utica & B. R. R. Co.*, 75 N. Y. 273; reversing 13 Hun 187.

If a person well acquainted with the locality, and knowing it is about time for a train to pass a crossing, heedlessly drives upon such crossing without looking to see if there are cars approaching, when, by looking, he can easily see an approaching train, he is guilty of gross negligence, and cannot recover for any injury. *Chicago, B. & Q. R. Co. v. Damerell*, 81 Ill. 450.—QUOTING *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373.—QUOTED IN *Chicago, B. & Q. R. Co. v. Florens*, 32 Ill. App. 365.

Unless it appears that the company was guilty of gross negligence. *Chicago & N. W. R. Co. v. Hatch*, 79 Ill. 137.

Where a person goes upon a track between stations, at a place where he has no right to be, without looking or listening for approaching trains, and is injured, he cannot recover against the company in the absence of wilfulness, notwithstanding a failure to give the signals required by law. *Ivens v. Cincinnati, W. & M. R. Co.*, 23 Am. & Eng. R. Cas. 238, 103 Ind. 27, 2 N. E. Rep. 134.—DISTINGUISHED IN *Ohio & M. R. Co. v. Walker*, 113 Ind. 196.—*Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

Where a view of the track is obstructed, one who knows that a train is approaching, but does not know which way it is running, cannot recover, if he ventures on the track without ascertaining the facts and is injured. *Griffin v. Chicago, R. I. & P. R. Co.*, 68 Iowa 638, 27 N. W. Rep. 192.—APPROVED IN *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

If a party knowingly about to cross a railroad track at a regular crossing on a public street of a town, can have an unobstructed view of the railroad so as to know of the approach of the train a sufficient time to clearly avoid any injury from it, and he fails to use his ordinary faculties and an injury occurs, he cannot, as a matter of course, recover. *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.

Where a person thoughtlessly walks upon the track without looking for moving cars or trains, or knowingly and recklessly, in the face of approaching cars, attempts to cross

a track in front of the same, and is injured or killed thereby, his negligence is such as will bar any recovery. *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16, 31 Pac. Rep. 674.—QUOTING *Wichita & W. R. Co. v. Davis*, 37 Kan. 743. REVIEWING *Brown v. New York C. R. Co.*, 32 N. Y. 597; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8.

In an action for injuries at a crossing, an instruction to the jury that "if you believe from the evidence that the plaintiff neither stopped his team nor made any effort to see or hear the train before he drove on the railroad track; and you further believe that if he had stopped and looked he could have seen the train, or if he had listened he could have heard it, then he cannot recover"—held, to embody the correct rule of law. *Benton v. Central R. Co.*, 42 Iowa 192.—FOLLOWED IN *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624.

255. Illustrations* — Proximate cause.† — (1) Generally. — Where, if the plaintiff had looked when within five feet of a crossing, his view of the railroad track would have been unobstructed 250 feet, and he must have seen the train approaching, it is evident that he either did not look, or that he saw the train and carelessly attempted to cross in front of it, and in either case was guilty of such contributory negligence as would authorize the court to direct a verdict for the defendant. *Gardner v. Detroit, L. & N. R. Co.*, 97 Mich. 240, 56 N. W. Rep. 603.

Where the evidence of plaintiff, relied upon by defendant in a demurrer to the evidence, is vague, ambiguous, and uncertain, and does not clearly nor conclusively show that plaintiff was guilty of negligence in failing to look or listen for approaching trains before attempting to cross the track, the demurrer should be overruled. *Drain v. St. Louis, I. M. & S. R. Co.*, 86 Mo. 574; reversing 10 Mo. App. 531.

Plaintiff in crossing a track left the regular cross-walk and walked across in a diagonal course, which he testified was the usual way of crossing the street, and was struck by a train that might have been seen when two hundred and sixty feet away. Held: (1) that by leaving the regular cross-

* Injury at crossing to one familiar with it. Contributory negligence, see 32 AM. & ENG. R. CAS. 158, *abstr.*

† See also *ante*, 204.

ing he assumed all additional risks; (2) that his failure to look for approaching trains would defeat a recovery. *Adams v. New York, L. E. & W. R. Co.*, 49 N. Y. S. R. 854, 66 Hun 634, 21 N. Y. Supp. 681.

Plaintiff drove upon a track at a street crossing and was struck by a train which might have been seen had he looked before going on the track. The train was two hours late and, plaintiff claimed, did not give signals as it approached, and he produced witnesses who testified that they only heard a signal at another crossing five hundred yards distant, or possibly at one still farther away; but the engineer and certain passengers on the train testified that the signals were given at all of the crossings. *Held*, that a verdict in plaintiff's favor could not be sustained. *Ward v. Richmond & D. R. Co.*, 43 Fed. Rep. 422.—FOLLOWING *Petrie v. Columbia & G. R. Co.*, 29 So. Car. 303, 7 S. E. Rep. 515.

Plaintiff's contributory negligence should defeat a recovery against the company in the following cases:

Where plaintiff, the owner of a team, went upon a crossing without looking or listening for the approach of trains, and might, by ordinary care, have seen or heard the train in time to have avoided the accident. *Kimes v. St. Louis, I. M. & S. R. Co.*, 85 Mo. 611.

Where plaintiff, a female, attempted to drive across a track in a city after being warned three times of an approaching train just around the curve, and within sight of the smoke and within hearing of the noise of the train. *Neier v. Missouri Pac. R. Co.*, (Mo.) 1 S. W. Rep. 387.—FOLLOWING *Henze v. St. Louis, K. C. & N. R. Co.*, 71 Mo. 638; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 483; *Purl v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 168; *Hixson v. St. Louis, H. & K. R. Co.*, 80 Mo. 335; *Bell v. Hannibal & St. J. R. Co.*, 72 Mo. 50; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80; *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 86.

Where plaintiff was injured in the daytime at a crossing where he was well acquainted, the view unobstructed, and signals were given, while driving a rapid trotter and going at more than an ordinary road-gait. *Crandall v. Lehigh Valley R. Co.*, 25 N. Y. Supp. 151, 72 Hun 431, 55 N. Y. S. R. 170.

Where plaintiff, in full possession of his senses, stood upon a track in a town till an

engine ran against and injured him, and did not know of its approach till he was knocked off the track. *McAdoo v. Richmond & D. R. Co.*, 41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316.

Where plaintiff attempted to cross a track which is several feet above the level of surrounding fields, on which there are no obstructions to view or to sound, in broad daylight, and failed to look either way on the track or to listen to the noise made by an approaching train. *Brown v. Texas & P. R. Co.*, 42 La. Ann. 350, 7 So. Rep. 682.

(2) *Injuries resulting in death.*—In a suit by the personal representative it appeared that the country was level at the place of the accident, and that the deceased could readily have seen the approaching train, but drove upon the crossing without looking for it, and was not seen by the company's servants until it was too late to check the train. *Held*, that a verdict in favor of plaintiff could not be sustained, even if a bell was not rung or a whistle sounded, as required by law. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.—QUOTED IN *Chicago W. D. R. Co. v. Klauber*, 9 Ill. App. 613; *Quincy Horse R. & C. Co. v. Gruse*, 26 Ill. App. 397.

An instruction, in an action to recover damages for the death of a person who was killed by an engine and tender which were running backwards, that if the bell was ringing and there was a light upon the tender which might have been seen at a distance of six hundred and fifty feet from the crossing, the plaintiff cannot recover, ought not to be refused when there is evidence to support the facts stated. *Union R. Co. v. State*, 42 Am. & Eng. R. Cas. 172, 72 Md. 153, 19 Atl. Rep. 449.

Plaintiff's intestate had obtained permission to learn telegraphy at a station and had been warned by the agent not to go on the tracks. He volunteered to go on an errand for the station agent, where he was more or less familiar, and with the knowledge that a train was approaching. He went on the track without giving any heed to the train, and could have stepped off in safety after the signal was given. *Held*, that no action could be maintained for his death. *Barstow v. Old Colony R. Co.*, 28 Am. & Eng. R. Cas. 473, 143 Mass. 535, 10 N. E. Rep. 255.—APPLYING *Butterfield v. Western R. Corp.*, 10 Allen (Mass.) 532.

Plaintiff and his wife were driving on a highway and were struck in crossing a track by a train, and the wife killed and plaintiff injured. The train was a special one and not on schedule time, and the company had failed to fence as required. The cab was moving at a slow pace and trains could be seen from the approach to the crossing some 500 yards, but neither the driver nor any of the party saw the train until the horses' feet were on the track and the train very near. The driver knew the locality, and the preponderance of evidence was that the whistle was sounded some three or four hundred yards from the crossing. *Held*, that the contributory negligence of plaintiff and that of his driver prevented a recovery in his own right or as administrator of his wife. While the company was negligent in not fencing, its negligence was not the proximate cause of the accident. *Winckler v. Great Western R. Co.*, 18 U. C. C. P. 250.

256. Special trains, or trains out of time.—(1) *Special trains*.—One who approaches a track and, without looking or listening, or giving any attention to his surroundings, steps thereon, and is almost immediately struck by a passing train, is guilty of such contributory negligence as to prevent his recovery for the injuries so received, though the train was an extra one and no signal was given of its approach. *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1, 20 S. W. Rep. 654.—APPROVING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Austin v. Chicago, R. I. & P. R. Co.*, 91 Ill. 35. FOLLOWING *Boyd v. Wabash Western R. Co.*, 105 Mo. 371; *Yancey v. Wabash, St. L. & P. R. Co.*, 93 Mo. 433; *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80; *Turner v. Hannibal & St. J. R. Co.*, 74 Mo. 602; *Henze v. St. Louis, K. C. & N. R. Co.*, 71 Mo. 636; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476.

The fact that one about to cross a track knows that a train has just passed, and according to the time-table another train will not pass for some time, does not relieve him from the exercise of due care in looking and listening for trains that may be running off time. *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 *Oreg. 5*, 11 Am. St. Rep. 778, 17 Pac. Rep. 5.

But in such a case plaintiff is only bound to look when to do so would aid him in as-

certaining the approach of a train; under other circumstances he has a right to rely upon his sense of hearing. *Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472, 13 S. E. Rep. 884.

(2) — *illustrations*.—Where a person, in a sleigh drawn by one horse, on a wagon road, approaching a crossing with which he was familiar, could have seen a coming train during its progress through a distance of 70 rods from the crossing, if he had looked from a point at any distance within 600 feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one and was running at a high rate of speed, and did not stop at a depot 70 rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing. *Schofield v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 353, 114 U. S. 615, 5 Sup. Ct. Rep. 1125.—APPROVING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.—APPROVED IN *Bertelson v. Chicago, M. & St. P. R. Co.*, 5 Dak. 313, 40 N. W. Rep. 531; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38. DISTINGUISHED IN *State v. Union R. Co.*, 42 Am. & Eng. R. Cas. 167, 70 Md. 69. QUOTED IN *Bauer v. St. Louis, I. M. & S. R. Co.*, 46 Ark. 388; *New York, P. & N. R. Co. v. Kellam*, 32 Am. & Eng. R. Cas. 114, 83 Va. 851. RECONCILED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.

Plaintiff attempted to walk across or along the main track of a railroad. There was nothing to obstruct his view of the track or divert his attention from the conditions surrounding him; but he failed to look for approaching trains, and was struck and injured by a passing locomotive. *Held*, that he was guilty of contributory negligence preventing a recovery, although he did not expect a train and no regular train was due there at that time. *Schmolze v. Chicago, M. & St. P. R. Co.*, 83 Wis. 659, 53 N. W. Rep. 743, 54 N. W. Rep. 106.

(3) *Trains behind time*.—The fact that the train is behind time and is running faster than usual at the crossing, does not excuse plaintiff from exercising the care and caution required of him when the train is running at its usual rate. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.—DISAPPROVING *Pittsburgh, C. & St. L. R. Co. v. Martin*, 82 Ind.

476.—*Wright v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 21 S. W. Rep. 581. *Howard v. Northern C. R. Co.*, 17 N. Y. S. R. 190, 49 Hun 605, 1 N. Y. Supp. 528.—REVIEWING Woodward v. New York, L. E. & W. R. Co., 106 N. Y. 369, 11 N. Y. S. R. 169.

But he is not bound to the same degree of care where no train is due and he has no knowledge of its approach, as when these conditions confront him. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. Cas. 89, 66 Mich. 150, 9 West. Rep. 903, 33 N. W. Rep. 161.

Nor is it always negligence to cross a track at times when a train is not due or cannot be reasonably expected to pass, without looking for a train, when no signal of its approach is given by the ringing of a bell or otherwise. *McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144.

The failure of a person to look along the track before attempting to cross it is not negligence, if there is sufficient evidence, without that precaution, to satisfy a person of ordinary carefulness that the track is clear—as when he knows it is not the usual train time and he does not hear the usual signal. *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 49 Am. & Eng. R. Cas. 390, 92 Ky. 345, 18 S. W. Rep. 2.

(4) — *illustrations*.—A person in crossing a track should look and see if a train is coming; if he does not he cannot recover for an injury received, although the train that injured him was behind time about thirty minutes and he was crossing the track to get on another train. *Anderson v. Railroad Co.*, 12 Phila. (Pa.) 369.

Plaintiff was injured after dark while crossing a switch some five hundred feet from a station, by two coaches that had been cut loose from a train at the station and were running on the switch of their own momentum, and at the rate of five miles an hour. The train from which the cars were detached was two hours late; they were lighted inside, and a brakeman rode on the front platform with a red lantern, but no other warning was given except such noise as the cars would make in running on the track. Plaintiff stepped on the switch without looking for trains. *Held*, that he was guilty of contributory negligence, and a nonsuit should have been allowed. *Howard v. Northern C. R. Co.*, 17 N. Y. S. R. 190, 49 Hun 605, 1 N. Y. Supp. 528.

Where the evidence tended to show among other things, that the plaintiff and the engine were going in nearly the same direction, the highway making an angle of 30° with the railroad at the crossing; that the accident occurred on Sunday, when no train was due; that the plaintiff and her sister, who was riding with her, looked along the track when they were 200 feet from the crossing, again when they were 100 feet away, and once afterwards, but saw nothing; that they first saw or heard the engine when it gave an alarm about 400 feet from the crossing, and when it was too late to avoid the collision; and that from a point on the highway seventy or eighty feet from the crossing, to a point within a few feet thereof, the view of an approaching engine would be shut out by a water tank—*held*, that the question of contributory negligence was properly left to the jury. *Hahn v. Chicago, M. & St. P. R. Co.*, 78 Wis. 396, 47 N. W. Rep. 620.

257. Where the injury occurs at night.—An instruction that "if plaintiffs drove upon the track in the dark, without stopping to investigate, when by stopping and listening they could have learned that a train was approaching, they were guilty of contributory negligence and could not recover" was properly refused where it ignored evidence that, at a time when no regular train could be anticipated, defendant had removed the watchman and extinguished the light usually kept at the crossing, and that, after plaintiffs drove on the track, defendant's engine was put in motion without signal of warning and was standing by the crossing backed against plaintiffs' wagon. Whether under such circumstances plaintiffs were guilty of negligence and, if so, whether such negligence contributed to the injury, were questions for the jury. *St. Louis, I. M. & S. R. Co. v. Amos*, 54 Ark. 159, 15 S. W. Rep. 362.

Whether or not a traveler who is injured upon a crossing in the open country on a dark night by a train running without a headlight is guilty of contributory negligence in failing to stop his team before entering upon the track in order to listen for an approaching train is, at least, a question for the jury, his view of the track being unobstructed other than by the darkness. *Van Auken v. Chicago & W. M. R. Co.*, 96 Mich. 307, 55 N. W. Rep. 971.—REVIEWING *Mynning v. Detroit, L. & N. R. Co.*, 64 Mich.

93; *Brady v. Toledo, A. A. & N. M. R. Co.*, 81 Mich. 616.

Where a plaintiff is injured in crossing where there are several tracks and the evidence shows that the night was dark and hazy and that one train had just passed which was yet making considerable noise and carrying several lights at its rear; that another lay near the crossing with a bright headlight, and that there were various switch-lights near by; and plaintiff testifies that he looked both ways before entering the tracks, and there is a conflict of evidence as to whether the signals were given, the question of his contributory negligence in failing to see the train injuring him should be left to the jury. *Beckwith v. New York C. & H. R. R. Co.*, 54 Hun 446, 28 N. Y. S. R. 292, 7 N. Y. Supp. 719; affirmed in 125 N. Y. 759, mem., 36 N. Y. S. R. 1010.

Plaintiff was injured at night on a sidewalk crossing defendant's tracks. There were several tracks running north and south across the street, and plaintiff, who was going west, had stopped between the rails of the east track and was watching a train going south on the next track when he was struck by an engine coming from the south on the east track. The testimony tended to prove, among other things, that plaintiff did not know that he was on the track, but supposed the train going south was upon the east track, and therefore did not look to the south for an approaching train or engine; that the sidewalk was planked on a level with the tops of the rails, and that a person might walk over the rails in the night without discovering them. *Held*, that the question of contributory negligence was one for the jury. *Regan v. Chicago, M. & St. P. R. Co.*, 85 Wis. 43, 54 N. W. Rep. 623.

258. When a question for jury.*—Whether under the various circumstances and inferences of fact plaintiff, injured while driving across a track, exercised the proper degree of care was properly submitted to the jury. *Hutchinson v. St. Paul, M. & M. R. Co.*, 19 Am. & Eng. R. Cas. 280, 32 Minn. 398, 21 N. W. Rep. 212.—DISTINGUISHED

* See also *ante*, 218; *post*, 307, 311, 329.

Failure to look and listen. Whether negligence is question of law or a question of fact, see note, 39 AM. & ENG. R. CAS. 624.

Injury at crossing. When plaintiff's contributory negligence for the jury, see 35 AM. & ENG. R. CAS. 402, *abstr.*

IN *Rheiner v. Chicago, St. P., M. & O. R. Co.*, 36 Minn. 170.

Though the injury and defendant's negligence are conceded, and the testimony strongly preponderates against plaintiff on his contributory negligence, yet, if the plaintiff testifies that before crossing the track he slowed up his buggy till it did not prevent his hearing all he could have heard if he had come to a full stop, the case should go to the jury. *Masterson v. Chicago, R. I. & P. R. Co.*, 49 Mo. App. 6.

Although from the uncontradicted evidence it might have been inferred that if the traveler had stopped, and looked, and listened, he would have seen the approaching train, it was for the jury to determine the fact. *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157.

A man was found dead on a railroad where it crossed a street, having been killed by a train of cars. *Held*, that whether he was lawfully on the railroad and whether his own negligence contributed to his death were for the jury. *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361.—REVIEWED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106; *Brown v. Pennsylvania R. Co.*, 15 Phila. (Pa.) 321.

The court cannot say, as matter of law, that ordinary care required plaintiff to stop his team and listen for the train; or that trotting his team to within a rod of the track was negligence, even though he knew that the train usually passed the crossing at about that time in the day; but these questions are for the jury. *Eilert v. Green Bay & M. R. Co.*, 48 Wis. 606, 4 N. W. Rep. 769.—DISTINGUISHED IN *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

An instruction that it was the duty of a person approaching a railroad crossing to have looked up the track, if by so doing he could have ascertained the approach of a train at a sufficient distance to have avoided it—*held*, proper. The question, what was such sufficient distance, was for the jury. *Bower v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 301, 61 Wis. 457, 21 N. W. Rep. 536.—REVIEWED IN *Duane v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394.

In an action for an injury at a crossing a careful statement was made by the company of the speed of the train and the estimated speed at which the injured person was driv-

ing, and from such calculations it was insisted that he was guilty of negligence either in not looking and seeing the train, or in having looked at a place where he could have saved himself from accident. *Held*, that from the nature of such calculations the demonstration is not absolutely certain, and the court is warranted in submitting the case to the jury. *Puff v. Lehigh Valley R. Co.*, 71 Hun (N. Y.) 577.—QUOTING *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524.

The contributory negligence of one injured at a crossing should be left to the jury in the following cases:

Where there is any conflict in the evidence, or the question is not free from doubt. *Endress v. Lake Shore & M. S. R. Co.*, 19 N. Y. S. R. 481, 2 N. Y. Supp. 719; *affirmed* (P) 117 N. Y. 640 *mem.*, 22 N. E. Rep. 1130, 27 N. Y. S. R. 977.—APPLYING *Leonard v. New York C. & H. R. R. Co.*, 10 J. & S. (N. Y.) 225; *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun 34; *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417. DISTINGUISHING *Smith v. New York C. & H. R. R. Co.*, 19 Wkly. Dig. 230.—*Hinkle v. Richmond & D. R. Co.*, 109 N. Car. 472, 13 S. E. Rep. 884.

Where the testimony upon the part of the defendant tends to show that if the plaintiff, or any of his companions, had looked and listened, they could have seen and heard the approaching train in time to have avoided the accident. *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376.—FOLLOWED IN *Bunting v. Central Pac. R. Co.*, 6 Am. & Eng. R. Cas. 282, 16 Nev. 277.

Where plaintiff, driving a horse and light wagon over a crossing, was killed by a locomotive, there being no express testimony as to whether he stopped and listened before going on the track. *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157.

259. — Illustrations.—Deceased crossed defendant's track and was met by a friend on the adjacent parallel track of another road, thence turned back to defendant's track, and there conversed during the passage of a long train running at the speed of five miles an hour on the adjacent road, and having separated, was then killed by a switch-engine backing on defendant's track in a direction opposite that of the passing train, the friend having got twenty feet away before being apprised of the accident, and not having seen the switch-engine, nor

heard it because of the noise of the passing train. *Held*, that it was properly left to the jury to say whether or not the deceased was guilty of negligence, under the circumstances, in turning back or in not observing the approaching engine. *Kansas Pac. R. Co. v. Twombly*, 3 Colo. 125, 21 Am. Ry. Rep. 447.

The plaintiff, while lawfully walking westward on a sidewalk, came to the place where the defendant's eight tracks crossed the same, where he stopped on the eastern uninclosed track and looked both westward and southward. Several trains were moving in different directions on the other tracks, and while he was looking to the west, with his face turned a little to the north, he was struck by some cars coming from the south, which had just been switched upon the track upon which he stood, and were running down-grade by their own momentum, without any engine and without warning of any kind. *Held*, that the facts did not justify the court in directing a verdict for the defendant. *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. Rep. 510; *affirming* 35 Ill. App. 430.

If a person with a team crossing a railroad upon the highway of a village is injured by an engine running rapidly backward at the rate of 30 miles an hour, without any whistle being sounded, bell rung, or any other signal given, and such person has timely looked both ways up and down the track to ascertain if there is any danger in crossing, and fails to discover the engine approaching, and there are complicated circumstances, as falling snow, a gale of wind, and other things, calculated to deceive or throw him off his guard—*held*, whether he is guilty of negligence in attempting to cross the track, under the particular circumstances of the case, is a question of fact for the jury. *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1, 22 Pac. Rep. 995.—DISTINGUISHING *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153; *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Union Pac. R. Co. v. Adams*, 33 Kan. 427; *Atchison, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115. NOT FOLLOWING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 6 Am. Ry. Rep. 158. QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.

Plaintiff was injured while attempting to

cross one track for the purpose of taking passage on a train on another track, by a train running at unusual speed and without giving signals. He was required to cross the track in going to his train, but there was no evidence that he looked in the direction in which the train striking him was approaching, before entering the track; but he had to walk some forty feet from the platform to the track where he was injured, and during part of that time the evidence tended to show that he was looking in the direction of the approaching train, but for the purpose of seeing an acquaintance. *Held*, that the question of his contributory negligence was for the jury. *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203, 2 Am. Ry. Rep. 402.—DISTINGUISHED IN *Debbins v. Old Colony R. Co.*, 154 Mass. 402; *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354. QUOTED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

In an action on Mass. Pub. St. ch. 112, § 213, for injuring a foot traveler on the highway, at a grade crossing, there was evidence that she was about seventy years old, of ordinary intelligence, with good sight and hearing, and familiar with the locality; that she was at the time going from her home to a store beyond the tracks to buy provisions; that the weather was clear, and that about forty feet from the middle track, on which she was struck, her view towards an approaching train was uninterrupted for several hundred feet, and from that point extended as she neared the track; that there was no gate or flagman at the crossing, and that the statutory signals were omitted by such train; that before and after entering upon the track she looked and saw no train; that when on the nearest track she heard the noise of the train and the danger signals; and that, without looking up to see where the train was, she tried to cross, became confused, and, falling upon the rails, was injured. *Held*, that the question whether she was guilty of gross or wilful negligence was properly submitted to the jury. *Sullivan v. New York, N. H. & H. R. Co.*, 154 Mass. 524, 28 N. E. Rep. 911.—QUOTED IN *Grand Trunk R. Co. v. Ives*, 144 U. S. 408.

It appeared that plaintiff, who was familiar with the ground, stopped twice to listen on approaching the crossing, once at a distance of about one hundred and twenty feet and again at ninety feet; that he heard nothing;

that he did not look because a train could not be seen until he came within a few feet of the track. When he reached that point, his horses moving at a brisk walk, he looked to the west and saw nothing; then he looked to the east and saw a train almost on him, his horses being at that time nearly across the rails. He struck them to hurry them up, but the buggy failed to clear the track in time. *Held*, not error to refuse to instruct the jury that plaintiff could not recover. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837.

The evidence showed that plaintiff stopped his horse and listened for trains; that he heard a sound which he took to be a train at a station some 1200 yards distant; that he saw an engine some 800 yards away, which he supposed was a switch-engine, belonging to certain smelting works; that on attempting to cross the track he was at once struck by an engine running much faster than was allowed under a city ordinance. *Held*, that the question of contributory negligence was properly left to the jury. *Gratiot v. Missouri Pac. R. Co.*, (Mo.) 19 S. W. Rep. 31.

Plaintiff was injured at a crossing where she was familiar, and knew that a train was about due, and where she could have seen the approaching train when she was fifty-one feet from the track. She testified that she looked and listened for trains; that the watchman waved his lantern as a signal to cross, but just as her buggy was on the track he stopped the horse. Another witness testified that he came to the track from the opposite side and was beckoned to cross, which he barely did with safety; but all of this evidence was contradicted by the company. *Held*, that the question of contributory negligence was for the jury. *Richardson v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 868, 40 N. Y. S. R. 616, 61 Hun 624, *mem.*

Where a party is injured at a street crossing and there is some evidence of care on his part the case should be left to the jury. *So held*, where a plaintiff testified that before going upon the track he looked to see whether an engine was approaching and was very particular to look for headlights; that he looked both ways but saw none; and where the other evidence shows that he was struck by an engine running without cars attached, and without a headlight or

signals and making but very little noise. *Donovan v. Long Island R. Co.*, 51 N. Y. S. R. 183, 67 Hun 73, 22 N. Y. Supp. 62.

Where it appeared that plaintiff upon approaching defendant's crossing stood up in his wagon and listened about a minute for a train, and then, driving ahead, was injured by a train, and that no bell or whistle was sounded, this latter fact being, however, contradicted by the defendant—held, that the question of contributory negligence was for the jury. *Smith v. Rio Grande Western R. Co.*, 9 Utah 141, 33 Pac. Rep. 626.

Plaintiff while crossing a track at night was struck by a train of gravel cars which were being pushed in front of the locomotive. There was no light on the foremost car, but there was a strong headlight on the locomotive. He testified that before starting to cross he looked up and down the track but did not see the train nor the headlight. Held, that the question of contributory negligence was for the jury. *Bohan v. Milwaukee, L. S. & W. R. Co.*, 15 Am. & Eng. R. Cas. 374, 58 Wis. 30, 15 N. W. Rep. 801. See also the following cases for instances where the contributory negligence of the injured party was for the determination of the jury: *St. Louis, I. M. & S. R. Co. v. Amos*, 54 Ark. 159, 15 S. W. Rep. 362. *Van Auken v. Chicago & W. M. R. Co.*, 96 Mich. 307, 55 N. W. Rep. 971. *Beckwith v. New York C. & H. R. R. Co.*, 54 Hun (N. Y.) 446, 28 N. Y. S. R. 292, 7 N. Y. Supp. 719; affirmed in 125 N. Y. 759, mem., 36 N. Y. S. R. 1010. *Regan v. Chicago, M. & St. P. R. Co.*, 85 Wis. 43, 54 N. W. Rep. 623.

200. Acts held not amounting to negligence, especially as matter of law.—The fact that a plaintiff injured by a collision with a passing train was, at the time of the accident, in the employment of a lumber firm, who kept a lumber yard in violation of a city ordinance, is no defense to an action against the company. *Pennsylvania Co. v. Frana*, 112 Ill. 398.

In an action for personal injuries, caused through the alleged negligence of the defendant's servants, whereby a buggy, in which the plaintiff was traveling, was struck by a passing train of cars, etc., a judgment in favor of the plaintiff will not be reversed because an instruction given to the jury, relating to the flagman, did not state, by way of qualification, the duty of the plain-

tiff to look and listen for an approaching train, where the jury found specially, in answer to interrogatories, that at the time of the alleged injury, and as the plaintiff approached the crossing in question, she availed herself of every opportunity to look and listen for the approach of a train or engine or car. *Lake Erie & W. R. Co. v. Carson*, 4 Ind. App. 185, 30 N. E. Rep. 432.

Where the jury found that the plaintiff and her husband stopped twice to look and listen, once 64 feet from the track, and once 27½ feet from the track, the latter being the farthest point distant from which a view of the track could be had in both directions, there being no evidence that either of them knew that a train might be expected at that point at that time, proof being produced that the noise made by the escape of steam from a freight engine standing near would probably prevent plaintiff from hearing an approaching train; that the said train was moving at the rate of 35 or 40 miles an hour; and that the horses were on the track before the approach of the train was known, the law will not assume lack of care on the part of plaintiff, and that she did in fact see the train. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 Am. & Eng. R. Cas. 200, 134 Ind. 380, 33 N. E. Rep. 280.

A driver of a team, injured at a crossing, testified that he looked twice both ways before driving on the track, first when one hundred feet away and again when he was sixty feet; and then when he was very near the track he looked one way a third time, but he was momentarily prevented from looking the other way by having his attention attracted to a boy who was recklessly entering the track, when he heard a signal, but the train was then too near to avoid a collision. Held, that a nonsuit was improper. The question of contributory negligence should have been left to the jury. *Thompson v. New York C. & H. R. R. Co.*, 110 N. Y. 636, 2 Silv. App. 82, 17 N. E. Rep. 690, 13 Cent. Rep. 240, 16 N. Y. S. R. 869; reversing 33 Hun 16.—DISTINGUISHED IN *Campbell v. New York C. & H. R. R. Co.*, 21 N. Y. S. R. 685, 4 N. Y. Supp. 265, 51 Hun 642. REVIEWED IN *Grand Trunk P. Co. v. Ives*, 144 U. S. 408.

Plaintiff was injured in driving across a track, and it appeared that he was driving slowly and listened for trains. It was claimed that he was negligent because the

approaching train might have been seen two hundred feet away and he failed to see it until it was within one hundred feet of him. The evidence showed that at the rate of speed the train was going it would pass one hundred feet in three seconds. *Held*, that it cannot be said, as a matter of law, that one, having the charge of a team, is guilty of negligence in failing to look for trains for a period of three seconds. *Kain v. New York & N. E. R. Co.*, 20 N. Y. S. R. 891, 50 Hun 606, *mem.*, 3 N. Y. Supp. 311.

When plaintiff approached a crossing it was blocked by freight trains. He stopped while the trains were being cut, looked and listened, and saw and heard no approaching train; when the trains were cut he approached near the crossing and again stopped, looked, and listened, and then, seeing and hearing no approaching train, started to cross the tracks, when he was struck by an unscheduled freight train passing very rapidly without sounding the whistle or bell. *Held*, not error to refuse to instruct the jury to find for defendant on the ground of plaintiff's contributory negligence. *Bare v. Pennsylvania R. Co.*, 135 Pa. St. 95, 19 Atl. Rep. 935.

The testimony tended to show that when between fifty and sixty feet from the crossing the plaintiff looked in the direction from which defendant's train was coming and did not see it, though he could have seen it had it then been within 900 feet of the crossing; that his attention was diverted by the conduct of his horses, so that he did not look again in that direction until he reached the track, when the train was so near that a collision could not be avoided; that the train was running thirty-six miles or more an hour, and that no warning was given as it approached the crossing; and that if the train had been 900 feet away when the plaintiff first looked, and had been running at the lawful rate of six miles an hour, he would have passed far beyond the crossing before the train reached it. *Held*, that it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence. *Piper v. Chicago, M. & St. P. R. Co.*, 77 Wis. 247, 46 N. W. Rep. 165.—DISTINGUISHING *Allen v. Maine C. R. Co.*, 82 Me. 111, 19 Atl. Rep. 105.

261. How far one may presume that trains will be properly managed.*—It is the duty of those in charge

of a train approaching a crossing of a street in a town or city not only to give warning of the train's approach, but to slacken the speed of the train, and one who is about to cross the track has the right to assume that these legal requirements will be complied with. Therefore, where one is injured in attempting to cross the track, by reason of the negligence of the company in failing to comply with these requirements, it cannot be imputed to him as negligence that he did not stop and look and listen to ascertain whether a train was approaching, and his failure to do so does not deprive him of the right to recover; and in such a case it is not a material inquiry whether the collision would have occurred if the plaintiff had been driving at a less speed. *Ramsey v. Louisville, C. & L. R. Co.*, 89 Ky. 99, 20 S. W. Rep. 162.

One who approaches a track and can neither see nor hear any indications of a moving train is not chargeable with negligence in assuming that there is no car sufficiently near to make the crossing dangerous. He has a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given. *Tabor v. Missouri Valley R. Co.*, 46 Mo. 353.—FOLLOWING *Kennayde v. Pacific R. Co.*, 45 Mo. 255.—*Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.

A traveler may presume compliance by the carrier with the municipal regulation of the rate of speed. *Kelny v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806.

But he has no right to omit the exercise of proper care in crossing a railroad track, upon the assumption that a train is being run precisely in obedience to a city ordinance. *Calligan v. New York C. & H. R. R. Co.*, 59 N. Y. 651.

The court charged that the plaintiff had a right to assume that the defendant would do its duty and ring a bell, adding further that the plaintiff, though he might make that assumption, was not relieved thereby from the duty on his part to vigilantly use his senses to avoid danger. *Held*, that the instruction as qualified was proper. *Shaw v. Jewett*, 6 Am. & Eng. R. Cas. 111, 86 N. Y. 616.

262. Traveling on or parallel with track—Duty to look back.—(1) On

* See also *ante*, 186, 215.

track.—A person standing or walking on a track at a crossing, who fails to use his senses of sight and hearing to ascertain the approach of a train, is guilty of contributory negligence, as matter of law, which bars an action for damages, unless the negligence of the persons in charge of the train was so reckless and wanton as to be the legal equivalent of wilful or intentional. This is the rule applicable to travelers and the public generally, and it applies, *a fortiori*, to a watchman or flagman employed by the railroad company for service at the crossing. *Louisville & N. R. Co. v. Crawford*, 89 Ala. 240, 8 So. Rep. 243.—QUOTING *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5.

But while one riding on a wagon on the track is guilty of negligence in not looking back for a colliding train, still his negligence will not prevent recovery on his part if the servants of the company in charge of the train saw, or by the use of proper care might have seen, the peril to which the traveler was exposed, and thereafter could have avoided the injury and failed to do so. *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. Rep. 233.

Where a person walking upon a track between crossings fails to look and listen, and moreover walks on the track at the time when he knows a train is due, and after he has heard the same whistling in the distance, he is guilty of such contributory negligence as will preclude recovery by him in case of injury. *Terre Haute & I. R. Co. v. Graham*, 12 Am. & Eng. R. Cas. 77, 95 Ind. 286, 48 Am. Rep. 719.

(2) — *illustrations*. — Where a person walked upon the track knowing it was time for a train going in the same direction, and looked back several times, but did not see the train or hear any signal, though he thought he heard it come to the point from which he started, and he could have seen the train for nearly a quarter of a mile, but did not observe it until it struck him, and those in charge of the train, on observing that said person was heedless of the approaching danger, made the usual efforts to stop the train and avoid running upon him — *held*, that he could not recover for the injury. *Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239, 6 Am. Ry. Rep. 358.

A traveler, turning his vehicle upon a track upon a public street on which he has

a right to travel, is not guilty of contributory negligence so as to prevent his recovery for injuries from a train colliding with him in the rear because he did not look back for such train, unless by so looking he would have discovered that it was so near that, taking into consideration the rate of speed at which he had a right to believe it to be moving, and the other surrounding circumstances, it was imprudent for a reasonably prudent man to go upon the track. *Kelley v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806.—APPLIED IN *Jennings v. St. Louis, I. M. & S. R. Co.*, 112 Mo. 268.

Plaintiff was guilty of contributory negligence in driving some sixty feet along the track before crossing, after having looked for trains approaching. *Ehrisman v. East Harrisburg City Pass. R. Co.*, 51 Am. & Eng. R. Cas. 190, 150 Pa. St. 180, 24 Atl. Rep. 596, 30 W. N. C. 373, 23 Pittsb. L. J. (N. S.) 73, 9 Lanc. L. Rev. 356.

The locomotive was not going at an undue rate of speed, and no statute required the engineer to sound a signal at that place. The engineer saw plaintiff approach the track with the apparent intention of crossing, for which there was ample time; but plaintiff started to walk along the track between the rails. When the engineer realized plaintiff's intention he gave an alarm, but it was too late. *Held*, that the engineer had the right to assume that plaintiff would cross the track and that he knew the locomotive was approaching; and a verdict to the effect that the exercise of reasonable care by the engineer might have avoided the consequences of plaintiff's negligence is unwarranted. *Schmolze v. Chicago, M. & St. P. R. Co.*, 83 Wis. 659, 53 N. W. Rep. 743, 54 N. W. Rep. 106.—DISTINGUISHING *Valin v. Milwaukee & N. R. Co.*, 82 Wis. 1.

Even if the accident in such a case might have been avoided by the exercise of reasonable care on the part of the engineer after discovering plaintiff's negligence, it is doubtful whether plaintiff could recover, since up to the very moment of the injury his negligence mingled, as an efficient and equally operating cause, with the negligence of the engineer. *Schmolze v. Chicago, M. & St. P. R. Co.*, 83 Wis. 659, 53 N. W. Rep. 743, 54 N. W. Rep. 106.

(3) *Parallel with track*.—Travelers upon a highway which runs parallel to a track, before crossing it are under no obligation to

look for trains before they discover the crossing. *Gulf, C. & S. F. R. Co. v. Greenlee*, 35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129.

The evidence showed that plaintiff was traveling on a highway which ran near to and parallel with a railroad; that he had turned several times to look for trains, the last time when about 100 yards from a crossing, and seeing none for a mile back, attempted to cross. It appeared that the train was overdue and he had reason to believe that it had already passed; if not, that it was where a whistle should be sounded. Held, that it was not negligence *per se* for him to attempt to cross the track without again stopping, looking, and listening for trains. *Wright v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 21 S. W. Rep. 581.—APPROVING *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 18 S. W. Rep. 2. REVIEWING *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

263. Duty to look and listen not affected by company's negligence, generally.*—One who goes upon a track at a crossing without looking or listening for a train, when by looking the approaching train could have been seen, and who is injured, is guilty of such contributory negligence as will preclude a recovery, notwithstanding the negligence of the trainmen in operating and managing the train. *Butts v. St. Louis, I. M. & S. R. Co.*, 98 Mo. 272, 11 S. W. Rep. 754. *Toledo, W. & W. R. Co. v. Shuckman*, 50 Ind. 42. *Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 308, 26 N. E. Rep. 916, 36 N. Y. S. R. 272; reversing 33 N. Y. S. R. 863, 11 N. Y. Supp. 692.

In an action to recover damages for injuries so sustained, the plaintiff must show that he did his duty in respect to looking and listening, or prove facts from which the inference can reasonably be drawn that he did. *Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 308, 26 N. E. Rep. 916, 36 N. Y. S. R. 272; reversing 33 N. Y. S. R. 863, 11 N. Y. Supp. 692.

The rule that a person who goes on a railroad track or purposes crossing it must use his eyes and ears to avoid injury, and that if he neglects to do so and is injured he cannot recover, notwithstanding the negligence of the company, is not, however, of universal application, but has exceptions under

exceptional circumstances. *Jennings v. St. Louis, I. M. & S. R. Co.*, 112 Mo. 268, 20 S. W. Rep. 490.

Although a company may be negligent in detaching an engine from the cars composing the train and, by increasing its speed, widely separate it from the cars, which are allowed to run over a crossing without means of giving the statutory warning, yet if a pedestrian who is familiar with the crossing and the habit of the company to so detach the engine is run over and killed by the drifting train in the daytime, when by looking or heeding outcries he could have avoided injury, an action for damages will not lie. *Chicago & E. I. R. Co. v. Hedges*, 37 Am. & Eng. R. Cas. 516, 118 Ind. 5, 20 N. E. Rep. 530.—DISTINGUISHED IN *Pennsylvania Co. v. Stegemeyer*, 118 Ind. 305, 20 N. E. Rep. 843.

One who recklessly goes upon the track without looking or listening for trains and is killed, when by looking or listening he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was at the time running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring the bell. (Black, J., dissenting.) *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457.—APPROVING *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480; *Maier v. Atlantic & P. R. Co.*, 64 Mo. 269; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476; *Hallihan v. Hannibal & St. J. R. Co.*, 71 Mo. 113; *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 86; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80; *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504; *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.—FOLLOWED IN *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1.

264. — in failing to give signals.*

—(1) *The rule.*—The fact that the servants of defendant in charge of its train were negligent in not giving the customary or statutory signals by ringing the bell or

* Company not giving statutory signals not liable in cases of contributory negligence, see note, 19 AM. & ENG. R. CAS. 361.

* See also *ante*, 197; *post*, 321.

sounding the whistle on approaching a public road crossing will not warrant a recovery where the injured person was guilty of contributory negligence in not looking and listening for the train as he came upon defendant's right of way and track. *Drake v. Chicago & A. R. Co.*, 51 Mo. App. 562.—QUOTING *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 91.—*Chicago & A. R. Co. v. Robinson*, 8 Ill. App. 140. *Mann v. Belt R. & S. Y. Co.*, 128 Ind. 138, 26 N. E. Rep. 819. *Indiana, B. & W. R. Co. v. Hammock*, 32 Am. & Eng. R. Cas. 127, 113 Ind. 1, 14 N. E. Rep. 737, 12 West. Rep. 297. *Ivens v. Cincinnati, W. & M. R. Co.*, 23 Am. & Eng. R. Cas. 258, 103 Ind. 27, 2 N. E. Rep. 134. *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576. *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65, 8 Am. Ry. Rep. 381. *Union Pac. R. Co. v. Adams*, 19 Am. & Eng. R. Cas. 376, 33 Kan. 427, 6 Pac. Rep. 529.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1. FOLLOWED IN *Clark v. Missouri Pac. R. Co.*, 35 Kan. 350.—*Groux v. Maine C. R. Co.*, 67 Me. 100, 16 Am. Ry. Rep. 326.—APPROVING *Nicholls v. Great Western R. Co.*, 27 U. C. Q. B. 382.—*Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1, 20 S. W. Rep. 654. *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457. *Steph v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229. *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 86.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283. APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457. FOLLOWED IN *Damrill v. St. Louis & S. F. R. Co.*, 27 Mo. App. 202. QUOTED IN *Drake v. Chicago & A. R. Co.*, 51 Mo. App. 562.—*Henze v. St. Louis, K. C. & N. R. Co.*, 2 Am. & Eng. R. Cas. 212, 71 Mo. 636.—FOLLOWING *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.—FOLLOWED IN *Hixson v. St. Louis, H. & K. R. Co.*, 80 Mo. 335; *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1. QUOTED IN *Huckshold v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 659, 90 Mo. 548.—*Wengler v. Missouri Pac. R. Co.*, 16 Mo. App. 493. *Rodrian v. New York, N. H. & H. R. Co.*, 125 N. Y. 526, 26 N. E. Rep. 741, 35 N. Y. S. R. 814; reversing 28 N. Y. S. R. 625, 7 N. Y. Supp. 811. *Cullen v. Delaware & H. Canal Co.*, 113 N. Y. 667, 2 Silo. App. 255, 21 N. E. Rep. 716, 23 N. Y. S. R. 719; reversing 40 Hun 637, mem. *Havens v. Erie R. Co.*, 41

N. Y. 296; reversing 53 Barb. 328.—FOLLOWING *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.—DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106. FOLLOWED IN *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Cook v. New York C. R. Co.*, 5 Lans. (N. Y.) 401. QUOTED IN *Chicago & N. W. R. Co. v. Gertsen*, 15 Ill. App. 614. REVIEWED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.—*Ernst v. Hudson River R. Co.*, 39 N. Y. 61, 36 How. Pr. 84.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758. FOLLOWED IN *Havens v. Erie R. Co.*, 41 N. Y. 296. QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Toledo, W. & W. R. Co. v. Shuckman*, 50 Ind. 42.—*International & G. N. R. Co. v. Jordan*, 1 Tex. App. (Civ. Cas.) 494. *Williams v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 274, 64 Wis. 1, 24 N. W. Rep. 422. *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354. *Horn v. Baltimore & O. R. Co.*, 55 Am. & Eng. R. Cas. 153, 54 Fed. Rep. 301. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574. *Weir v. Canadian Pac. R. Co.*, 16 Ont. App. 100.—REVIEWING *Wanless v. North Eastern R. Co.*, L. R. 6 Q. B. 481, 7 H. L. Cas. 12.—*Milner v. Grand Trunk R. Co.*, 25 U. C. C. P. 389.—FOLLOWING *Johnson v. Northern R. Co.*, 34 U. C. Q. B. 432.—*Davey v. London & S. W. R. Co.*, 14 Am. & Eng. R. Cas. 650, L. R. 11 Q. B. D. 213.—QUOTING *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1155.

The failure of an engineer to give the statutory signals as a train is approaching a street crossing, does not relieve a traveler from the duty to look and listen to ascertain if a train is approaching. If he fails to look and listen, or after seeing a train, undertakes to cross in front of it and is injured, his own contributory negligence will defeat a recovery. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.—APPROVED IN *Schofield v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 353, 114 U. S. 615; *Thomas v. Delaware, L. & W. R. Co.*, 19 Blatchf. (U. S.) 533; *Bertelson v. Chicago, M. & St. P. R. Co.*, 5 Dak. 313, 40 N. W. Rep. 531; *Taylor v. Missouri Pac. R. Co.*, 86 Mo. 457; *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1. DISTINGUISHED IN *Northern Pac. R. Co. v. Holmes*, 3 Wash. T. 543, 18 Pac. Rep. 76. FOLLOWED IN *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602;

Holland v. Chicago, M. & St. P. R. Co., 5 McCrary (U. S.) 549, 18 Fed. Rep. 243. QUOTED IN Parker v. Wilmington & W. R. Co., 8 Am. & Eng. R. Cas. 420, 86 N. Car. 221; Atchison, T. & S. F. R. Co. v. Morgan, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1; Durbin v. Oregon R. & N. Co., 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5, 11 Am. St. Rep. 778, 17 Pac. Rep. 5; Chicago & N. W. R. Co. v. Gertsen, 15 Ill. App. 614; Holohan v. Washington & G. R. Co., 8 Mackey (D. C.) 316; Schofield v. Chicago, M. & St. P. R. Co., 2 McCrary (U. S.) 268; Blaker v. New Jersey Midland R. Co., 30 N. J. Eq. 240; Norfolk & W. R. Co. v. Stone, 88 Va. 310; Mark v. Petersburg R. Co., 88 Va. 1; Lewis v. Puget Sound Shore R. Co., 4 Wash. 188. RECONCILED IN Grand Trunk R. Co. v. Ives, 144 U. S. 408. REVIEWED IN State v. Maine C. R. Co., 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.

(2) — and its scope and extent.—Where a person, on approaching a crossing with a team, does not avail himself of his sense of sight and hearing, when by proper exercise thereof he could have avoided a collision, he will be regarded as negligent on his part, and cannot recover for the injury where the only neglect of the company was the omission to give the required signal. *St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300, 11 Am. Ry. Rep. 102.—QUOTED IN *Chicago, B. & Q. R. Co. v. Johnson*, 8 Am. & Eng. R. Cas. 225, 103 Ill. 512.

It is a primary rule of legal caution that a person about to cross a track is bound to use his eyes and ears, to watch for signboards and signals, to listen for bell and whistle, and to guard against the approach of trains by looking each way before crossing; and the failure of the company to provide or give a statutory signal will not relieve a person from making this observation, if he has an opportunity, by a view of the road, to avoid danger. *Pennsylvania R. Co. v. Richter*, 2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180. *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484, 17 Am. Ry. Rep. 303.—QUOTING *Gorton v. Erie R. Co.*, 45 N. Y. 662.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283. DISTINGUISHED IN *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485. FOLLOWED IN *Zimmerman v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191, 71 Mo. 476; *Henze v. St. Louis, K. C. & N. R. Co.*, 2 Am. & Eng. R. Cas. 212, 71 Mo. 636.

QUOTED AND DISTINGUISHED IN *Petty v. Hannibal & St. J. R. Co.*, 88 Mo. 306.

One who knows he is approaching a crossing, and whose view of the track is unobstructed so that he can see an approaching train in time to avoid injury from it, cannot as a matter of law recover damages for injuries inflicted by the train in his effort to cross the track, even though the railway company may neglect to give the signals required by statute in crossing the road. One approaching a railway track must look up and down the track, and a failure to do so is contributory negligence. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. Rep. 127. *Missouri Pac. R. Co. v. Peay*, (Tex.) 20 S. W. Rep. 57.

The failure of the company to give the customary or statutory signals will not excuse the negligence of the person injured in the following cases:

Where, on approaching a crossing, he does not stop and look for trains, where there is any point within a reasonable distance from the crossing from which he can observe a train approaching; or when no train being seen he does not, on nearing the crossing, stop and listen for the sound which ordinarily follows a moving train. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863.

Or where he looked for danger from a given point and then closed his eyes and passed upon the track. *Thornton v. Cleveland, C., C. & St. L. R. Co.*, 131 Ind. 492, 31 N. E. Rep. 185.

Or where he attempted to cross the track and failed to look and listen both ways for trains. *Gorton v. Erie R. Co.*, 45 N. Y. 660.—APPROVED IN *Haines v. Illinois C. R. Co.*, 41 Iowa 227. QUOTED IN *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Dlaui v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645. REVIEWED IN *Gonzales v. New York & H. R. Co.*, 50 How. Pr. (N. Y.) 126.—*Nixon v. Chicago, R. I. & P. R. Co.*, 84 Iowa 331, 51 N. W. Rep. 157.

Where he is injured at the crossing, having failed to use care in looking and listening, proportioned to the difficulty of seeing and hearing trains at the place, and the probability of a train passing at that hour. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574.

265. — Illustrations.—An instruction that the plaintiff could not recover "if at the time of and just preceding the injury he

could, by looking in the proper direction, have seen the train coming towards him in time to have avoided the injury," although no warning was given of its approach, and although the train was running in violation of a city ordinance, is not objectionable because of the omission of the element of listening, the same having been fully treated of in other instructions. *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. Rep. 45.

Plaintiff attempted to cross a track without looking for trains and was struck by a passing train. It was dark, but the engine carried a headlight, and he could not have failed to see it if he had looked. He knew that a train was due about that time. His only excuse for not looking was that it was storming, the wind blowing hard, and that he had his hand up, holding his hat on his head, so as to prevent him seeing the train. He listened, but the wind and the breaking of the snow-crust under his feet made it difficult to hear. *Held*, that he was guilty of contributory negligence, and could not recover, though the train approached without signals. *Butterfield v. Western R. Corp.*, 10 Allen (Mass.) 532.—REVIEWING *Toomey v. London, B. & S. C. R. Co.*, 3 C. B. N. S. 146.—APPLIED IN *Barstow v. Old Colony R. Co.*, 28 Am. & Eng. R. Cas. 473, 143 Mass. 535. FOLLOWED IN *Allyn v. Boston & A. R. Co.*, 105 Mass. 77. QUOTED IN *Peck v. New York, N. H. & H. R. Co.*, 14 Am. & Eng. R. Cas. 633, 50 Conn. 379; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.

Where it is admitted that, had the engineer and fireman obeyed the statute and sounded the signals, the plaintiff's decedent would not have been killed, and it is equally probable or certain that if deceased had been exercising due care, and had looked out for the train at any time within 40 rods of the track, with the location of which he was familiar, the accident would not have taken place—there can be no recovery. *Matta v. Chicago & W. M. R. Co.*, 32 Am. & Eng. R. Cas. 71, 69 Mich. 109, 13 West. Rep. 717, 37 N. W. Rep. 54.

A freight train lay across the street but was separated to allow persons to cross. A brakeman stood in the passage between the cars, but gave no warning to plaintiff, who passed through and was injured by a train on another track. *Held*, that plaintiff was not excused from looking for trains by the fact that the brakeman was stationed there, in the absence of anything to show that he

was there for the purpose of warning persons, or that plaintiff knew he was a brakeman, or that he supposed that he owed him any duty. *Young v. New York, L. E. & W. R. Co.*, 32 Am. & Eng. R. Cas. 130, 107 N. Y. 500, 9 Cent. Rep. 879, 14 N. E. Rep. 434, 12 N. Y. S. R. 285; *reversing* 35 Hun 663, *mem.*—FOLLOWING *Davey v. London & S. W. R. Co.*, L. R. 11 Q. B. D. 213.

Where a traveler is approaching a crossing, with an unobstructed view of the track in both directions, it is his duty to look both ways, and if he attempts to cross in front of an advancing train, and receives injury, he cannot recover, and the failure of the engineer to give the precautionary signal, when it does not contribute to the accident, does not impose a liability on the corporation. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.

One about to cross a track must look and listen for trains, and continue to do so while he remains upon the track. The neglect to perform this duty constitutes contributory negligence that may defeat an action by such person for injuries received while upon the track from other negligence than failure of the company to observe the required statutory precautions. *Patton v. East Tenn., V. & G. R. Co.*, 48 Am. & Eng. R. Cas. 581, 89 Tenn. 370, 15 S. W. Rep. 919.

The neglect of the engineer to sound the whistle or ring the bell on approaching a street crossing does not relieve a party from the necessity of taking ordinary precautions for his safety. He is bound to use his senses, to listen and to look, before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, he is guilty of culpable negligence; and if he receives any injury, he so far contributes to it as to deprive him of any right to complain. If, using them, he sees the train coming and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be cast upon the railroad company. If one chooses in such a position to take risks, he must bear the possible consequences of failure. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.—APPROVED IN *Cleveland, C., C. & St. L. R. Co. v. Arbaugh*, 47 Ill. App. 360. QUOTED IN *Baltimore & O. R. Co. v.*

Hobbs, (Md.) 19 Am. & Eng. R. Cas. 337. REVIEWED IN *Mobile & O. R. Co. v. Stroud*, 31 Am. & Eng. R. Cas. 443, 64 Miss. 784, 2 So. Rep. 171.

A foot passenger injured by being run over at a crossing is not entitled to recover if the evidence shows that the accident was caused by his failure to look for the train, which could have been easily seen, although the engine driver did not whistle and the flagman gave no warning. *Davey v. London & S. W. R. Co.*, L. R. 12 Q. B. D. 70, 53 L. J. Q. B. D. 58, 49 L. T. 739, 48 J. P. 279; affirming L. R. 11 Q. B. D. 213, 52 L. J. Q. B. D. 665.

266. — In failing to provide flagman or watchman, or to give signals.

—The neglect of a person attempting to cross a track, at its intersection with a public highway, to use his senses of sight and hearing, to guard against approaching trains, is contributory negligence as matter of law; and the fact that the railroad's watchman was, as he saw, sitting ninety feet distant, with his flag across his lap, and, looking in the opposite direction, failed to warn him of the moving train, does not make it a question for the jury. *Louisville & N. R. Co. v. Webb*, 49 Am. & Eng. R. Cas. 427, 90 Ala. 185, 8 So. Rep. 518.

Though a company has no flagman at a crossing as required by law, and is running its train faster than the municipal ordinance allows, a person who could have seen the train had she stopped at a reasonable distance before reaching the crossing, is guilty of such contributory negligence as bars a recovery for injuries received. *Sala v. Chicago, R. I. & P. R. Co.*, 85 Iowa 678, 52 N. W. Rep. 664.

Where the evidence shows that when within 35 feet of the crossing trains could be seen 1200 feet away, that when plaintiff was at that point the train doing the injury could not have been more than 300 feet away, there is such contributory negligence as to prevent a recovery, though it appears that the train was running at a high rate of speed without signals, and that the person injured had always been accustomed at other times to see a flagman at the crossing, except at this time, which caused her to pass on supposing there was no danger; but it further appearing that the plaintiff claimed that she had stopped and looked for trains and did not in fact rely upon the absence of a flagman. *Sala v. Chicago, R.*

I. & P. R. Co., 85 Iowa 678, 52 N. W. Rep. 664.

The evidence showed that the driver of a team must have seen the train in time to avoid the accident if he had stopped to look, and that he was driving the horse at a quiet trot, and could easily have stopped. *Held*, that notwithstanding the negligence of the defendant in failing to hire a flagman at the crossing the contributory negligence of the driver precluded the plaintiff from recovering. *Freeman v. Duluth, S. S. & A. R. Co.*, 37 Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594.

The fact that an ordinance requires a company to keep a watchman whose duty it is to warn persons about to cross the tracks of approaching trains does not absolve such persons from a like duty to use their senses, and do as all prudent persons under the circumstances would do to avoid danger. *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198.—QUOTING *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480, 65 Mo. 22.

Plaintiff stopped about fifteen feet from a track while one train was passing, where he could see 200 feet along the track, and then walked on the track without looking and was struck by another train, without anything to prevent his seeing it or to divert his attention. *Held*, that he could not recover, and the duty to look was not relieved by the belief that a flagman would give him warning if there was danger. *Moore v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 489, 62 Hun 621, 17 N. Y. Supp. 205.

267. — In failing to provide signs, gates, or lookouts.*—Evidence that there was no sign-board at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff. *Elkins v. Boston & A. R. Co.*, 115 Mass. 190. And compare also *Pennsylvania R. Co. v. Richter*, 2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180. *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484, 17 Am. Ry. Rep. 303.

The fact that the safety-gates at a highway crossing are up does not release a person about to cross the track from the necessity of stopping, looking, and listening for approaching trains. *Lake Shore & M. S. R. Co. v. Frantz*, 39 Am. & Eng. R. Cas. 628, 127 Pa. St. 297, 18 Atl. Rep. 22.

* See also *ante*, 61.

Where a train is backed over a crossing or frequented street, the company must keep a lookout on the leading car. But a traveler approaching the crossing must vigilantly use his eyes and ears and look in every direction to make sure the crossing is safe. Failure so to do is contributory negligence, except where the view of the track is obstructed, or where the party injured is a passenger going to or from a train, or where the direct act of the company's agent induced the traveler to cross without precaution; or where the company, after discovering his negligence, fails to use due care to avert its consequences. *Mark v. Petersburg R. Co.*, 49 *Am. & Eng. R. Cas.* 418, 88 *Va.* 1, 13 *S. E. Rep.* 299.—QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 *U. S.* 697. REVIEWING *New York, P. & N. R. Co. v. Kellam*, 83 *Va.* 851.—QUOTED AND FOLLOWED IN *Norfolk & W. R. Co. v. Stone*, 88 *Va.* 310.

268. Running at unlawful speed.*

—It is the duty of a person about to cross a track to look in each direction for an approaching train, and a failure to so look, if injury results, will not be excused because the train may have been running at an unusual rate of speed, or faster than allowed by a city ordinance. *St. Louis & S.-E. R. Co. v. Mathias*, 50 *Ind.* 65, 8 *Am. Ry. Rep.* 381. *Highland Ave. & B. R. Co. v. Sampson*, 91 *Ala.* 560. *Sala v. Chicago, R. I. & P. R. Co.*, 85 *Iowa* 678, 52 *N. W. Rep.* 664. *Taylor v. Missouri Pac. R. Co.*, 86 *Mo.* 457. *Powell v. Missouri Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 467, 76 *Mo.* 80.—APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 *Mo.* 457. FOLLOWED IN *Maxey v. Missouri Pac. R. Co.*, 113 *Mo.* 1. QUOTED IN *Damrill v. St. Louis & S. F. R. Co.*, 27 *Mo. App.* 202.

Where one could see an approaching train for seventy rods while he is yet six hundred feet from the track, to drive upon the track without looking will defeat a recovery for an injury, though the train was running at a dangerous speed. *Schofield v. Chicago, M. & St. P. R. Co.*, 2 *McCrory (U. S.)* 268.—QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 *U. S.* 697.

If, however, the company was guilty of running its train at a greater rate of speed than allowed by a municipal ordinance, though plaintiff was guilty of contributory

negligence in failing to stop and listen, such contributory negligence would not bar a recovery, provided he used due diligence to prevent the accident after becoming aware of his peril, and provided the company, after plaintiff's peril was apparent, could, by the use of care and vigilance, have avoided the injury. *Highland Ave. & B. R. Co. v. Sampson*, 91 *Ala.* 560, 8 *So. Rep.* 778.

269. Duty to look in both directions.*—(1) The rule.

—It is negligence and carelessness for a person to go, stand, or be upon, or cross over, or approach the track of a railroad without keeping watch both ways for trains. *Denver & R. G. R. Co. v. Ryan*, 17 *Colo.* 98, 28 *Pac. Rep.* 79. *Dunning v. Bond*, 38 *Fed. Rep.* 813. *Chicago, B. & Q. R. Co. v. Van Patten*, 64 *Ill.* 510. *St. Louis & S.-E. R. Co. v. Mathias*, 50 *Ind.* 65, 8 *Am. Ry. Rep.* 381. *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 261, 10 *West. Rep.* 184, 33 *N. W. Rep.* 306. *Marty v. Chicago, St. P., M. & O. R. Co.*, 32 *Am. & Eng. R. Cas.* 107, 38 *Minn.* 108, 35 *N. W. Rep.* 670. *Berry v. Pennsylvania R. Co.*, 26 *Am. & Eng. R. Cas.* 396, 48 *N. J. L.* 141, 4 *Atl. Rep.* 303. *Gorton v. Erie R. Co.*, 45 *N. Y.* 660. *Endress v. Lake Shore & M. S. R. Co.*, 19 *N. Y. S. R.* 481, 2 *N. Y. Supp.* 719; affirmed (P) 117 *N. Y.* 640, *mem.*, 22 *N. E. Rep.* 1130, 27 *N. Y. S. R.* 977. *Haight v. New York C. R. Co.*, 7 *Laus. (N. Y.)* 11.—REVIEWED IN *Salter v. Utica & B. R. R. Co.*, 75 *N. Y.* 273.—*Rigler v. Charlotte, C. & A. R. Co.*, 26 *Am. & Eng. R. Cas.* 386, 94 *N. Car.* 604. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 *Tex.* 643, 11 *S. W. Rep.* 127.

It is culpable negligence for any one to cross the track of a railroad without looking in every direction that the rails run to make sure that the road is clear. *Illinois C. R. Co. v. Goddard*, 72 *Ill.* 567.—QUOTED IN *Chicago, B. & Q. R. Co. v. Spring*, 13 *Ill. App.* 174.—*Garland v. Chicago & N. W. R. Co.*, 8 *Ill. App.* 571.

(2) *Its extent and limits.*—It is not, under all circumstances, necessary for a person approaching a railroad crossing to look both ways and to listen for approaching

* Contributory negligence of persons attempting to cross track without looking both ways for trains, see note, 51 *AM. REP.* 360.

Injuries at crossings. Contributory negligence in only watching one of two engines, see 42 *AM. & ENG. R. CAS.* 190, *abstr.*

* See also *ante*, 168-189; *post*, 320, 335, 346.

trains. *Richmond v. Chicago & W. M. R. Co.*, 49 *Am. & Eng. R. Cas.* 367, 87 *Mich.* 374, 49 *N. W. Rep.* 621. *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 261, 10 *West. Rep.* 184, 33 *N. W. Rep.* 306. *Nash v. New York C. & H. R. R. Co.*, 14 *N. Y. S. R.* 531.

Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time. *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 261, 10 *West. Rep.* 184, 33 *N. W. Rep.* 306.

A person about to cross a track at a public crossing is not required constantly to look in both directions in which trains might approach. *Gratiot v. Missouri Pac. R. Co.*, (Mo.) 49 *Am. & Eng. R. Cas.* 398, 16 *S. W. Rep.* 384.

Where there is a double track, and trains are run one way only on each track, it is contributory negligence in one approaching the track, who knows how the trains are run, to look one way but fail to look the other way, from which trains are most liable to approach. *Young v. New York, L. E. & W. R. Co.*, 32 *Am. & Eng. R. Cas.* 130, 107 *N. Y.* 500, 9 *Cent. Rep.* 879, 14 *N. E. Rep.* 434, 12 *N. Y. S. R.* 285; *reversing* 35 *Hun* 663, *mem.*—DISTINGUISHED IN *Oldenburg v. New York C. & H. R. R. Co.*, 124 *N. Y.* 414.

A pedestrian before crossing a track must, in the absence of circumstances excusing it, look in each direction to ascertain whether a train is approaching; he may not omit this, in reliance upon the performance by the company of its duty to give reasonable notice of the approach of a train; and if he does omit it the neglect of the company to discharge its duty will not relieve him from the imputation of negligence. *Rodrian v. New York, N. H. & H. R. Co.*, 125 *N. Y.* 526, 26 *N. E. Rep.* 741, 35 *N. Y. S. R.* 814; *reversing* 28 *N. Y. S. R.* 625, 7 *N. Y. Supp.* 811.

Where the evidence may justify opposing inferences as to the performance by the pedestrian of his duty in these respects, the question is one of fact for the jury. *Rodrian v. New York, N. H. & H. R. Co.*, 125 *N. Y.* 526, 26 *N. E. Rep.* 741, 35 *N. Y. S. R.* 814; *reversing* 28 *N. Y. S. R.* 625, 7 *N. Y. Supp.* 811.

A traveler on a highway, when about to cross a railroad track, is bound to look up and down the track before crossing, although the railroad may not have given the ordinary

signals. Neglect so to do is, in case of accident, contributory negligence on the part of the traveler, unless obstructions prevent a view of the track, or unless he had some assurance of safety from the railroad company which excuses him. *Ormsbee v. Boston & P. R. Corp.*, 14 *R. I.* 102, 51 *Am. Rep.* 354.—DISTINGUISHING *Commonwealth v. Fitchburg R. Co.*, 10 *Allen (Mass.)* 189; *Craig v. New York, N. H. & H. R. Co.*, 118 *Mass.* 431; *Webb v. Portland & K. R. Co.*, 57 *Me.* 117; *Johnson v. Hudson River R. Co.*, 20 *N. Y.* 66; *Continental Imp. Co. v. Stead*, 95 *U. S.* 161; *Pennsylvania R. Co. v. Ogier*, 35 *Pa. St.* 60; *Fordham v. London, B. & S. C. R. Co.*, L. R. 3 C. P. 368; *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 13; *Dublin, W. & W. R. Co. v. Slaterry*, L. R. 3 App. Cas. 1155; *Brassell v. New York C. & H. R. R. Co.*, 84 *N. Y.* 241; *Gaynor v. Old Colony & N. R. Co.*, 100 *Mass.* 208; *Chaffee v. Boston & L. R. Corp.*, 104 *Mass.* 108; *Mayo v. Boston & M. R. Co.*, 104 *Mass.* 137; *Wheelock v. Boston & A. R. Co.*, 105 *Mass.* 203; *Stapley v. London, B. & S. C. R. Co.*, L. R. 1 Ex. 21; *Warren v. Fitchburg R. Co.*, 8 *Allen (Mass.)* 227; *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99. NOT FOLLOWING *French v. Taunton Branch R. Co.*, 116 *Mass.* 537; *Allyn v. Boston & A. R. Co.*, 105 *Mass.* 77.—QUOTING *Wilcox v. Rome, W. & O. R. Co.*, 39 *N. Y.* 358; *Wanless v. North Eastern R. Co.*, L. R. 6 Q. B. 481; *North Eastern R. Co. v. Wanless*, L. R. 7 H. L. Cas. 12. REVIEWING *Brown v. New York C. R. Co.*, 32 *N. Y.* 597; *Stillwell v. New York C. R. Co.*, 34 *N. Y.* 29; *Ernst v. Hudson River R. Co.*, 35 *N. Y.* 9.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 *Am. & Eng. R. Cas.* 62, 5 *Dak.* 523, 3 *L. R. A.* 363, 41 *N. W. Rep.* 758. DISTINGUISHED IN *Boss v. Providence & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 364, 15 *R. I.* 149.

270.—*Illustrations.*—(1) *Generally.*—A person who, driving in his wagon down a private road, which was on a right of way, and partly on the track, fails to look up and down before getting on the track, though he was slightly deaf, is guilty of contributory negligence, and cannot recover damages for injuries to his wagon caused by collision with a train of detached cars which were standing in full view about two hundred yards from the point at which he drove on the track, unless the evidence also shows such gross negligence on the part of the company as amounts to recklessness, wilfulness, or in-

tentional wrong. *Georgia Pac. R. Co. v. O'Shields*, 90 Ala. 29, 8 So. Rep. 248.

It appeared that the plaintiff, who was familiar with the crossing, when about 250 feet away looked to the east, where he could see about one fourth of a mile, and saw no approaching train. He did not look to the east again, but looked to the west, where the view of the track was somewhat obstructed. If he had looked to the east when 100 feet away he would have had an unobstructed view for one half mile. He drove to the crossing in a slow trot, and was struck by a train from the east. No signals were given. *Held*, that the plaintiff was guilty of contributory negligence as a matter of law. *Mann v. Belt R. & S. Y. Co.*, 128 Ind. 138, 26 N. E. Rep. 819.

Where one in an attempt to cross a track looks in but one direction, from which he is expecting a train, and is struck by a train coming from the opposite direction, and could have looked in the opposite direction and have seen the train which struck him, but failed to look in that direction, he is guilty of contributory negligence. *Thornton v. Cleveland, C. & St. L. R. Co.*, 131 Ind. 492, 31 N. E. Rep. 185.

A father and son were driving together, and the father was killed while crossing a track. The son testified that when they came to the track they stopped, and each looked both ways along the track, and each listened, but could neither see nor hear a locomotive, and that there was no whistle blown or bell rung. *Held*, that this was sufficient to *prima facie* show due care on the part of the deceased, and it was proper for the court to refuse a nonsuit at the close of plaintiff's evidence. *Keese v. New York, N. H. & H. R. Co.*, 67 Barb. (N. Y.) 205, 4 N. Y. 73, mem.

Instructions.—The court was asked to instruct the jury that the failure of one to look to cross a track to look each way for an approaching engine is negligence; also, if the train was running at such a rate of speed as would have enabled deceased to have seen and avoided it, then his unsuccessful attempt to do so in front of it was negligence. These charges took the question of contributory negligence from the jury, and were rightly refused. *Houston & T. C. R. Co. v. Waller*, 8 Am. & Eng. R. Cas. 431, 56 Tex. 331.

The court instructed, as a matter of law, "that a railway crossing is a place of great

danger; that the tracks themselves are a warning to those about to go upon them that it is dangerous, and that it is the duty of every person before going upon or across the railway track to exercise care and caution, either in looking in both directions, or to listen to ascertain whether it is safe to go upon the track or otherwise, as may be shown by the evidence in the case." Such instruction was faulty because it failed to state the degree of care required, and because it was in the alternative. *Chicago & N. W. R. Co. v. Gertsen*, 15 Ill. App. 614.—QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.

271. When rule does not apply.

—As a general proposition every person going upon a railroad track is bound to look each way, and is deemed negligent, as a matter of law, for failure to do so; but there may be circumstances where this rule does not apply, as where the party's attention is diverted to avoid other dangers, or where there is much confusion. *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.

Nor does the rule apply in its strictness to workmen engaged on the track. As to them, the question of their contributory negligence is generally for the jury. *Noonan v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 41, 62 Hun 618, 16 N. Y. Supp. 678; *affirmed* 131 N. Y. 594, mem., 42 N. Y. S. R. 949, 30 N. E. Rep. 67.—QUOTING *Omingcr v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 159.

Nor to one about to cross a city street. *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. Rep. 415, 13 N. Y. S. R. 648, 11 Cent. Rep. 90; *affirming* 38 Hun 370.—FOLLOWING *Wendell v. New York C. & H. R. R. Co.*, 91 N. Y. 420.—DISTINGUISHED IN *Scott v. Third Ave. R. Co.*, 36 N. Y. S. R. 838, 59 Hun 456, 13 N. Y. Supp. 344.

The traveler is not bound to stop on the highway, or to look up and down an intersecting railway track before crossing, when there are no signs of an approaching engine. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61, 3 Abb. Pr. N. S. 82; *reversing* 32 Barb. 159.—DISTINGUISHED IN *Zimmerman v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191, 71 Mo. 476. REVIEWED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354.

272. Where party is deaf.*—Where

* Injury to deaf persons, see note, 34 Am. & Eng. R. Cas. 38.

a party who is about to cross a track is deaf, and it appears that by looking he could have seen the train in time to have avoided an accident, it shows a great want of care in not looking the more carefully, as he could not hear. *Illinois C. R. Co. v. Buckner*, 28 Ill. 299.

So where a deaf person approaches a crossing along a private way, with a high fence on either side, and steps on the track without looking to see whether a train is in sight, and is killed in consequence, he is guilty of such contributory negligence as will preclude the recovery of damages for his death by his administrator. *Johnson v. Louisville & N. R. Co.*, 13 Am. & Eng. R. Cas. 623, 91 Ky. 651, 25 S. W. Rep. 754.

Where an adult steps upon a track in front of and in full view of an approaching train, those in charge have the right to presume that he will leave it before the train reaches him; and in case the person is deaf, or otherwise deficient in his faculties, so as to render him unconscious of his impending danger, the knowledge of such infirmity must be brought home to those in charge of the train before the company can be made liable. *Johnson v. Louisville & N. R. Co.*, 13 Am. & Eng. R. Cas. 623, 91 Ky. 651, 25 S. W. Rep. 754.

Where a party who is deaf sees the smoke of a train and then undertakes to cross the track without stopping to see which way it is going, and is struck by the train while looking in the opposite direction, he is negligent in assuming that it was going away from him, and his deafness is no excuse. *Purl v. St. Louis, K. C. & N. R. Co.*, 6 Am. & Eng. R. Cas. 27, 72 Mo. 168.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283.

Plaintiff, a man of mature years, in his right mind, with his eyesight unimpaired, but deaf, without looking to see if a train was coming, went upon a track and started down the track, when he was almost instantly struck and injured by a train approaching from behind. A short distance before reaching the track he passed a point where the train was in full view; and a sidewalk for the use of pedestrians ran alongside the track. *Held*, a case of negligence precluding recovery against the company. *Zimmerman v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191, 71 Mo. 476.

The deafness of the plaintiff being conceded, in determining whether the servants of the defendant company used such care as

3 D. R. D.—38.

was incumbent upon them, the jury should have been given to understand, in the absence of knowledge on their part that the plaintiff was deaf, that the conduct of such employes should be considered as though plaintiff was not thus deficient, and their care measured from that standpoint. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223.

A greater degree of care would be incumbent upon a deaf man in crossing or walking upon a track than on one having his senses perfect. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223.

Plaintiff, who was deaf, undertook to drive across a portion of the track in process of construction. The foreman at first requested him to wait, but, on his proceeding, directed a laborer to lead the horse over. After passing over, the horse starting, the laborer let loose, and the horse, running against a telegraph pole, was injured. *Held*: (1) that whether the company exercised proper care and skill in the performance of the work, and as to preventing obstructions to passers-by, and whether plaintiff was chargeable with contributory negligence, were for the jury, as was also the cause of the injury; (2) that plaintiff had a right to believe, from the act of defendant's laborer in leading the horse over, that the crossing was safe. *Rembe v. New York, O. & W. R. Co.*, 102 N. Y. 721, 1 Silv. App. 154, 7 N. E. Rep. 797, 2 N. Y. S. R. 498; affirming 32 Hun 68, mem.

273. — or partially deaf.—The fact that a party killed at a crossing was partially deaf, will not excuse the company for a failure to properly ring the bell or sound the whistle. *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.

Where a party injured at a crossing is an adult of ordinary mental capacity, but partially deaf, her infirmity, not being known to the servants of the company, will not increase their responsibilities as to care; nor will it excuse her from the full measure of care which prudent persons partially deaf, but conscious of their infirmity, would ordinarily assume under similar circumstances. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570.

Where evidence of such deafness, and evidence that the party injured, at the time of crossing the track, was prevented from observing the proximity of the train by reason of a veil drawn and retained over

her face, has been submitted to the jury, it is the right of the defendant to require the court to charge the jury that neither such deafness, nor voluntary obscuration of vision, will excuse the party injured from the observance of such ordinary care, "by the more cautious exercise of her remaining faculties;" and the court, on being requested so to charge, cannot, without comment, refer the whole matter to the jury. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570.—QUOTING *Trow v. Vermont C. R. Co.*, 24 Vt. 497.

Where one who is partially deaf passes a point where he has an extended view of a railroad track, and stops in front of a "watch-house" where his view is obstructed, and there "looks and listens," and is killed a moment later in crossing the track—*held*, such contributory negligence as to prevent a recovery. *Central R. Co. v. Feller*, 84 Pa. St. 226, 18 Am. Ry. Rep. 369.—DISTINGUISHED IN *Philadelphia & R. R. Co. v. Carr*, 99 Pa. St. 505.

274. — or with ears covered.*—Plaintiff, a boy ten years old, was in a wagon with a companion who was driving, and the former was injured by a collision with a train at a highway crossing. It was a cold, winter day and he had the lappets of his cap over his ears. *Held*, that the fact that his ears were thus covered and that he knew that the highway was crossed by a railroad, and that he did not tell his companion, and failed to look and listen for trains, is not conclusive of a want of care, where the evidence tends to show that he did not know that he was yet at the crossing, and where sufficient signals were not given. *Elkins v. Boston & A. R. Co.*, 115 Mass. 190, 7 Am. Ry. Rep. 456.

While, where the severity of the weather requires a traveler upon the highway to protect himself from it by covering his ears, if the means taken materially impair his ability to perceive coming danger, and he is injured at a crossing, he is not to be freed from a charge of contributory negligence; yet, unless it is certain that the means used did have that effect, it is a question for the jury, not for the court. *Salter v. Utica & B. R. Co.*, 59 N. Y. 631.—APPLIED IN *Northrup v. New York, O. & W. R. Co.*, 37 Hun (N. Y.) 295. FOLLOWED IN *Weber*

* Parties approaching crossing with head muffled or with umbrella, see note, 19 AM. & ENG. R. CAS. 332.

v. New York C. & H. R. R. Co., 67 N. Y. 587.

In an action for an injury received by plaintiff at a crossing, it appeared that plaintiff, who was familiar with the locality, was driving his team with a heavily loaded sled down a hill towards the crossing, and had his ears covered to protect them from the cold; that a strong wind was blowing towards the direction from which the train came; that he stopped several times on the descent to look and listen for trains, but, not seeing or hearing any, drove slowly on, and, when within half a rod of the track and going down a pitch made more steep by snow thrown off the track, first heard the whistle of the engine, but was then unable to stop his horses. *Held*, that the court erred in taking the question of plaintiff's contributory negligence from the jury and directing a verdict for defendant. *Siegel v. Milwaukee & N. R. Co.*, 79 Wis. 404, 48 N. W. Rep. 488.—APPROVING *Williams v. Chicago, M. & St. P. R. Co.*, 64 Wis. 1; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis. 216; *Winstanley v. Chicago, M. & St. P. R. Co.*, 72 Wis. 375.

275. Where there is a great deal of noise.—(1) *Generally.*—If the crossing is obstructed from view, increased caution is required on the part of the traveler as well as on the part of the company; and if from noise, such as a gale of wind or the rattling of a wagon, hearing is rendered difficult, it then becomes the duty of the traveler to stop and listen. *Steepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229.

Plaintiff was riding in a hired carryall, driven by the owner, with twenty-seven other companions, who were singing and shouting so as to make an unusual noise as they approached a crossing. Plaintiff was familiar with the crossing and knew that it was about time for a train to pass. The track was so situated as to prevent their seeing the train until very near the track. *Held*, that under such circumstances it was his duty to refuse to go on the track, whether he was helping to make the noise or not. If his expostulations and warnings would not have controlled the driver he should have left the carryall, if he reasonably might. *Koehler v. Rochester & L. O. R. Co.*, 66 Hun (N. Y.) 566, 50 N. Y. S. R. 619, 21 N. Y. Supp. 844.

(2) *Factories and mills.*—Where it appeared that the plaintiff, before crossing the

tracks, stopped and looked and listened, but at a point where his vision was obstructed by steam escaping from a factory, the operation of which made a great deal of noise, the question of his contributory negligence is for the jury, not the court. *Neiman v. Delaware & H. Canal Co.*, 149 Pa. St. 92, 24 Atl. Rep. 96.

Where there is nothing to prevent the view of the track or of an approaching train, the fact that a mill is in operation near a crossing that would prevent one from hearing does not excuse him for attempting to cross without using his eyes to see if a train is coming. *Sabine & E. T. R. Co. v. Dean*, 76 Tex. 73, 13 S. W. Rep. 45.

Where plaintiff testified that she "held up very slow" as she was approaching the track, and, hearing no bell, which she had heard the day before while at the crossing, notwithstanding the noise of the factories on either side of the street, concluded that no engine was approaching, and drove on—held, that it was not necessary for her to get out of the buggy and go beyond the cars to look up and down the track, or to stop and listen for an approaching engine, when no signal was given of its approach. *Alexander v. Richmond & D. R. Co.*, 112 N. Car. 720, 16 S. E. Rep. 896.

276. Proper place at which to stop, look, and listen.—(1) *Generally.*—Plaintiff was guilty of negligence in not looking in the direction of the approaching train, by which he was injured, when within five feet of the track, and when, if he had looked, his view would have been unobstructed for a distance of 250 feet. *Gardner v. Detroit, L. & N. R. Co.*, 97 Mich. 240, 56 N. W. Rep. 603.—QUOTING *Kwiatkowski v. Grand Trunk R. Co.*, 70 Mich. 551.

A plaintiff approaching the crossing, and stopping from four to six rods therefrom to look and listen, and neither seeing nor hearing a signal of an approaching train, is not to be deemed guilty of such negligence as to justify a nonsuit. *Renwick v. New York C. R. Co.*, 36 N. Y. 132, 34 How. Pr. 91.—FOLLOWING *Ernst v. Hudson River R. Co.*, 32 How. Pr. 61.—REVIEWED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.

It seems that if it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and

time when and where looking would have been of the most advantage. The presence of other and imminent dangers, the raising of gates erected by the company to guard the highway—giving assurance that the crossing was safe—and similar circumstances may be considered in determining whether the person injured fairly discharged the duty imposed upon him in making his observations. *Rodrian v. New York, N. H. & H. R. Co.*, 125 N. Y. 526, 26 N. E. Rep. 741, 35 N. Y. S. R. 814; reversing 28 N. Y. S. R. 625, 7 N. Y. Supp. 811.

If a person could have had an unobstructed view of the track for nineteen hundred and fifty feet, if he had stopped and looked at a point eighteen feet from the crossing, and he goes upon the track and is injured, it is in vain for him to say that he stopped, looked, and listened at the point of unobstructed view. *Urias v. Pennsylvania R. Co.*, 152 Pa. St. 326, 25 Atl. Rep. 566.

The court charged that from the time one about to cross a track enters within the "limits of actual danger" until he leaves them he must exercise ordinary care to avoid it. *Held*, that the words "limits of actual danger," as used by the court, meant the time when and the place where it became the person's duty to look and listen for an approaching train; and that the instruction, when considered with others given, did not mislead the jury on account of the use of these words. *Nosler v. Chicago, B. & Q. R. Co.*, 73 Iowa 268, 34 N. W. Rep. 850.

(2) *Persons with teams.*—Where one driving a team approaches a track he should look and listen for trains sufficiently distant from the track, so that if his horses become frightened they may be restrained without getting on the track. *Rhoades v. Chicago & G. T. R. Co.*, 21 Am. & Eng. R. Cas. 659, 58 Mich. 263, 25 N. W. Rep. 182.

A person approaching a crossing with a team should, at the nearest and most eligible point to the road, stop his team, listen, and look out for any approaching train. It is also obligatory upon the servants in charge of the train to exercise a degree of caution and circumspection in approaching such crossing commensurate with the danger to travel by the public. *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 518; affirmed in 98 Mo. 183, 11 S. W. Rep. 569.—QUOTING *Johnson v. Chicago, R. I.*

& P. R. Co., 77 Mo. 553; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 120.

It is not negligence *per se* for one to drive his vehicle near the edge of a street approaching a railroad, although he would have had a better view of the track from the middle of the street. *Scott v. Wilmington & W. R. Co.*, 96 N. Car. 428, 2 S. E. Rep. 151.

Where the injuries complained of were received by plaintiff while he was driving over a grade crossing, it is proper to charge that if the jury find from the evidence that plaintiff stopped at a proper place or places, and properly exercised his senses of sight and hearing, and neither saw nor heard an approaching train, he was not guilty of contributory negligence. *Smith v. Baltimore & O. R. Co.*, 158 Pa. St. 82, 27 Atl. Rep. 847.

Where plaintiff drove slowly and carefully, and stopped less than seventy feet from the track, and, standing in his wagon, looked both east and west for trains, and, seeing none, sat down and drove on, looking again to the east and west, and listening all the time—*held*, that he could not be charged with contributory negligence simply because at one point, twenty feet from the crossing, of which he had no knowledge, the train could have been seen ten hundred and eighty feet away. *Lee v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 157, 80 Iowa 172, 45 N. W. Rep. 739.—DISTINGUISHING *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 627; *Haines v. Illinois C. R. Co.*, 41 Iowa 227.

277. Place and manner of looking, generally for jury.—Where the evidence is conflicting, or where there are inferences of fact to be drawn from the testimony, the question whether or not a person injured at a railroad crossing stopped, looked, and listened at the right place is for the jury, and it is error to rule it as a question of law. *McGill v. Pittsburgh & W. R. Co.*, 152 Pa. St. 331, 25 Atl. Rep. 540. *Newhard v. Pennsylvania R. Co.*, 55 Am. & Eng. R. Cas. 258, 153 Pa. St. 417, 26 Atl. Rep. 105.—FOLLOWING *Wilde v. Trainor*, 59 Pa. St. 439.—*Lehigh & W. B. Coal Co. v. Lear*, (Pa.) 32 Am. & Eng. R. Cas. 74, 9 Atl. Rep. 267.—QUOTING AND FOLLOWING *Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. St. 610, 6 Atl. Rep. 238, 5 Cent. Rep. 147. QUOTING *Philadelphia & R. R. Co. v. Calebs*, 8 W. N. C. 529.

Where there is a doubt as to the proper

place to stop, look, and listen before crossing a railroad track, the question will, as a general rule, be referred to the jury; but where there is no such doubt, and it appears that the person injured stopped at a point where he could not see, it is for the court to determine whether the point was a proper place to stop. *Urias v. Pennsylvania R. Co.*, 152 Pa. St. 326, 25 Atl. Rep. 566.—QUOTING *Carroll v. Pennsylvania R. Co.*, 2 Pennyp. 159, 12 W. N. C. 348.—*Whitman v. Pennsylvania R. Co.*, 156 Pa. St. 175, 27 Atl. Rep. 290.—FOLLOWING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

In the case of steam railroads a question sometimes arises as to the proper place to stop, look, and listen. Where there is a fair doubt upon this question it must be submitted to the jury. No such case arises in the case of city railways. *Ehrisman v. East Harrisburg City Pass. R. Co.*, 51 Am. & Eng. R. Cas. 190, 150 Pa. St. 180, 24 Atl. Rep. 596, 30 W. N. C. 373, 23 Pittsb. L. J. (N. S.) 73, 9 Lanc. L. Rev. 356.

Plaintiff was killed while attempting to ride over a public crossing. The unquestioned evidence was that when he approached the track he stopped, looked, and listened. The contention being whether the place where he stopped was a suitable one to see and hear, and whether due effort was made to ascertain if a train was approaching, it was proper for the court to submit it to the jury as a question of fact. *Pennsylvania & N. Y. C. & R. Co. v. Huff*, (Pa.) 8 Atl. Rep. 789.

The mere act of stopping before going upon a track does not of itself show that the person injured stopped at a proper place, or that there was not another and better place where he should have stopped again, or that his duty of looking and listening was performed with proper care and attention; but stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clearly that no other inference can properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury. *Ely v. Pittsburgh, C. & St. L. R. Co.*, 158 Pa. St. 233, 27 Atl. Rep. 970.—QUOTING *Kohler v. Pennsylvania R. Co.*, 135 Pa. St. 346.

278. Driving upon crossing at too rapid a speed.—One who drives his team at a brisk trot upon a railroad crossing

without stopping to listen for trains or looking up and down the track, is guilty of contributory negligence. *Turner v. Hannibal & St. J. R. Co.*, 6 Am. & Eng. R. Cas. 38, 74 Mo. 602.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283. FOLLOWED IN *Hixson v. St. Louis, H. & K. R. Co.*, 80 Mo. 335; *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1.

Where the facts show that one killed at a crossing approached it at a dangerously rapid rate of speed, and that he drove upon the track without reducing the speed of his team, when he could have seen and heard an approaching train in time to have avoided the injury, the conclusion is irresistible that he must have seen and heard the train, and that he was driving at a rate of speed which he supposed would carry him over in advance of the train, and he therefore had taken the chances. *Cones v. Cincinnati, I., St. L. & C. R. Co.*, 114 Ind. 328, 16 N. E. Rep. 638, 14 West. Rep. 101.

Plaintiff was driving in the daytime where he was familiar, and passed through a private gate seventy-nine feet from the track, and when within thirty-five feet of the track started on a trot and collided with a train just as he entered the first of two tracks. He knew that trains coming from the direction that the one did that struck him passed on the first track, but failed to look or listen until he was substantially on the track, where he might have seen the train when half a mile distant. *Held*, that he could not recover, though the engineer failed to give the statutory signals. *Nash v. New York C. & H. R. R. Co.*, 34 N. Y. S. R. 788, 3 *Silv. App.* 315.—REVIEWED IN *Smith v. New York C. & H. R. R. Co.*, 44 N. Y. S. R. 55, 63 Hun 624, 17 N. Y. Supp. 400.

It is not error for the court to refuse to charge that the rate of speed at which plaintiff approached and drove on the track, which she described as a slow trot, "and slowed up towards the railroad track," of itself constituted negligence on her part. *Richardson v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 868, 40 N. Y. S. R. 616, 61 Hun 624, *mem.*

270. At crossings where flagmen are stationed.*—(1) *Generally*.—If it be

true that in a particular case a reasonably prudent and careful man, on approaching a track over a public street, would do more than observe the absence of the ordinary signal of the flagman, the facts and circumstances should be submitted to the jury to be considered in determining whether, under them, plaintiff had exercised ordinary care and caution to avoid injury. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855.

It cannot be deemed as a matter of law that a person approaching a crossing, when there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed whose duty it is to warn all persons of danger from moving trains, is required to look elsewhere than to the flagman. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855.

It is the duty of one about to cross a track to take reasonable precaution to ascertain whether a train is approaching; but he is only required to have satisfactory evidence of this, and the signal of a flagman, or other circumstances, may justify him in attempting to cross. *Spencer v. Illinois C. R. Co.*, 29 Iowa 55.

If it is customary to have a flagman at a crossing, and he is absent, this does not excuse a traveler on the highway from looking to see if a train is coming before he attempts to cross, when there is no obstacle to prevent his seeing. *Tyler v. Old Colony R. Co.*, 157 Mass. 336, 32 N. E. Rep. 227.—FOLLOWED IN *Connolly v. New York & N. E. R. Co.*, 158 Mass. 8.

One about to cross a track must look and listen for trains; he is also charged with the duty of looking for a flagman and obeying the signals he gives, if given in time to avoid a collision. Where he knows that a flagman is habitually stationed at a crossing, and upon looking finds the flagman is not at his post giving signal of danger, he has a right to presume that a train is not about to pass. But absence or negligence of a flagman will not excuse him from looking both ways and listening. *Berry v. Pennsylvania R. Co.*, 26 Am. & Eng. R. Cas. 396, 48 N. J. L. 141, 4 *Atl. Rep.* 303.

(2) *Illustrations—Instructions*.—One who approaches a crossing with which he is familiar, and attempts to cross without looking and listening, where it is possible to do

* See also *ante*, 213.

Duty of traveler to look and listen at crossing where flagman is stationed, see note, 45 AM. & ENG. R. CAS. 144.

so, is guilty of contributory negligence, although the crossing is supplied with a flagman, and the flagman does not give notice of the approach of danger. A person attempting to cross should not have the right to assume, from that circumstance, that no danger existed, and enter upon the track without looking. Had the flagman done anything to induce the appellant to attempt the crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury. *Cadwallader v. Louisville, N. A. & C. R. Co.*, 128 Ind. 518, 27 N. E. Rep. 161.—DISTINGUISHING *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305.

Where a company, in pursuance of an ordinance, has erected gates and stationed a watchman at a street crossing, a traveler who approaches and finds the gates open, and receives no warning from the watchman, has a right to assume that there are no approaching trains; and if, acting upon this assumption, he enters upon the crossing and is instantly confronted by trains going in opposite directions, and in the confusion caused by the unexpected danger into which he is thus led is struck and killed, the company is liable. *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. Rep. 843.—DISTINGUISHING *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5.—APPLIED IN *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535. DISTINGUISHED IN *Cadwallader v. Louisville, N. A. & C. R. Co.*, 128 Ind. 518. FOLLOWED IN *Pennsylvania Co. v. Horton*, 132 Ind. 189.

Where a street was crossed by two main tracks and twenty side tracks, and a flagman was stationed at such crossing to give warning of danger to any one about to cross the tracks, and plaintiff was injured by a collision in attempting to pass over the tracks, it was not error to refuse to instruct that the plaintiff was under an obligation, while driving across the tracks, before driving over any particular track to look and listen for a train that might be approaching upon any of the tracks, and that the obligation which the law imposed upon him would not be satisfied by looking and listening before driving upon the first track, but that the exercise of such care and caution on his part should have existed while driving over all the tracks. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25

N. E. Rep. 664, 29 N. E. Rep. 184; affirming 33 Ill. App. 129.—FOLLOWING *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 587.

280. Where gates are maintained.*

—(1) *Rule stated.*—A traveler approaching a crossing guarded by gates is not required to exercise the same vigilance in looking and listening as when the approaches are not so guarded. *Bond v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 637, 23 N. Y. Supp. 450, 69 Hun 476.

Ordinarily one approaching a crossing must both look and listen for trains; but this duty may be modified by circumstances, such as the fact that gates maintained at the crossing are open. *Schultz v. New York C. & H. R. R. Co.*, 69 Hun (N. Y.) 515, 53 N. Y. S. R. 149, 23 N. Y. Supp. 509.—QUOTING *Palmer v. New York C. & H. R. R. Co.*, 112 N. Y. 234.

But the fact that such gate is open does not relieve the traveler from taking proper precautions for his own safety. It is still his duty to be on the lookout for danger and to exercise the same care that a man of ordinary prudence would exercise under the same conditions. *Schultz v. New York C. & H. R. R. Co.*, 69 Hun (N. Y.) 515, 53 N. Y. S. R. 149, 23 N. Y. Supp. 509.—APPLYING *Oldenburg v. New York C. & H. R. R. Co.*, 124 N. Y. 414.

Safety gates, on a city street at a crossing, are a warning of the passing of trains not only to vehicles but to pedestrians; and if, in disregard thereof, a pedestrian passes a gate in broad daylight, enters upon the crossing, and while watching one train is struck by another and killed, his contributory negligence will prevent a recovery of damages. *Cleary v. Philadelphia & R. R. Co.*, 140 Pa. St. 19, 21 Atl. Rep. 242.

(2) *Illustrations—Instructions.*—A young lady was driving on Sunday, having the rear seat of the carriage, with her sister on the front seat, who did the driving. She was injured by a collision at a crossing, where gates were maintained, but which were not operated on Sunday; but plaintiff had no knowledge of this fact. *Held*, that the question of her contributory negligence in failing to keep a lookout for trains was for the jury. *McCaffrey v. Delaware & H. Canal Co.*, 16 N. Y. Supp. 495, 41 N. Y. S.

* See also *ante*, 55, 214.

Duty of persons to stop and look for trains before passing gate leading to railroad track, see 37 AM. & ENG. R. CAS. 508, *abstr.*

R. 221, 62 Hun 618; affirmed in 33 N. E. Rep. 339, 137 N. Y. 568, mem., 50 N. Y. S. R. 934.—*DISTINGUISHING* *Brickell v. New York C. & H. R. R. Co.*, 120 N. Y. 293, 24 N. E. Rep. 449, 30 N. Y. S. R. 932. *REVIEWING* *Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199, 19 N. Y. S. R. 80, 18 N. E. Rep. 648.

Plaintiff was driving with his wife and on approaching a crossing on the east side stopped while a train was passing. When the train had passed the gate-keeper lifted the east gate and beckoned plaintiff to cross, but when he was on or near the track he saw another train approaching, running in the same direction as the other. The gate-keeper was situated where he had a favorable view of the track. *Held*, that plaintiff had a right to suppose that when the east gate was raised that the keeper intended to lift the west gate also, and that the track was safe. *Callaghan v. Delaware, L. & W. R. Co.*, 52 *Hun* (N. Y.) 276, 22 N. Y. S. R. 594, 5 N. Y. Supp. 285.—*APPLYING* *Woodard v. New York, L. E. & W. R. Co.*, 106 N. Y. 390. *REVIEWING* *Lindeman v. New York C. & H. R. R. Co.*, 42 *Hun* 306.

In such case whether plaintiff relied on the gate-keeper, and did not look as he otherwise would have done to see if another train was approaching, and whether he was justified in doing so, were questions for the jury. *Callaghan v. Delaware, L. & W. R. Co.*, 52 *Hun* (N. Y.) 276, 22 N. Y. S. R. 594, 5 N. Y. Supp. 285.

An instruction that the existence of gates at a crossing, seemingly intended to be closed when trains pass, did not excuse plaintiff from looking before crossing, but that he had a right to take the fact into consideration on the question to what extent he would look, is not contradictory, and is correct. *Merrigan v. Boston & A. R. Co.*, 154 *Mass.* 189, 28 N. E. Rep. 149.

The erection by a railroad company of gates at the crossing of a highway at grade by its tracks within the limits of a city, shortly after an order passed by the mayor and aldermen requesting it to erect such gates is communicated to the company, may be treated as an admission, unless explained, that the gates were reasonably necessary for the public safety. *Merrigan v. Boston & A. R. Co.*, 154 *Mass.* 189, 28 N. E. Rep. 149.

The question whether such an admission

is more applicable to busy days of the week, when the gates are often lowered, than to Sunday, when they are lowered during one hour only, and that not the hour when an accident occurred at the crossing, is for the jury rather than for the court. *Merrigan v. Boston & A. R. Co.*, 154 *Mass.* 189, 28 N. E. Rep. 149.

281. At private crossings.—If the contributory negligence of the plaintiff, who is injured in driving upon a private railroad crossing by a passing train of cars, without stopping or looking out and listening before driving upon it, for a train that may be approaching it from either direction, clearly appears from the evidence for him in an action on the case against the railroad company for the injury, the defendant will be entitled to a nonsuit. *Lynam v. Philadelphia, W. & B. R. Co.*, 4 *Houst. (Del.)* 583.

The failure to give signals of the approach of a train to the crossing of a private way is not negligence, and if one steps upon the track at such a crossing without looking or listening, and is struck by a train, his injuries must be regarded as the result of his own negligence. *Johnson v. Louisville & N. R. Co.*, 91 *Ky.* 651, 25 *S. W. Rep.* 754.

282. On city streets.—When railroads cross public streets at grade and consequently there is more danger of accidents, great vigilance is demanded of those attempting to cross the track, and the use of all proper precautions, such as slackening the speed if they are driving, keeping a good lookout, and approaching the crossing as a dangerous place. *Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 74.

It cannot be said that every person who, in a populous town, at a railroad crossing, fails to pause and look up and down the track, is guilty of such negligence as to prevent a recovery for an injury inflicted by the flagrant wrong of those in charge of a passing train. *Whiton v. Chicago & N. W. R. Co.*, 2 *Biss. (U. S.)* 282; *affirmed in 13 Wall. (U. S.)* 270.

283. When contributory negligence not a defense.*—The defense of contributory negligence, though established

* See also *ante*, 206.

Liability of railroad company for negligence notwithstanding contributory negligence of plaintiff, see note, 22 *Am. & Eng. R. Cas.* 537; 19 *Id.* 36, 266.

by the evidence, is overcome and defeated by proof of such gross negligence, such recklessness or wantonness as is the legal equivalent of wilful or intentional wrong; as by the failure to use all reasonable efforts to avoid the injury when plaintiff's perilous position was discovered in time to prevent injury by the exercise of due care and diligence; but not the mere running at a high rate of speed at a crossing which is not in a populous district, nor a failure to give the statutory signals on approaching, nor the failure to keep a proper lookout, nor other mere omission of duty under circumstances showing mere negligence, as distinguished from recklessness or wantonness. *Georgia Pac. R. Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230.

While it was negligence on the part of the deceased to go on the track without looking or listening for a train, the railroad is still liable notwithstanding that fact if it either knew or might have known by the exercise of ordinary diligence of the danger of the deceased in time to have prevented the accident. *Bergman v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 588, 88 Mo. 678.—FOLLOWING *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 139; *Werner v. Citizens' R. Co.*, 81 Mo. 368; *Scoville v. Hannibal & St. J. R. Co.*, 81 Mo. 434; *Welsh v. Jackson County Horse R. Co.*, 81 Mo. 466.—*Donohue v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 673, 91 Mo. 357, 2 S. W. Rep. 424, 3 S. W. Rep. 848. *Smith v. Citizens' R. Co.*, 52 Mo. App. 36. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. App. 172.—QUOTED IN *Omaha Horse R. Co. v. Doolittle*, 7 Neb. 481. REVIEWED IN *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.

If the negligence of the company, which contributed directly to cause the injury, occurred after the party injured was or by the exercise of proper care might have been discovered on the track in time to stop the train and avert the calamity, the company is liable, however gross the negligence of the injured party may have been in placing himself in danger. *Kelley v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 638, 75 Mo. 138.—APPROVED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314. DISTINGUISHED IN *Rine v. Chicago & A. R. Co.*, 88 Mo. 392. FOLLOWED IN *Werner v. Citizens' R. Co.*, 81 Mo. 368; *Bergman v. St. Louis, I. M. &*

S. R. Co., 88 Mo. 678. QUOTED IN *White v. Wabash Western R. Co.*, 34 Mo. App. 57; *Warmington v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159. REVIEWED IN *Williams v. Kansas City, S. & M. R. Co.*, 37 Am. & Eng. R. Cas. 329, 96 Mo. 275, 9 S. W. Rep. 573.

Notwithstanding a person is guilty of negligence in going on a track without looking or listening for a train, still the company will be liable for his death caused by backing its train on him if it could have avoided the accident by having observed the provisions of an ordinance of the city in which the accident occurred requiring it to have a man stationed on the end of its train to give danger signals when backing through the city. *Bergman v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 588, 88 Mo. 678.—FOLLOWED IN *Brooks v. Hannibal & St. J. R. Co.*, 35 Mo. App. 571.

A failure, in violation of municipal regulations, to keep a brakeman and a lookout on a train, which contributes directly to the injury, may render the defendant liable, notwithstanding the plaintiff's negligence in not looking for the train, if by the observance of such regulation the accident could have been avoided. *Merz v. Missouri Pac. R. Co.*, 14 Mo. App. 459; affirmed in 88 Mo. 672.

284. Where team becomes frightened.*—Where a company has constructed its track along a highway which constitutes the only means of ingress to and egress from an adjacent landowner's farm, and has left excavations and embankments in the highway, in violation of its statutory duty to restore it, the act of a member of the landowner's family in using the highway under such circumstances does not of itself constitute contributory negligence. *So held*, in a case where plaintiff was injured by his horse becoming frightened at a hand-car negligently managed. *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 19 N. E. Rep. 310, 2 L. R. A. 450.

A woman was driving near a crossing, and stopped some distance from the track, and was signaled by a flagman to come on, which she did, though she knew a train was approaching. When her horse had reached the first track the flagman stopped her and the horse became frightened, and in turning

* See also *ante*, 15, 16, 139, 140.

Frightening team at crossing. Contributory negligence, see 24 AM. & ENG. R. CAS. 479, *abstr.*

upset the carriage. There was evidence tending to show that if the flagman had not interfered she would have crossed in safety. *Held*, that it was error to decide, as a matter of law, that she was guilty of contributory negligence. *Buchanan v. Chicago, M. & St. P. R. Co.*, 35 *Am. & Eng. R. Cas.* 378, 75 *Iowa* 393, 39 *N. W. Rep.* 663.

Plaintiff lived near a crossing and was familiar with the operation of trains. When he was a reasonably safe distance away he saw a freight train a short distance from the crossing backing toward him, but drove on until his horse came to the track. The horse became frightened; and after attempting to back him the horse turned and threw plaintiff out. *Held*, that he could not recover. *Whitney v. Maine C. R. Co.*, 69 *Me.* 208.—*QUOTED IN* *Lesan v. Maine C. R. Co.*, 23 *Am. & Eng. R. Cas.* 245, 77 *Me.* 85.

Plaintiff stopped his horse when fifty feet away from the track, and the horse became frightened at the approach of a train, and ran away and injured him. *Held*, that the fact of stopping where he did does not show a want of due care, as a matter of law. *Herrick v. Sullivan*, 120 *Mass.* 576.

Plaintiff was driving at a crossing with which she was familiar, with a horse familiar with the cars and entirely manageable. She saw the approaching train and calculated the chances of getting over, and urged her horse forward by striking it with the lines, and succeeded in clearing the track; but the horse became restive at the blowing of the train whistle, whereupon her sister, who was riding with her, seized the reins, and while the horse was in their joint management the carriage struck a post and threw plaintiff out and injured her. *Held*, that a nonsuit was properly granted. *Campbell v. New York C. & H. R. R. Co.*, 21 *N. Y. S. R.* 665, 4 *N. Y. Supp.* 265, 51 *Hun* 642; *affirmed in* 130 *N. Y.* 631, *mem.*, 29 *N. E. Rep.* 150, 40 *N. Y. S. R.* 982.—*DISTINGUISHING* *Thompson v. New York C. & H. R. R. Co.*, 110 *N. Y.* 636, 16 *N. Y. S. R.* 869.

Plaintiff drove in the daytime upon a track within forty feet of an approaching train, and upon his horse becoming frightened he attempted to turn it around, when the wheel of the carriage was struck by the train. *Held*, that he could not recover, whether the accident was due to carelessly driving on the crossing or through losing control of his horse. *Schwartz v. Hudson River R. Co.*, 4 *Robt. (N. Y.)* 347.

It is contributory negligence for one to attempt to drive across a track in front of a train engine that partially covers the crossing, though leaving space enough for a team to pass; and there can be no recovery for an injury which results from the team taking fright. *Fl. Worth & D. C. R. Co. v. Taliaferro*, 4 *Tex. App. (Civ. Cas.)* 545, 19 *S. W. Rep.* 432.

285. Imputed negligence*—Where party injured is driven by third person.—Plaintiff was injured at a crossing in the daytime, while riding in an open carriage driven by another. He testified that he did not see the sign at the crossing, though plainly visible, and that he had a steady horse and a careful driver. *Held*, not sufficient to show due care in the absence of evidence that the driver looked for trains. *Allyn v. Boston & A. R. Co.*, 105 *Mass.* 77, 2 *Am. Ry. Rep.* 399.—*FOLLOWING* *Butterfield v. Western R. Corp.*, 10 *Allen (Mass.)* 532.—*APPROVED IN* *Haines v. Illinois C. R. Co.*, 41 *Iowa* 227. *DISTINGUISHED IN* *Paducah & M. R. Co. v. Hoehl*, 12 *Bush (Ky.)* 41; *Cohen v. Eureka & P. R. Co.*, 14 *Nev.* 376. *EXPLAINED IN* *Noyes v. Boscawen*, 64 *N. H.* 361. *NOT FOLLOWED IN* *Ormsbee v. Boston & P. R. Corp.*, 14 *R. I.* 102, 51 *Am. Rep.* 354. *QUOTED IN* *Tully v. Fitchburg R. Co.*, 14 *Am. & Eng. R. Cas.* 682, 134 *Mass.* 499; *Durbin v. Oregon R. & N. Co.*, 32 *Am. & Eng. R. Cas.* 149, 17 *Oreg.* 5.

Plaintiff rode in a wagon at the invitation of the driver. He sat with his back to the driver while the vehicle was approaching a crossing at a fast trot. He knew that they were approaching a crossing and that a train was expected, yet he did not look, or warn the driver, or ask him to stop or listen, or take any precaution whatever. *Held*, that plaintiff's contributory negligence precluded a recovery. *Dean v. Pennsylvania R. Co.*, 39 *Am. & Eng. R. Cas.* 697, 129 *Pa. St.* 514, 18 *Atl. Rep.* 718.

Where the parents of a boy aged about nine years intrusted him with a neighbor, and the two latter, in the neighbor's wagon, while crossing a track, were struck by a

* See also title IMPUTED NEGLIGENCE.

Imputed negligence. Driver and passenger in public carriage, see note, 45 *Am. & Eng. R. Cas.* 180.

Injury at crossings. Imputed negligence of third party, see 55 *Am. & Eng. R. Cas.* 221, *abstr.*

Injury at crossings. When negligence of driver of vehicle imputed to other occupants, see 49 *Am. & Eng. R. Cas.* 455, *abstr.*

passing train going at its ordinary speed, and the boy killed, and the proof showed that the train was in plain view for a considerable distance before reaching the crossing, and that a bell was rung as required by law—*held*, that the company was not responsible. *Toledo, W. & W. R. Co. v. Miller*, 76 Ill. 278.—QUOTED IN *Chicago & N. W. R. Co. v. Schumilowsky*, 8 Ill. App. 613.

Plaintiff was in the employ of another lady, who was driving the carriage with plaintiff in the back seat in care of a child. She did not look or listen for trains as they approached the railroad track, but there was nothing to show that any act of hers would have avoided the accident; but others in the carriage did look and listen for trains. *Held*, that whether there was contributory negligence on her part was for the jury. *Crawford v. Delaware, L. & W. R. Co.*, 22 J. & S. (N. Y.) 262.

The rule requiring a traveler on a highway, on approaching a crossing, to have senses alert to discover and avoid danger from an approaching train, is not relaxed in favor of one who is being carried in a vehicle owned and driven by another; it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger and avoid it, if practicable. *Brickell v. New York C. & H. R. R. Co.*, 42 Am. & Eng. R. Cas. 107, 120 N. Y. 290, 24 N. E. Rep. 449, 30 N. Y. S. R. 932; *affirming* 46 Hun 678, 12 N. Y. S. R. 450.—QUOTING *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 202.—APPROVED IN *Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97. DISTINGUISHED IN *McCaffrey v. Delaware & H. Canal Co.*, 41 N. Y. S. R. 221, 62 Hun 618, 16 N. Y. Supp. 495.

Where, therefore, in an action for an injury occasioned by a collision at a crossing, it appeared that plaintiff was riding in a buggy, seated by the side of the driver, who had been hired to carry him; that an approaching train could be seen for some distance from the crossing, the location of which was well known to both; but that neither made any effort, by looking or listening, to discover such approach after they came within 200 feet of the crossing—*held*, that plaintiff was properly nonsuited. *Brickell v. New York C. & H. R. R. Co.*, 42 Am. & Eng. R. Cas. 107, 120 N. Y. 290, 24 N. E. Rep. 449, 30 N. Y. S. R. 932; *affirming* 46 Hun 678, 12 N. Y. S. R. 450.

Where the plaintiff sues to recover damages for the destruction of a portable engine which was stalled whilst attempting to pass over a defective crossing, and with which a train collided, the fact that his driver did not inspect the crossing to see whether the company had discharged its duty by keeping it in proper repair, or examine his watch to see whether any train was due, is not sufficient to show contributory negligence on his part, when it appears that he went upon the track to see whether any train was approaching before he attempted to cross. *Bullock v. Wilmington & W. R. Co.*, 42 Am. & Eng. R. Cas. 93, 105 N. Car. 180, 10 S. E. Rep. 988.—FOLLOWED IN *Lay v. Richmond & D. R. Co.*, 42 Am. & Eng. R. Cas. 110, 106 N. Car. 404, 11 S. E. Rep. 412.

3. When View of Track is Obstructed.*

286. Generally.—The law requires a listening as well as looking for coming trains at a highway crossing, and obstruction of vision is no defense against a failure to listen. *Pennsylvania R. Co. v. Mooney*, 39 Am. & Eng. R. Cas. 612, 126 Pa. St. 244, 17 Atl. Rep. 590.

One who drives his team upon a track where the view is obstructed, and is injured by a train running at less speed than allowed by a city ordinance, and where the statutory signals are given, cannot recover. *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114.—OVERRULING *Nashville & D. R. Co. v. Comans*, 45 Ala. 437.—FOLLOWED IN *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142.

Whether a person killed at a public crossing was bound to do more than look for a flagman and observe the absence of any signal of danger in order to have been in the exercise of ordinary care, especially when the view was obstructed, is a question of fact. The flagman's duty is to know of the approach of trains, and to give timely warning to persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty. *Chicago & A. R. Co. v. Adler*, 39 Am. & Eng. R. Cas. 666, 129 Ill. 335, 21 N. E. Rep. 846; *affirming* 28 Ill. App. 102.

It was error to instruct that if the view was obstructed and there was a failure to ring the bell or sound the whistle within

* See also *ante*, 150, 151.

eighty rods of the crossing, the jury might infer want of contributory negligence in attempting to cross the track under any circumstances which would have made it reasonably safe on the supposition that the engine and train were eighty rods away. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.

It appeared that the highway upon which plaintiff's son was riding crossed the defendant's track by a grade which it took some time to ascend. The son testified that before mounting the grade he listened and looked, but heard nothing or saw nothing of the approaching train. Other persons behind him at the time saw the smoke of said train, but it appeared that intervening objects might have prevented his seeing it. *Held*, that under all the facts of the case the court could not say that plaintiff's son had been guilty of contributory negligence. *Indianapolis & V. R. Co. v. McLin*, 8 Am. & Eng. R. Cas. 237, 82 Ind. 435.

287. Care to be observed, generally.*—The fact that one is approaching a track, with the view obstructed, does not excuse his neglect to stop and listen, but makes his duty to do so the greater. *Pennsylvania Co. v. Morel*, 40 Ohio St. 338. *Beyel v. Newport News & M. V. R. Co.*, 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532.—QUOTING *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis. 216.

If the view of the track is limited and partially obstructed, greater care is required on the part of a traveler than would be if he had an open and extended view of the same. *Atchison, T. & S. F. R. Co. v. Townsend*, 35 Am. & Eng. R. Cas. 352, 39 Kan. 115, 17 Pac. Rep. 804.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1.—*Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.

The care must be in proportion to the increase of danger that may come from the use of a highway at such a place. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.

And also those in charge of the train

should approach the crossing at a less rate of speed and use increased diligence to give warning of its approach. *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.—REVIEWING *Continental Imp. Co. v. Stead*, 95 U. S. 163; *Louisville, C. & L. R. Co. v. Goetz*, 79 Ky. 442.

When the track and crossing are so situated that the approach of a train cannot be seen, it may be the duty of a person about to cross to stop and look, to ascertain if a train is coming. *Pennsylvania Co. v. Frana*, 112 Ill. 398.—QUOTED IN *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20.

It is especially the duty of a traveler to look and listen before attempting to cross a track at a crossing known to him to be dangerous from its obstructed view and the conformation of its surroundings rendering it difficult to hear. *McBride v. Northern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 146, 19 Oreg. 64, 23 Pac. Rep. 814.

One attempting to cross a track at a familiar crossing, where the view is obstructed, cannot recover for an injury received if he fails to stop and look and listen for trains before going on the track; and such failure cannot be excused by the fact that one train has just passed and another is not expected. *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5, 11 Am. St. Rep. 778, 17 Pac. Rep. 5.—QUOTING *Salter v. Utica & B. R. Co.*, 75 N. Y. 273; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. 226; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 290; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Allyn v. Boston & A. R. Co.*, 105 Mass. 79.

Common prudence requires that one walking across a track at a crossing should look for approaching trains, and his failure to do so, when unexcused by any other fact than that the view was obstructed until he came within six feet of the track, is negligence. *Clark v. Northern Pac. R. Co.*, 47 Minn. 380, 50 N. W. Rep. 365.

A traveler walking along a track upon a street is bound to use reasonable prudence. If he can see he is bound to look; if he can hear he is bound to listen; ordinarily, he is required to both look and listen. But if, without his fault, he is for the time being deprived of making full use of his eyes, and he is at a place where he can hear the ringing of the bell or the sounding of a whistle,

* See also ante, 193, 245.

Rule requiring persons to stop, look, and listen before crossing track. Approaching track where view is obstructed, see 32 Am. & Eng. R. Cas. 156, *abstr.*

and it is at a place where it is the usual custom, as well as the requirement of the law, for the railroad company to ring its bell or blow its whistle, and he does listen, then he would not be guilty of negligence from the simple fact that without any fault on his part he was for the time being deprived of the sense of sight to such an extent that he could not see the approach of a locomotive. *Selep v. Virginia & T. R. Co.*, 13 Nev. 106.

288. — by persons driving.—If the traveler cannot see the track by looking out from his carriage he should get out and lead his horse. *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 6 Am. Ry. Rep. 158.

Where a traveler is about to cross a track on a public crossing, and at hours when trains are passing, he should, if he cannot see the track, listen, and if necessary for that purpose, should stop. *Kelly v. Chicago & A. R. Co.*, 88 Mo. 534.

Where one's business requires him to drive over a track frequently it is his duty to look and listen for trains each time that he crosses, if the lapse of time since he last looked is more than enough to enable the train, going at an ordinary speed, to cover the space of track which is visible from any attainable point. *Chicago, B. & Q. R. Co. v. Florens*, 32 Ill. App. 365.

If the view of a traveler on the highway approaching a crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, and he knows that a train is due about that time, and is unable to hear the approaching train when his team is in motion, either because of the wind or noises in the vicinity made by his own wagon, or by other causes, ordinary care requires him to stop his team while he may do so and listen for the train. *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.—**APPROVING Mantel v. Chicago, M. & St. P. R. Co., 33 Minn. 62; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401; *Griffin v. Chicago, R. I. & P. R. Co.*, 68 Iowa 638; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Connelly v. New York C. & H. R. R. Co.*, 88 N. Y. 346; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Merkle v. New York, L. E. & W. R. Co.*, 49 N. J. L. 473, 9 Atl. Rep. 680; *Northern Pac. R. Co. v. Holmes*, 3 Wash. T. 202, 14 Pac. Rep. 688; *Kennedy v. Chicago & N. W. R. Co.*, 68**

Iowa 559. **DISTINGUISHING** *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269; *Urbanek v. Chicago, M. & St. P. R. Co.*, 47 Wis. 59; *Eilert v. Green Bay & M. R. Co.*, 48 Wis. 606.—**DISTINGUISHED IN** *Winstanley v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856. **QUOTED IN** *Beyel v. Newport News & M. V. R. Co.*, 34 W. Va. 538. **REVIEWED IN** *Gunn v. Wisconsin & M. R. Co.*, 70 Wis. 203, 35 N. W. Rep. 281.

Plaintiff was injured in attempting to drive across a railroad in a city, where there were two tracks, by being struck by a train on the second track. The road was so constructed that the approaching trains could not be seen until about the time one reached the first track; but the evidence showed that plaintiff looked straight ahead. *Held*, that it was his duty to look up and down the track as far as he was able. *Whalen v. New York C. & H. R. R. Co.*, 58 Hun (N. Y.) 431, 35 N. Y. S. R. 556, 12 N. Y. Supp. 527.

A person who, approaching a crossing which he knows to be dangerous, leaves his own team, no matter how gentle, to make the crossing without a driver, goes forward to take a seat upon another sleigh, and makes no effort to look or listen for a train, is guilty of gross negligence, and cannot recover for an injury caused by a collision with his team, even though the train was negligently run, and though it could not have been seen by him upon approaching the crossing. *Gunn v. Wisconsin & M. R. Co.*, 70 Wis. 203, 35 N. W. Rep. 281.—**REVIEWING** *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis. 216.

When the railroad track is hidden from the view of an approaching traveler for some considerable distance, and the noise made by the wagon upon which the traveler is riding is such as to interfere with his hearing the approach of a train, it is his absolute duty to stop his team and listen before attempting to cross the track. *Abbot v. Duwinnell*, 74 Wis. 514, 43 N. W. Rep. 496.—**REVIEWING** *Duame v. Chicago & N. W. R. Co.*, 72 Wis. 523.

289. — Illustrations.—Where the evidence shows that plaintiff placed himself in peril by driving his wagon and team on a crossing without looking out for the approaching trains, at a place where his view was so obstructed that he could not see a locomotive which was approaching and

near at hand, and by which he was struck and injured, it was such negligence as precludes a recovery, unless the defendant could have averted the injury by the use of all means which were reasonably capable of adoption for the purpose. *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114.—QUOTING *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500; *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74. REVIEWING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.—QUOTED IN *Patnode v. Harter*, 20 Nev. 303, 21 Pac. Rep. 682.

The plaintiff, who was familiar with a crossing, drove rapidly towards it at a time when he knew an express train was due. The view was obstructed at the crossing so that a train on the road could not be seen by the plaintiff until he reached it, and even then but a short distance off. The flagman came out as he approached, held up his hands, and warned him not to come on; but plaintiff testified that he did not hear what he said. He did not stop on approaching the track, but merely slackened his speed and then drove on. The express train passed at high speed and without sounding any signal just as plaintiff was passing, struck the hind wheels of his wagon, and threw him out, inflicting injuries. *Held*, that plaintiff was guilty of contributory negligence *per se*. *Baltimore & O. R. Co. v. Hobbs*, (Md.) 19 Am. & Eng. R. Cas. 337.—QUOTING *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.

Plaintiff was guilty of contributory negligence in attempting to cross a track at a crossing so obstructed by intervening objects that he could not see a train approaching from one direction until he was within 20 or 25 feet of the crossing, and then only for a few rods up the track, without first stopping his team and taking some precaution to see if a train, which he knew was about due, was approaching. *Brady v. Toledo, A. A. & N. M. R. Co.*, 81 Mich. 616, 45 N. W. Rep. 1110.—REVIEWED IN *Van Auker v. Chicago & W. M. R. Co.*, 96 Mich. 307.

One who approaches a crossing at a locality familiar to him, where the track cannot be seen, and where the noise of an approaching train, if close, would drown the noise of his buggy, and who does not stop to listen for the train nor look for it until upon the side track eight and a half feet from the track, although warned in a

manner to attract his attention, is guilty of such contributory negligence as will preclude a recovery for an injury sustained from a passing train while attempting to cross. *Hixson v. St. Louis, H. & K. R. Co.*, 80 Mo. 335.

290. Approaching crossing in covered conveyance.—It is contributory negligence for one to knowingly approach a track with the top of his carriage up and driving fast, without any precautions or thought of the railroad. *McCall v. New York C. R. Co.*, 54 N. Y. 642.—APPROVED IN *Haines v. Illinois C. R. Co.*, 41 Iowa 227.—See also *Canfield v. New York C. & H. R. R. Co.*, 46 N. Y. S. R. 911, 19 N. Y. Supp. 839.

Failure of a traveler in a covered buggy to let down his buggy-top before starting up, after stopping his horse at the sign-board of a crossing, and looking each way for trains—*held*, not, as matter of law, negligence. *Stackus v. New York C. & H. R. R. Co.*, 79 N. Y. 464; *reversing* (P) 7 Hun 559.

One who approached a railroad at a point in a town where he had often crossed, muffled in his coat within the covered top of his wagon, taking no notice of the railroad, and drove slowly upon the track without stopping or looking out, was guilty of negligence. *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.—DISTINGUISHED IN *Baughman v. Shenango & A. R. Co.*, 6 Am. & Eng. R. Cas. 51, 92 Pa. St. 335, 37 Am. Rep. 690.

Where it is shown that the deceased, possessed of all his faculties and knowing the existence and location of the railroad, and presumably familiar with the time of the trains running thereon, approached the crossing in a covered wagon, with no opening except in front, without stopping still at any point to look or listen for an approaching train, and for a distance of more than forty yards from such crossing drove his team at a trot, without stopping or looking, until he reached the crossing where he was run over and killed, such conduct is contributory negligence on the part of the deceased. *Terre Haute & I. R. Co. v. Clark*, 6 Am. & Eng. R. Cas. 84, 73 Ind. 168.—DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Martin*, 82 Ind. 476.

One driving a covered wagon in which there were boxes containing a large number of loose bottles which rattled, in attempting to cross a track upon which he could

not see an approaching train until he came within six or eight feet of the track, was killed. *Held*, that he was guilty of contributory negligence; inasmuch as he could not see an approaching train in any considerable distance from the track, ordinary prudence required him to stop the noise of his wagon when he was near enough to the railroad to ascertain by listening whether there was any danger or not. *Merkle v. New York, L. E. & W. R. Co.*, 49 N. J. L. 473, 9 Atl. Rep. (80), & 100 Fed. Rep. 346.—APPROVED IN *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

A person driving in a covered wagon through the streets saw a train pass at a street crossing and observed the gate raised. He drove to within thirty feet of the track, where the view was somewhat obstructed, and not seeing or hearing any train drove on the track, where his horse was killed and his wagon wrecked by a passing train, ringing no bell and sounding no whistle. *Held*, that the question of contributory negligence was properly left to the jury. *Glushing v. Sharp*, 19 Am. & Eng. R. Cas. 372, 96 N. Y. 676.—APPLIED IN *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

Plaintiff, in a covered wagon open at each end, drawn by two horses, was traveling on a street parallel with defendant company's track. On reaching its intersection with another street, and being about to cross the track, he looked up and down for trains, and seeing none, turned to pass over at the crossing. A train was coming in on time at four or five miles an hour; a box-car on a side track in some degree prevented the engineer from seeing the wagon until within 25 or 30 feet, when he at once did all he could to stop; but a collision occurred between the engine and the hind end of the wagon, which was slowly going across the track, breaking the wagon and plaintiff's thigh. *Held*, that though defendant may have been guilty of some negligence in leaving the box-car on the siding, still plaintiff's own negligence in turning short and crossing the track slowly without having used reasonable care to ascertain if a train was coming was the proximate cause of the collision and he cannot recover. *Nash v. Richmond & F. R. Co.*, 82 Va. 55.

Plaintiff's intestate undertook to drive across a track at a familiar crossing, in a wagon with covered sides preventing his

looking either way. A freight train lay on a siding, indicating that it was waiting for another train to pass. He was seventy-one years old and drove upon the track without stopping or looking and listening in any way and was killed. There was a conflict of evidence as to whether the statutory signals were given. *Held*, that there was such contributory negligence as to defeat a recovery. *Horn v. Baltimore & O. R. Co.*, 54 Fed. Rep. 301, 6 U. S. App. 381, 4 C. C. A. 346.

291. Not bound to look where it would be useless.—(1) *Generally*.—The neglect or failure of a person approaching a railway crossing to look or listen for an approaching train is mere evidence on the question of contributory negligence, like any other to be submitted to the jury. To omit looking and listening when neither can be of any avail, as when the track is hidden from sight or other sounds drown the noise of the cars, is not contributory negligence. The omission to take such precautionary steps does not necessarily and as a question of law constitute negligence, but is proper to be considered by the jury as evidence bearing on the question as one of fact. *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20.—QUOTING *Laverenz v. Chicago, R. I. & P. R. Co.*, 56 Iowa 689; *Pennsylvania Co. v. Frana*, 112 Ill. 398.

Negligence is not imputable to one for attempting to walk or drive over a crossing without stopping and looking for a train, when by doing so he could not have seen the train which occasioned the injury. *Petty v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 618, 88 Mo. 306.—APPLIED IN *Jennings v. St. Louis, I. M. & S. R. Co.*, 112 Mo. 268.—*Dahlstrom v. St. Louis, I. M. & S. R. Co.*, 108 Mo. 525, 18 S. W. Rep. 919.

Unless he actually knew the train was approaching. *Norfolk & W. R. Co. v. Burge*, 32 Am. & Eng. R. Cas. 101, 84 Va. 63, 4 S. E. Rep. 21.

Where a party is driving on the highway and could not have seen or heard an approaching train until his horses were within four feet of the track, and too near to avoid a collision, he is not, as a matter of law, guilty of contributory negligence in failing to look or listen. *Winstanley v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856.—AP-

PROVED IN *Siegel v. Milwaukee & N. R. Co.*, 79 Wis. 404.

While a traveler on a highway on approaching a railroad crossing is bound to look and listen for an approaching train before undertaking to cross, it is only where it appears from the evidence that he might have seen had he looked or might have heard had he listened, that a jury, in the absence of evidence upon the question, is authorized to find that he did not look and did not listen. *Smedis v. Brooklyn & R. B. R. Co.*, 8 Am. & Eng. R. Cas. 445, 88 N. Y. 13; affirming 23 Hun 279.—DISTINGUISHED IN *Rodrian v. New York, N. H. & H. R. Co.*, 28 N. Y. S. R. 625, 7 N. Y. Supp. 811. QUOTED IN *Cranston v. New York C. & H. R. R. Co.*, 39 Hun (N. Y.) 308.

(2) *Instructions*.—It is correct to charge the jury that one about to cross a track is not bound, as a matter of law, to look for trains if they could not have been seen or to listen if they could not have been heard. *Cranston v. New York C. & H. R. R. Co.*, 39 Hun (N. Y.) 308; reversed in 103 N. Y. 614.—QUOTING *Smedis v. Brooklyn & R. B. R. Co.*, 88 N. Y. 13.

It was not error to refuse to instruct the jury that it was the plaintiff's duty to stop and look for an approaching train at a point from which the evidence shows the train would not be visible, or to refuse an instruction calling for findings as to plaintiff's mental impressions when he approached the crossing, when there was no evidence of such mental condition. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837.

An instruction that it was the duty of plaintiff when approaching the crossing to stop, look, and listen for an approaching train, and that if he did not do so in time to prevent the collision then the jury must find for defendant—*held*, to be objectionable in not requiring the jury to find as a further condition that plaintiff, by stopping, looking, and listening, could have discovered the train in time to have avoided the collision. *Johnson v. Chicago, R. I. & P. R. Co.*, 77 Mo. 546.—FOLLOWED IN *Xeenig v. Missouri Pac. R. Co.*, 19 Mo. App. 327.

292. Partial blindness.—Partial blindness on the part of one about to cross a track will not excuse him from the exercise of ordinary care, but imposes the duty of greater caution to avoid injury. *Mark*

v. Petersburg R. Co., 49 Am. & Eng. R. Cas. 418, 88 Va. 1, 13 S. E. Rep. 299.

An instruction that if plaintiff, on account of an obstruction or loss of an eye, could not, from where he stood, see the approaching train, then it was his duty to get where he could have an unobstructed view, if there was such a place in the street, and look up and down defendant's track before attempting to cross the same, and if he failed to get an unobstructed view when he could have done so, and to look up and down the track, and, by so doing, he could have avoided the injury, then such failure was negligence which would preclude his recovery, is proper on the facts of this case. Plaintiff's physical infirmity formed a portion of the circumstances which were to determine whether ordinary care was exercised by him; and such physical infirmity imposed the duty of increased vigilance in the employment of his remaining faculties. *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.

293. Where the view is obstructed by steam or smoke.*—Plaintiff testified that before attempting to cross the track he looked in the direction from which the train came, but a view of the track was obscured by smoke from a train which had just passed, going in the opposite direction; that he listened, but heard nothing indicating the approach of a train. *Held*, that the question of whether he used due care was for the jury. *Randall v. Connecticut River R. Co.*, 132 Mass. 269.

There was evidence that plaintiff, intending to take an outward train, approached a station located near a level street crossing; that a platform extended to the street from a waiting-shed opposite the station, and the space between was planked; that he came along the street and found his train at the station on the farther track stretching partly over the crossing; that the crossing gate and the platform gates on his side of the cars were both closed; that he passed the crossing gate, which did not obstruct the sidewalk, and glanced up the inward track, but saw nothing because of steam and smoke from the engine of his train; that he proceeded to cross the inward track diagonally so as to go around the rear of his train and get upon it, and while crossing was struck by an inward train and injured;

* See also *ante*, 29.

and that at the time the gateman was standing in the middle of the street with his back to the plaintiff, and the bell upon the engine of the inward train was not rung or its whistle sounded. *Held*, that plaintiff was not entitled to go to the jury. *Debbins v. Old Colony R. Co.*, 47 *Am. & Eng. R. Cas.* 531, 154 *Mass.* 402, 28 *N. E. Rep.* 274.—DISTINGUISHING *Wheelock v. Boston & A. R. Co.*, 105 *Mass.* 203.—FOLLOWED IN *Connolly v. New York & N. E. R. Co.*, 158 *Mass.* 8.

Plaintiff, who was injured at a crossing, testified that when he was within a few feet of the crossing the view of an approaching train was obscured by smoke from a tug in a river near by; that otherwise he could have seen the train. *Held*, that it was his duty to wait until the smoke passed away. *Foran v. New York C. & H. R. R. Co.*, 64 *Hun* (N. Y.) 510, 46 *N. Y. S. R.* 423, 19 *N. Y. Supp.* 417.—FOLLOWING *Heaney v. Long Island R. Co.*, 112 *N. Y.* 122.—DISTINGUISHED IN *Puff v. Lehigh Valley R. Co.*, 71 *Hun* (N. Y.) 577.

Plaintiff passed around a freight train and was struck by a hand-car which was running past a station at the rate of fifteen miles an hour without any notice or signals. Plaintiff was crossing to take passage on a train, and the view of the approaching car was obstructed both by persons and smoke and steam from the freight engine. *Held*, that the question of her contributory negligence was properly submitted to the jury. *Conklin v. New York C. & H. R. R. Co.*, 43 *N. Y. S. R.* 414, 63 *Hun* 628, 17 *N. Y. Supp.* 651.—REVIEWING *Massoth v. Delaware & H. Canal Co.*, 64 *N. Y.* 524.

Plaintiff was injured at a crossing while attempting to prevent a cow from crossing. His evidence tended to show that he looked and listened before going on the track, but that the escaping steam from an engine near by prevented his seeing an approaching train, and that he was somewhat engaged in his effort with the cow. The evidence for the defense tended to show that he either heedlessly ran on the track, or, seeing the train, he recklessly attempted to cross in front of it. *Held*, that it was proper to submit the question of contributory negligence to the jury. *Campbell v. New York C. & H. R. R. Co.*, 3 *N. Y. Supp.* 694, 19 *N. Y. S. R.* 659, 49 *Hun* 611; *affirmed in* 121 *N. Y.* 669.

Plaintiff attempted to cross, where there

were six tracks, in a covered wagon on a windy day. Box-cars lay upon one track, which came to the curbstone, and an engine with steam up stood on another track; in the other direction his view was obscured by smoke. A surveyor testified that from the first track one could see one hundred and thirty-four feet along the track, and a short distance farther could see some two thousand feet. *Held*, that this did not conclusively show contributory negligence under the circumstances, so as to prevent a submission of the case to the jury. *Canfield v. New York C. & H. R. R. Co.*, 46 *N. Y. S. R.* 911, 19 *N. Y. Supp.* 839.—APPLYING *Massoth v. Delaware & H. Canal Co.*, 64 *N. Y.* 524.

It is competent for a plaintiff to rebut a charge of contributory negligence by evidence that his view of the approaching train which injured him, was obscured by smoke as he attempted to cross the track; and this is so even where the complaint contains no allegation to that effect. *Gulf, C. & S. F. R. Co. v. Anderson*, 42 *Am. & Eng. R. Cas.* 160, 76 *Tex.* 244, 13 *S. W. Rep.* 196.

294. — by buildings, etc.—(1) *Generally*.—Contributory negligence to prevent a recovery cannot be imputed to a person approaching a crossing because he did not look for the train when his view in the direction it was approaching was obstructed by a row of houses. *Donohue v. St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 673, 91 *Mo.* 357, 2 *S. W. Rep.* 424, 3 *S. W. Rep.* 848.

When an engineer, at a distance beyond 75 feet from the crossing of a street in a city, cannot see into the street except the straight line thereof where the track crosses, and the traveler cannot see even the top of the locomotive until he gets within forty feet of the track, something more than ordinary pains to prevent accidents is incumbent on both the company and the traveler, if he is acquainted with the situation. *Freeman v. Duluth, S. S. & A. R. Co.*, 37 *Am. & Eng. R. Cas.* 501, 74 *Mich.* 86, 41 *N. W. Rep.* 872, 3 *L. R. A.* 594.

Plaintiff stopped forty-seven feet from a track where his view of an approaching train was obstructed, but listened for trains. A strong wind was blowing against the train at the time. As he started on some children near by warned him of an approaching train, but he did not understand

what they said, supposing they were only playing; and he could not see the train by reason of buildings until he was within nine feet of the track, when it was too late to avoid a collision. *Held*, that a verdict acquitting plaintiff of a charge of contributory negligence should not be disturbed. *Brown v. Rome, W. & O. R. Co.*, 1 *N. Y. Supp.* 286, 16 *N. Y. S. R.* 456, 48 *Hun* 619; *affirmed in* 121 *N. Y.* 669.

(2) *Pedestrians*.—The defendants' railway crossed a public footway on the level. Plaintiff, a foot passenger, while crossing from the down side to the up side of the railway was knocked down and injured at the crossing by a train on the up line. Owing to the position of certain buildings it was impossible for one crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line, or the six-foot, had a clear view up and down the line for several hundred yards. Plaintiff stated that before crossing he looked to the right along the down line, but admitted that he did not look to the left along the up line and that if he had looked he must have seen the train coming. The engine driver did not whistle. There was a gatekeeper at the crossing, but he gave no warning that a train was coming. *Held*, that a nonsuit was right, on the ground that the undisputed facts of the case showed that there was no negligence on the part of defendants and that plaintiff's own want of caution was the sole cause of the accident. *Davey v. London & S. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 650, 11 *Q. B. D.* 213.—*QUOTING* *Dublin, W. & W. R. Co. v. Slattery*, 3 *App. Cas.* 1155.

(3) *Persons in vehicles*.—Plaintiff was driving towards a crossing where the view in either direction was obstructed by buildings and piles of lumber and was struck by a train running without giving the statutory signals. *Held*, that there was no contributory negligence such as would justify a nonsuit. *Strong v. Sacramento & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 273, 61 *Cal.* 326.

Plaintiff, familiar with the crossing, was driving toward it, going in a northerly direction. The track was in plain sight of travelers going northward on the highway for a distance of 1000 to 1500 feet until a point about ten rods from the crossing was reached, where the view was obstructed by a farmhouse and buildings, and for the last

three rods before going upon the track the railway was visible to a person looking to the east for a distance of eighty rods. He testified that he looked to the east, but the approaching train was so near upon the wagon that he saw no means of escape. The evidence as to giving the signals was conflicting. *Held*, that the failure of the company to perform its statutory duty in sounding the whistle cannot be held in legal contemplation to have been the efficient cause of the accident. *Indiana, B. & W. R. Co. v. Hammock*, 32 *Am. & Eng. R. Cas.* 127, 113 *Ind.* 1, 14 *N. E. Rep.* 737, 12 *West. Rep.* 297.

It appeared that there were six tracks across the highway; that the plaintiff, driving at 5.30 A.M. in December, was prevented by the buildings on either side of the highway from seeing the approaching engine until he had driven onto the first track; that he then saw the engine on the further track; that the place was one across and near which engines and cars of all kinds were constantly moving; that the gates, which were arranged to swing across the highway when a train was passing and across the railroad when the highway was safe for travel, were in the night-time swung back so as to leave both the highway and the railroad open; that there was no flag or lantern at the crossing as had been usual when an engine or train of cars was about to pass while the gates were not so shut; that the plaintiff's horse was gentle; that the plaintiff did not, on seeing the engine, stop or whip up his horse, which was walking; and that he thought he could have stopped the horse on seeing the engine if he had tried. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury. *Craig v. New York, N. H. & H. R. Co.*, 118 *Mass.* 431.—*DISTINGUISHED IN* *Ormsbee v. Boston & P. R. Corp.*, 14 *R. I.* 102, 51 *Am. Rep.* 354; *Hinckley v. Cape Cod R. Co.*, 120 *Mass.* 257. *REVIEWED IN* *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.

It appeared that plaintiff's view of the track was obstructed by buildings until he came very near the track, when his horses became frightened and unmanageable and were struck by the train. *Held*, that a failure to stop before reaching the buildings could not be held contributory negligence as a matter of law. *Faber v. St. Paul, M. & M. R. Co.*, 8 *Am. & Eng. R. Cas.* 277, 29 *Minn.* 465, 13 *N. W. Rep.* 902.

Plaintiff was driving over a narrow street in the daytime where the buildings obstructed the view of an approaching train until he was within a few feet of the track. He was familiar with the surroundings and knew he was approaching a place of danger. *Held*, that the evidence failed to show that he exercised that vigilance demanded by the circumstances of the case for his own safety. *Hoffmann v. Fitchburg R. Co.*, 67 *Hun* (N. Y.) 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463.—APPLYING *Heaney v. Long Island R. Co.*, 112 N. Y. 122.

The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at G. station at about ten feet from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a freight train was then on the track near the crossing, he started off to cross it and did not hear or see anything of the approaching train until it was within about four feet of him, when he was unable to avoid it, and the bus and harness were considerably damaged. It not appearing that the driver of the train had given any warning of its approach by sounding the whistle or bell on its nearing the part of the track where it crossed the road to the station, raises a question of contributory negligence for the jury. *Bennett v. Grand Trunk R. Co.*, 7 *Ont. App.* 470.—REVIEWING *Dublin, W. & W. R. Co. v. Slaterry*, 3 *App. Cas.* 1155.

(4) — *in sleighs*.—Plaintiff was injured at a crossing while riding in a sleigh by being struck by backing box cars just after dark. There was evidence tending to show that a building obscured the view of the approaching train, and that the driver and those with him looked and listened for trains, and approached the crossing at a walk; that they saw or heard no signal, and had no notice of the approach of cars in time to escape. *Held*, that it was for the jury to determine whether they believed the witnesses, and whether the precautions taken for their own safety were reasonably sufficient. *Bolinger v. St. Paul & D. R. Co.*, 29 *Am. & Eng. R. Cas.* 408, 36 *Minn.* 418, 31 *N. W. Rep.* 856.

Plaintiff, a girl of thirteen, was injured at

a street crossing while being driven in a sleigh. She was familiar with the surroundings and the manner of running trains. The view of the approaching train was obscured by buildings, and the flagman stationed there was not in sight, and another train was blowing off steam near by. The sleigh had crossed the first track before the flagman gave any warning, when the driver attempted to back, but the sleigh caught against the rails, and before he could go forward out of danger the sleigh was struck by the train, running some thirty-five miles an hour. There was a conflict of evidence as to whether signals were given. *Held*, sufficient to support a verdict for plaintiff. *Bennett v. New York C. & H. R. Co.*, 16 *N. Y. Supp.* 765, 40 *N. Y. S. R.* 948; *affirmed in* 133 *N. Y.* 563, *mem.*

295. — by buildings or obstructions erected by company.—(1) *Generally*.—A company should not permit obstructions upon its right of way, near a crossing, which will prevent the public from observing the approach of trains. *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 *Ill.* 235.

Plaintiff was driving on the highway and stopped just behind another team to allow a train to pass. When it had passed the other team crossed, but plaintiff was struck by a wild train running in the same direction, and not exceeding a half mile behind it, or two to four minutes in time. The evidence was conflicting as to whether the second train gave any signals. The jury found as a fact that the view was obstructed by the company, and that plaintiff looked as soon as he could have seen the approaching train. *Held*, that he was not chargeable with contributory negligence. *Funston v. Chicago, R. I. & P. R. Co.*, 14 *Am. & Eng. R. Cas.* 640, 61 *Iowa* 452, 16 *N. W. Rep.* 518.

Where there are five tracks at one crossing, and the view of the fifth is obstructed by an engine-house and lumber piles until the first four have been crossed, and there is no gate or flagman, it is for the jury to say whether a traveler who is injured on the fifth fulfilled his duty by stopping, looking, and listening, before driving upon the first track, or whether he should have taken other precautions. *Lehigh & W. B. Coal Co. v. Lear*, (Pa.) 32 *Am. & Eng. R. Cas.* 74, 9 *Atl. Rep.* 267.

(2) *Piles of wood*.—Whether the piling of

wood by the side of its track in such manner as to obscure the view of approaching trains, imposes upon the company the duty of greater care or caution in running their trains, or making use of extra means of notifying those about to cross when trains are approaching, *quare*. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.

One approaching a crossing at a locality familiar to him, where the track cannot be seen on account of piles of lumber, and where the noise of an approaching train, if close, would drown the noise of his buggy, and who does not stop to listen for the train, nor look for it until upon the side track eight and a half feet from the track, although warned in a manner to attract his attention, is guilty of such contributory negligence as will preclude a recovery for an injury sustained from the passing train while attempting to cross. *Hixson v. St. Louis, H. & K. R. Co.*, 80 Mo. 335.—DISTINGUISHING *Johnson v. Chicago, R. I. & P. R. Co.*, 77 Mo. 546. FOLLOWING *Henze v. St. Louis, K. C. & N. R. Co.*, 71 Mo. 636; *Turner v. Hannibal & St. J. R. Co.*, 74 Mo. 602.

Where the company has obstructed the view at a crossing by piling up wood so that a traveler cannot see an approaching train until he is on or very near the track, one who drives upon the track and looks for trains as soon as he can see, and in other matters exercises due care, is not chargeable with contributory negligence in not first stopping his team. *Mackay v. New York C. R. Co.*, 35 N. Y. 75; *affirming* 27 Barb. 528.—APPLIED IN *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451. DISTINGUISHED IN *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119. FOLLOWED IN *Bunting v. Central Pac. R. Co.*, 14 Nev. 351. QUOTED IN *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32. REVIEWED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Ingersoll v. New York C. & H. R. R. Co.*, 6 T. & C. (N. Y.) 416, 4 Hun 277, mem.

A company has the right to use its own land for any legitimate purpose in the prosecution of its business; such a use is not unlawful or negligent, although it may obstruct the vision of those crossing its tracks. The existence of obstructions, such as large piles of wood, preventing a view of an approaching train may have a material bearing upon the question of contributory negligence, and also upon the question of

the degree of care and vigilance which the defendant was bound to exercise in the running and management of its trains, and in giving warning of its approach, but it cannot be an independent ground of recovery. *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119, 18 Am. Ry. Rep. 511.—DISTINGUISHING *Richardson v. New York C. R. Co.*, 45 N. Y. 846; *Mackay v. New York C. R. Co.*, 35 N. Y. 75.—QUOTED IN *Hamm v. New York C. & H. R. R. Co.*, 18 J. & S. (N. Y.) 78.

It seems that where a company has placed obstructions to the view upon its lands near a farm crossing known to be used to some extent by the public, and where the place is such that one lawfully using the crossing cannot see or with ordinary care otherwise discover the approach of a train, that the company is required to exercise such care as will be likely to warn of its approach, or to so manage its trains that it will not be likely to injure one so using the crossing. *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119, 18 Am. Ry. Rep. 511.—DISTINGUISHING *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 243.—APPLIED IN *Collins v. New York, N. H. & H. R. Co.*, 8 N. Y. S. R. 164. FOLLOWED IN *Collins v. New York, N. H. & H. R. Co.*, 23 J. & S. (N. Y.) 31.

296. — by moving trains.—One about to cross a track is not excused from looking and listening where the view of the track is but momentarily obscured by a train which has just passed; and especially is this true where he is familiar with the crossing and knows that another train is due about that time. *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302.

Where a highway crosses a double track, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track. *Marty v. Chicago, St. P., M. & O. R. Co.*, 32 Am. & Eng. R. Cas. 107, 38 Minn. 108, 35 N. W. Rep. 670.—QUOTED IN *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302.

If the view of an approaching train is

obstructed so that it cannot be seen until a traveler on the highway reaches the track, he is not chargeable with contributory negligence in failing to look; but this rule does not apply where the obstruction is by a passing train and only momentary. *Hamm v. New York C. & H. R. R. Co.*, 18 J. & S. (N. Y.) 78.—QUOTING *Baxter v. Troy & B. R. Co.*, 41 N. Y. 502; *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119.

Before crossing a track one is bound not only to stop, look, and listen at a place where he can see, if possible, but if familiar with the place and his view be obstructed by a passing train, he should remain until his view of the track is clear; otherwise, he is chargeable with contributory negligence. *Kraus v. Pennsylvania R. Co.*, 139 Pa. St. 272, 20 Atl. Rep. 993.—DISTINGUISHING *Philadelphia & R. R. Co. v. Carr*, 99 Pa. St. 505.

The driver of an empty coal wagon approached defendant's tracks at a crossing and waited for a freight train to pass, when the gateman raised the gates and signaled him to come on, which he did at a trot, the grade being a descending one. When he was on the third track he discovered another train approaching, and the gateman called to him to stop. He whipped up his horse, but the train struck the hind end of his wagon, and threw it on plaintiff, who was on the sidewalk near by. Held, that even if the contributory negligence of the driver of the wagon constituted a defense to plaintiff's action, the question of such negligence was for the jury. *Bond v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 637, 23 N. Y. Supp. 450, 69 Hun 476.

297. — by standing cars, generally.—(1) *Rule stated.*—Where freight cars are left on a siding near a private farm crossing, so as to obstruct the view of approaching trains, it is the duty of both the company and of persons about to cross the track to use extra care. *Thomas v. Delaware, L. & W. R. Co.*, 19 Blatchf. (U. S.) 533, 8 Fed. Rep. 729.

Where the view of a track is obstructed by cars standing on a side track, the duty is imposed upon persons approaching the crossing of exercising a higher degree of vigilance in ascertaining whether it is safe to cross. *Garland v. Chicago & N. W. R. Co.*, 8 Ill. App. 571.—QUOTED IN *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Ill. App. 407.

A person who is driving in a vehicle having stopped and listened on approaching the track, where his view was obstructed by a train of cars standing on a side track, cannot be said to be guilty of contributory negligence, as matter of law, because he did not leave his vehicle and go to a point where he could see that the track was clear; in such case the question of contributory negligence must be submitted to the jury. *Georgia Pac. R. Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230.—FOLLOWED IN *Richmond & D. R. Co. v. Vance*, 93 Ala. 144.

When a company is required to sound an alarm, or is in the habit of blowing whistles and ringing bells, the traveler in the highway has a right to rely somewhat upon the performance of this custom or duty; and if the track is obstructed temporarily by standing cars, when the traveler has looked and listened and heard no warning, and no train is expected at that time, it cannot be said, as a legal conclusion, that ordinary prudence would require that he should stop his team and go on foot upon the track, simply because he could not determine with certainty, by sight alone, that a train was not approaching. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. Cas. 89, 66 Mich. 150, 9 West. Rep. 903, 33 N. W. Rep. 161.

When the evidence tends to show that the view of a person approaching a crossing was so obstructed by freight cars placed upon a side track and partly obstructing the street that he could not see or hear an approaching train, although he stopped his horse, and looked and listened for any train that might be approaching, and used all reasonable care and caution before attempting to cross the track, the plaintiff is entitled to an instruction that, under such circumstances, he is entitled to recover, and it is error for the court merely to charge that such circumstances show that the plaintiff was not guilty of contributory negligence. *Close v. Lake Shore & M. S. R. Co.*, 37 Am. & Eng. R. Cas. 522, 73 Mich. 647, 41 N. W. Rep. 828.

Where a person is killed at a crossing, and the evidence is conflicting as to whether the train complied with its duty to whistle, and the deceased's view was obscured by a train standing on another track, there is evidence of negligence on the part of the company and the case should be left to the jury. *Dublin, W. & W. R. Co. v. Slattery*,

L. R. 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191.

(2) — *its extent and limits.*—The evidence showed that the deceased approached the crossing driving at a trot; that the view of the approaching train was obstructed by standing freight cars and by other objects, except at a single point, and that the train approached without giving signals; that the deceased first saw the train when he was on the track, and at first checked his horse and then started him again, but was struck before clearing the track. *Held*, sufficient to show due care on his part. *Hanks v. Boston & A. R. Co.*, 35 *Am. & Eng. R. Cas.* 321, 147 *Mass.* 495, 7 *N. Eng. Rep.* 139, 18 *N. E. Rep.* 218.—DISTINGUISHED IN *Fletcher v. Fitchburg R. Co.*, 149 *Mass.* 127, 3 *L. R. A.* 743, 21 *N. E. Rep.* 302.

Plaintiff was injured in attempting to drive across a track. He claimed he looked for approaching trains but could not see, and there was a conflict of evidence as to whether cars standing on another track obstructed his view. *Held*, that the question of contributory negligence was for the jury. *Petrie v. New York C. & H. R. R. Co.*, 49 *N. Y. S. R.* 279, 66 *Hun* 282, 21 *N. Y. Supp.* 159.—QUOTING *Greany v. Long Island R. Co.*, 101 *N. Y.* 419.

An idiot, and under the influence of liquor, crossed a track at a usual place of crossing in or near a populous town, and was struck and injured by a passenger train running at about the usual speed of twenty or twenty-five miles an hour. Owing to standing cars upon another railroad he could not have seen the train until within six feet of the track he was crossing. It did not appear how near the train was to him, nor whether the engineer saw or could have seen him in time to have stopped. *Held*, that plaintiff could not recover in any view of the case. *Daily v. Richmond & D. R. Co.*, 42 *Am. & Eng. R. Cas.* 124, 106 *N. Car.* 301, 11 *S. E. Rep.* 320.

The evidence showed that an injury was caused by a car moving on the track unattended by an engine or any person, and that plaintiff's view of the track was obstructed by cars standing on the side track. *Held*, that whether plaintiff should have stopped and listened before crossing was for the jury. *Abbot v. Dwinnell*, 74 *Wis.* 514, 43 *N. W. Rep.* 496.

Plaintiff passed between freight cars that

stood on a siding on either side of a crossing, which prevented his seeing a train approaching on another track, and was struck by the train. He claimed that he did not stop and look after passing the cars because there was not space enough between the tracks for him to safely do so. *Held*, that in that event he should have crossed at some other place where he could have made the necessary observation. *Owens v. Pennsylvania R. Co.*, 41 *Fed. Rep.* 187.

208. — *Illustrations.*—The plaintiff went upon a private crossing of a chemical company without license or invitation and knew that the train which caused his injuries was expected, but his view was obstructed by cars placed by the chemical company on the track laid for its use. *Held*, that as there was nothing to induce the plaintiff to believe that the place was one where signals should have been given under the statute, he must be deemed guilty of contributory negligence in going upon the track without ascertaining whether the train was coming. *Donnelly v. Boston & M. R. Co.*, 42 *Am. & Eng. R. Cas.* 182, 151 *Mass.* 210, 24 *N. E. Rep.* 38.—DISTINGUISHING *Mayo v. Boston & M. R. Co.*, 104 *Mass.* 137.

One attempting to cross a track at a point where his view was shut off by standing cars and sheds was killed by a train two hours behind time, which came at high speed from a direction opposite to that in which he was looking. Several persons testified that they heard no warning signal. *Held*, that the question of liability should go to a jury. *Guggenheim v. Lake Shore & M. S. R. Co.*, 22 *Am. & Eng. R. Cas.* 546, 57 *Mich.* 488, 24 *N. W. Rep.* 827.

Plaintiff was injured while crossing a track with her employer who was driving. The evidence showed that she was carrying a child and that freight cars on a side track obscured the view, and she testified that she did not know she was approaching a track. *Held*, that it was for the jury to determine whether she exercised proper care. *Crawford v. Delaware, L. & W. R. Co.*, 1 *N. Y. Supp.* 339; affirmed in 121 *N. Y.* 652, *mem.*, 24 *N. E. Rep.* 1092, *mem.*

The evidence showed there were three tracks, two of them used for the passage of trains and the third a side track. At the time of the accident twenty freight cars stood on the side track. The driver both looked and listened, but could not hear or

see an approaching train. *Held*, that the question of negligence under all the facts of the case was for the jury. *Crawford v. Delaware, L. & W. R. Co.*, 13 N. Y. S. R. 298, 23 J. & S. 255.

A woman in passing a crossing where there were several tracks, but with an intermediate space of forty-five feet between them, had arrived at a safe position between the tracks, but where her view was shut off by standing cars, when she was summarily directed by a flagman to move on; but as she did so the horse became unmanageable at the near approach of a train, and she was struck and killed. *Held*, that a nonsuit on the ground of contributory negligence was properly refused. *Henning v. Caldwell*, 45 N. Y. S. R. 373, 18 N. Y. Supp. 339.

The evidence showed that plaintiff approached slowly, and when near the track stopped, looked, and listened, but neither saw nor heard anything that would indicate an approaching train; that his view was obstructed by cars on the track, but that the gates were up. There was a conflict of evidence as to whether the signal was given. *Held*, sufficient to support a verdict for plaintiff. *Anderson v. New York, L. E. & W. R. Co.*, 6 N. Y. Supp. 182, 25 N. Y. S. R. 158; *affirmed in* 125 N. Y. 701, *mem.*

Plaintiff testified that he could not see the main track until he passed certain standing cars on a siding, and that he looked both ways after he passed the cars, but did not see an approaching train; but there was other evidence that the track could be seen for twenty-one feet before reaching it, and evidence tending to show that plaintiff was intoxicated. *Held*, that a verdict in plaintiff's favor should be set aside as against the weight of evidence. *Nolan v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 848, 61 Hun 623, 16 N. Y. Supp. 826.—*REVIEWING Mulligan v. New York C. & H. R. R. Co.*, 33 N. Y. S. R. 534.

Plaintiff's intestate was killed at a crossing where a gate was maintained on either side, but both operated by the same person, the street being one hundred and forty-three feet wide, the first gate being open, but the other not. The brakeman on the rear of the approaching train saw the intestate and signaled him to stop, but his view was obstructed both by his covered wagon and intervening box-cars, and there was no evidence that he could see the brakeman or even the train. *Held*, that the

question of contributory negligence was for the jury. *Haywood v. New York C. & H. R. R. Co.*, 13 N. Y. Supp. 177, 59 Hun 617, 35 N. Y. S. R. 748; *affirmed in* 128 N. Y. 596, *mem.*, 38 N. Y. S. R. 1011.—*QUOTING Grippen v. New York C. R. Co.*, 40 N. Y. 34. *REVIEWING Palmer v. New York C. & H. R. R. Co.*, 112 N. Y. 234, 19 N. E. Rep. 678.

It appeared that there were in the neighborhood of the crossing a factory and a foundry, both making a noise like a running train. Defendant asked the court to instruct the jury, on an issue as to contributory negligence, "that if the cars on the track cut off plaintiff's vision, and the noise of the factory and machine-shop drowned other noises, it was the duty of plaintiff to use her sense of hearing all the more cautiously, and if she failed to use greater than ordinary caution the answer should be 'Yes.'" It was not error to substitute for the words "the answer to the second issue should be 'Yes,'" the words "it would be negligence." *Alexander v. Richmond & D. R. Co.*, 112 N. Y. 234, 19 N. E. Rep. 896.

The tracks of two companies crossed a highway at the place where the plaintiff was injured. When plaintiff came to the first set of tracks he found the view of the second, defendant's tracks, partially obstructed by standing cars. The gates provided at the crossing were up. Plaintiff stopped, looked, and listened, and while so doing saw a hand-car pass on defendant's tracks. He then started on, and saw nothing until he was struck by a second hand-car which was going at a rapid rate and gave no warning of its approach. It was impossible to say, as a matter of law, that it was plaintiff's duty to stop again before going on defendant's tracks, or that he might have stopped at a better place. *Held*, that contributory negligence on the part of the plaintiff was not clearly shown, and it was proper to refuse a nonsuit. *Lake Shore & M. S. R. Co. v. Frantz*, 39 Am. & Eng. R. Cas. 628, 127 Pa. St. 297, 18 Atl. Rep. 22.

A traveler, before sunrise on a foggy and dark morning, approached a crossing in a city, stopped about ten steps from it, and looked and listened without getting out of his wagon. The view of the track was somewhat obstructed by cars standing on a siding; the train came more rapidly than the city ordinances allowed, and there was snow on the track; there was evidence that the bell was not sounded; the wagon was

struck and the horse killed. *Held*, that under the circumstances the question of contributory negligence was for the jury. *Pennsylvania R. Co. v. Ackerman*, 74 Pa. St. 265, 7 Am. Ry. Rep. 165.

200. — by cuts.—Trains must run where the view is obstructed by cuts, embankments, trees, and other things; and he who does not choose to stop and listen, where he cannot see, must suffer the consequence of his own negligence. *Shufelt v. Flint & P. M. R. Co.*, 96 Mich. 327, 55 N. W. Rep. 1013.

In an action to recover for injuries occasioned to the plaintiff while driving over a railroad crossing, by reason of the negligence of the company defendant in failing to give sufficient warning of an approaching train by which plaintiff's wagon was destroyed, the evidence showed that, owing to a cut, it would have been impossible for the plaintiff to see the approaching train, no matter how much pains he had taken, in time to avert the accident. *Held*, that under these circumstances the plaintiff could not be held guilty of contributory negligence for failing to halt his team and look and listen for an approaching train before attempting to cross the track. *Pittsburgh, C. & St. L. R. Co. v. Martin*, 8 Am. & Eng. R. Cas. 253, 82 Ind. 476.—**DISTINGUISHING** *Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168.—**DISAPPROVED IN** *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280.

The evidence tended to show that plaintiff, in company with another boy, was driving a horse attached to an open wagon, when it came into collision with the defendant's train at a grade crossing; that the street on which he was riding sloped downward through a cut for one hundred feet until it entered upon the track; that, for a portion of this distance, the smoke-stack of an approaching engine could be seen through a picket fence, and, at a distance of from fifteen to thirty-five feet, a clear view of the track could be had; and that a train could be heard by a person in that street before it came in sight through the fence. The plaintiff testified that he drove into the street towards the track on an easy trot; that, when he came to the crest of the hill, about one hundred feet from the track, he pulled up, and afterwards drove at a rate half way between a trot and a walk; that the other boy pointed out to him a house,

which had been hidden from their view by an intervening building until they were over the crest of the hill; that he looked at the house and then turned to his horse; that the other boy called his attention to the train when he was within from ten to forty-six feet of the track, and he pulled up the horse, but, thinking he could not stop him, whipped him, drove across, and the wagon was struck on the hind wheel; and that there was nothing to prevent his hearing the train, except the rattle of the wagon. Both boys and another witness, who heard the train coming while sitting in a house near the track, with the windows shut, before the boys turned to look at the house above mentioned, testified that they did not remember hearing the bell on the engine ring. The engineer and the fireman testified that the bell did ring; but the whistle did not sound; and there was no flagman at the crossing at the time of the accident. *Held*, that the question whether the plaintiff exercised due care was for the jury. *Tyler v. New York & N. E. R. Co.*, 19 Am. & Eng. R. Cas. 296, 137 Mass. 238.

A team collided with a train at a crossing and the driver was killed. The railroad and the highway were both below the general surface of the ground, and an approaching train could only be seen occasionally by one driving towards the crossing. The driver was familiar with the crossing, but except that he checked his team for a moment some four rods from it, he did not appear to have observed any precaution. The engine whistle was duly sounded when the crossing was approached. *Held*, that such driver was chargeable with negligence directly contributing to the collision. *Haas v. Grand Rapids & I. R. Co.*, 8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216.

A boy of thirteen years, acquainted with a crossing at which, by reason of a deep cut, a train was not visible until one was on the track, though just informed at the post-office that the train was late and might reach the crossing about when he did, yet who drives upon the crossing with his ears wrapped up in a comfort on account of the cold, is guilty of such contributory negligence as bars the recovery of damages for his death, though the train was running more rapidly than usual and no signal was given of its approach. *Norfolk & W. R. Co. v. Stone*, 88 Va. 310, 13 S. E. Rep. 432.

The trial court properly refused to nonsuit the plaintiff, whose team and wagon were struck and injured by a detached locomotive running rapidly in advance of a belated passenger train at a highway crossing near a village, the testimony as to the possibility of seeing the locomotive while in a deep cut through which it passed just before reaching the crossing, and as to whether the bell was rung and the whistle blown, being conflicting, and there being evidence that after seeing the locomotive the driver could not have safely stopped his team or turned it into a side road. *Bower v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 301, 61 Wis. 457, 21 N. W. Rep. 536.

Plaintiffs were riding immediately behind another wagon, and both wagons were stopped about eighty-five feet from the crossing, at a place where the view was obstructed by a cut. After looking and listening they started and saw a light some distance in front and to the left of them, which they supposed was on the railroad track, but which was in fact beyond the track. Watching this light they passed upon the track, where they could not see in the dark, and were struck by an engine running thirty miles an hour. *Held*, that plaintiffs were not, as matter of law, guilty of contributory negligence, but the question was for the jury. *Northern Pac. R. Co. v. Peterm.*, 55 Fed. Rep. 940.

300. — by curves.—Where plaintiff, about to cross a track, looked both ways and saw that it was clear, and then started, when a switch-engine came around the curve behind him at a rapid rate of speed, without giving the usual signals, and struck him, the whistle of a workshop near by there being blown at the time—*held*, that negligence could not under the circumstances be attributed to plaintiff. *Chicago & N. W. R. Co. v. Ryan*, 70 Ill. 211.

Where the road on which plaintiff was driving made an abrupt curve to the north to cross the track, only some ten or twelve feet from that track, and at that point also continued west for a short distance and then turned in a southerly course, defendant's servants had no cause to suspect, nor were they bound to anticipate, that plaintiff intended to cross the track, and especially to do this in front of the train. *Purl v. St. Louis, K. C. & N. R. Co.*, 6 Am. & Eng. R. Cas. 27, 72 Mo. 168.

Whether a woman walking on the sidewalk of a public street is negligent in not knowing of the approach of a train around a curve, on a dark night, no signal being given, and whether in such a case the company is negligent in not warning her—*held*, questions for the jury. *Doyle v. Pennsylvania & N. Y. C. & R. Co.*, 139 N. Y. 637, 34 N. E. Rep. 1063.

The fact that plaintiff, a woman, with two small children, who desired to enter a car, was on the sidewalk between two street-car tracks, over which the cars ran on a curve to enter defendants' depot, did not constitute contributory negligence. *O'Toole v. Central Park, N. & E. R. R. Co.*, 12 N. Y. Supp. 347, 35 N. Y. S. R. 591; *affirmed in 128 N. Y. 597, mem.*

Where the view of plaintiff, who was injured at a crossing, is obstructed by a curve in the track and a building, and the engine approaches in a slow, stealthy manner without blowing or ringing, positive evidence that she looked and listened without seeing or hearing the engine, is not incredible, and therefore it is proper to submit the question of contributory negligence to the jury. *Larkin v. New York & N. R. Co.*, 6 N. Y. S. R. 658, 19 N. Y. Supp. 479.

The deceased, M., a young woman in full possession of all her faculties, was walking upon a public street crossed by defendant's tracks, which she had crossed many times before. As she approached the tracks from the south, a train was passing the crossing going west. She stopped and waited until it had passed, then, after looking both ways, proceeded on her journey. While crossing the tracks she was struck and killed by the tender to an engine, which was running backward from the west at a high rate of speed. There was a curve in the railroad just west of the crossing, which prevented a full view of the tracks in that direction. No bell was rung or whistle blown upon the engine. A flagman was stationed at the crossing, but he was absent from his post at the time of the accident. One of plaintiff's witnesses testified that a volume of smoke, emitted from the engine of the train which passed, settled down upon the crossing, which prevented her from seeing objects approaching. The witness himself saw the approaching engine, and did not testify that he was prevented from seeing objects by the smoke. M. was nearer the track than he, and, aside from the curve in the road,

her opportunities for seeing were apparently as good as his. *Held*, that a motion for a nonsuit on the ground of contributory negligence was properly denied; that the testimony of the witness as to the ability of M. to see was not conclusive upon the jury, but merely an expression of opinion; also, that she had a right to rely upon the presence of a flagman to warn her of danger, and to assume that proper signals would be given and that engines would not be moved at such a place at such an unusual rate of speed. *McNamara v. New York C. & H. R. R. Co.*, 136 N. Y. 650, 32 N. E. Rep. 765, 49 N. Y. S. R. 395; *reversing* 64 Hun 637, 46 N. Y. S. R. 439, 19 N. Y. Supp. 497.—DISTINGUISHING *Heaney v. Long Island R. Co.*, 112 N. Y. 122.

Plaintiff's evidence was to the effect that his intestate, who was drawing logs and had on a heavy load, approached the crossing from the east sitting sideways on his load, with his feet to the south, at a slow trot; there was a single point 230 feet from the crossing where a glimpse of a train from the south could be had during a moment when 262 feet distant. When he reached that point the train was a long distance south from that point; and no train could again be seen until he came within 21 feet of the track. When he reached this point the train was on a curve, the end of it toward the crossing being 435 feet therefrom, and, moving at the rate of 30 miles an hour, as estimated it would have taken it ten seconds to reach the crossing. No bell was rung or whistle sounded and two witnesses who were with the intestate testified that they neither heard nor saw the train. He appeared to have become alarmed at the first sight of the train, and the evidence justified a finding that he tried to stop but could not. He then jumped from his load but was struck by the engine and killed. The track was depressed from 18 to 20 inches below the surface of the street, and the descent commenced 6 to 8 feet back from the rails; this slope was icy. Banks of snow and ice 2 or 3 feet high, beginning 3 or 4 feet from the rails, and extending easterly 6 or 8 feet, bordered each side of the traveled track of the street, which was only wide enough for a single team. *Held*, that the evidence justified the submission of the question of contributory negligence to the jury. *Salter v. Utica & B. R. A. Co.*,

8 Am. & Eng. R. Cas. 437, 88 N. Y. 42; *affirming* 24 Hun 494.

The plaintiff was injured by defendants' locomotive on a sidewalk crossing in a thickly settled portion of a city. It was in the night-time and the locomotive had come down the street behind her, going in the same direction. The track curved sharply just before crossing the sidewalk, which was planked continuously on a level with the tops of the rails. The testimony tended to show, among other things, that the plaintiff was not familiar with the locality and did not know the precise position of the crossing; that trees and telegraph poles between the track and the sidewalk obscured, to some extent, her view of the track; and that, because of the curve, the light from the headlight did not fall directly upon her until the locomotive was very near the crossing. *Held*, that notwithstanding a special finding that if the plaintiff had looked before attempting to cross the track she could have seen the light from the headlight, it was still a question for the jury whether she was guilty of any contributory negligence. *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. Rep. 665.

For the defense it was shown that the deceased was driving slowly across the track with his head down, and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching; when he whipped up his horses and endeavored to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. *Held* (per Ritchie, C. J., and Fournier and Henry, JJ.), that the finding of the jury that there was no contributory negligence should not be disturbed. (Strong, Taschereau, and Gwynne, JJ., contra.) *Grand Trunk R. Co. v. Beckett*, 16 Can. Sup. Ct. 713; *affirming* 13 Ont. App. 174, which affirms 8 Ont. 601.

301. — by embankments. — The fact that the approach of a railroad to a highway crossing is obscured by embankments, or otherwise, imposes upon travelers by the highway as well as upon the company special care to avoid collisions. *Haas v. Grand Rapids & I. R. Co.*, 8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216.—APPROVED IN *Seefeld v. Chi-*

cago, M. & St. P. R. Co., 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

Where a company constructed its track upon a highway, digging an excavation in the highway, and piling the dirt from said excavation along the sides thereof, making an embankment, so as to entirely obstruct the view of travelers along the highway, and an engineer approaching at an unusual hour omitted to give the statutory signals in time so that a boy fifteen years of age driving along the road might take his horses to a safe distance, and the horses became frightened and ran away, the driver was not guilty of contributory negligence, although he did not stop and listen, and although he knew the horses were afraid of the cars. *Hoggatt v. Evansville & T. H. R. Co.*, 3 Ind. App. 437, 29 N. E. Rep. 941.

An old man, who was somewhat deaf, while driving a span of colts towards a track down a narrow road, from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on, and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up, and tried to cross the track, and the rear of the buggy was struck by the locomotive. *Held*, that in an action for the resulting injury the question whether plaintiff was guilty of contributory negligence was for the jury. *Chicago & N. E. R. Co. v. Miller*, 6 Am. & Eng. R. Cas. 89, 46 Mich. 532, 9 N. W. Rep. 841.

Where a train of cars and a wagon collide at a railroad crossing, at which, owing to a high bank and a curve in the road, the locomotive could not be seen or heard by the driver of the wagon until within ten seconds in time and three hundred feet in distance, the jury are not bound to infer from the presence of the wagon on the track at the time of the collision that the driver did not, in the absence of the usual signal by the bell, use proper care. *Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 150; *reversed and remanded on stip. April 20, 1880.*—DISTINGUISHING *Wilds v. Hudson River R. Co.*, 24 N. Y. 431. QUOTING *Davis v. New York C. & H. R. R. Co.*, 47 N. Y. 400.

In such a case, negligence will not be presumed on either side; and where the driver is killed by the collision, the plaintiff is not bound to establish affirmatively, by the evidence of eye-witnesses, that the deceased

did not by his negligence contribute to the injury. *Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 150; *reversed and remanded on stip. April 20, 1880.*

Plaintiff testified that he could not see the train injuring him until he got within a few feet of the track, by reason of an embankment, and that he approached at a slow trot, relying upon signals to be given if a train was approaching. *Held*, that upon this evidence it was proper to leave the question of contributory negligence to the jury. *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679.

302. — by weeds, underbrush, or trees.*—(1) *Rule stated.*—Where one approaching a crossing, looks and listens for trains before passing a corn field which obstructed the view, and after passing the same, again looks and listens, and no warning is given him by bell or whistle, he will be guilty of no negligence in going upon the track, and the fact that he is told to stop, that the cars are coming, which he does not hear, will not change the rule. *Dimick v. Chicago & N. W. R. Co.*, 80 Ill. 338.

When the only negligence charged is the neglect to ring a bell or sound a whistle at a public crossing, and a great rate of speed, proof of the erection of a granary, and suffering the brush to grow up on the right of way, so as to obstruct the view of the approaching train, as contributing to the injury, cannot be considered. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576.

That there were trees along the track obstructing the view of one approaching a public crossing, and who was injured in a collision at the crossing, is admissible in evidence whether alleged or not. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.

A person injured by collision with a train at a crossing is not chargeable with contributory negligence if he looks for the train before driving upon the track and cannot see it by reason of intervening trees and embankments, nor hear it on account of the rattle of his own and other vehicles upon the roadway. *Ladouceur v. Northern Pac. R. Co.*, 6 Wash. 280, 33 Pac. Rep. 556, 1080.

(2) *Illustrations.*—It appeared that plaintiff, while in the act of crossing defendant's

* See also *ante*, 29 (2).

railroad at its intersection of the public highway, was struck by an engine. The railroad was in a cut, and was approached by descending a hill. When about 65 yards from the track, plaintiff stopped his team, looked and listened for the train, and neither seeing or hearing it, he proceeded to cross. In approaching, the track was hidden from view by bushes until within a few feet of it, and then only a small part of the track could be seen, owing to a sharp curve in it. The train was running at an unusual speed. Plaintiff's horses became frightened, so that they required his whole attention. The statutory signal was not given before reaching the crossing. *Held*, that defendant was guilty of gross negligence, and that even if any negligence was attributable to plaintiff, it was slight in comparison with defendant's. *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313, 7 Am. Ry. Rep. 365.—QUOTED IN *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181.

While plaintiff was crossing defendant's railway with a team and wagon he was struck by a train and injured, his horses killed and wagon destroyed. When within 150 or 200 feet of the crossing he looked for the train, and again when within 40 or 50 feet thereof he slackened the speed of his team and again looked and listened, but could neither see nor hear the train. Defendant's track crossed the highway at the point in question at an acute angle, and the view of the railway in the direction from which the train approached was obstructed by weeds, bushes, and trees which had been permitted to grow between the highway and the track. The evidence tending to show that the train was running at a high rate of speed as it approached the crossing, and no bell was rung, nor whistle blown, until too late to warn the plaintiff of its approach, a verdict for plaintiff for damages for the injuries sustained will be affirmed. *Wesley v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 441, 51 N. W. Rep. 163.

A man crossing a track after dark in a wagon was killed. Whether the train was hidden from view by shrubbery, and whether any signal was given, were disputed questions. *Held*, that so far as these facts involved the legal duty of the railroad company, they must go to the jury. *Klanowski v. Grand Trunk R. Co.*, 21 Am. & Eng. R. Cas. 648, 57 Mich. 525, 24 N. W. Rep. 801.

—DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538.

Plaintiff was injured by a hand-car in attempting to drive across a track at a crossing. The evidence showed that a view of the track was obstructed by trees and other objects, and that the car was going down grade at a speed of five miles an hour without checking at the crossing; that plaintiff stopped and looked each way along the track before going on it, but failed to see the car. *Held*, that it was for the jury to determine whether plaintiff was negligent in failing to see the car, and whether he exercised proper care. *Boll v. Adirondack R. Co.*, 22 N. Y. S. R. 365, 52 Hun 610, 4 N. Y. Supp. 769.

303. — by dust.—It is the duty of the person intending to cross a track where he knows trains frequently pass, and where he knows one is likely to pass at any moment, to look as well as to listen, and if dust should temporarily obscure his view, to wait until the dust shall pass away before he attempts to cross. *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. Rep. 462.

If a person is driving a four-horse team along a road running parallel with and near to a railroad, and is approaching a crossing, and the air is so filled with dust that he cannot see the railroad, and his wagon makes some noise, and he attempts to cross the railroad without stopping his team to listen for an approaching train, and his horses are killed by the engine, he is guilty of contributory negligence, and cannot recover damages. *Flemming v. Western Pac. R. Co.*, 49 Cal. 253, 7 Am. Ry. Rep. 265.—DISTINGUISHED IN *Strong v. Sacramento & P. R. Co.*, 8 Am. & Eng. R. Cas. 273, 61 Cal. 326.

Where a person has full knowledge that from 10 to 20 railroad trains pass a certain crossing daily, and knows that a certain train which he has just seen a short distance away may at any moment pass such crossing, and where a temporary gust of wind temporarily fills the air with dust, which is not likely to last to exceed four or five minutes, and which to some extent obscures his view, it is negligence for him to attempt to cross the tracks at such crossing on a fast walk without stopping or looking. *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. Rep. 462.—REVIEWING Lier-

man *v. Chicago, M. & St. P. R. Co.*, 82 Wis. 286, 52 N. W. Rep. 91.

304. — by falling snow.—A person walking along a track on a public street in a city has a right to presume, and act on the belief, that the railroad company will not move its locomotives or cars thereon without giving the usual signals; especially if snow on the rails deadens the sound and a storm obscures vision. *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.—QUOTING Philadelphia & R. R. Co. *v. Hummell*, 44 Pa. St. 379; *Newson v. New York C. R. Co.*, 29 N. Y. 390; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Robinson v. Western Pac. R. Co.*, 48 Cal. 421. REVIEWING *Kennayde v. Pacific R. Co.*, 45 Mo. 262.

Plaintiff's testimony was to the effect that he approached the crossing driving at the rate of about ten miles an hour; a strong wind was blowing and it was snowing very fast; he was acquainted with the crossing and knew that trains were frequently passing. *Held*, that plaintiff was chargeable with contributory negligence and was properly nonsuited. *Powell v. New York C. & H. R. R. Co.*, 109 N. Y. 613, 15 N. E. Rep. 891, 14 N. Y. S. R. 74, 2 *Silo. App.* 9, 11 *Cent. Rep.* 909; *affirming* 38 Hun 640, *mem.*

Where plaintiff is injured at a crossing, he is not chargeable with contributory negligence merely because he failed to look for trains, where the evidence shows that by reason of a heavy snow storm he could not have seen the approaching train in time to have avoided a collision had he looked. *Hackford v. New York C. R. Co.*, 6 *Lans. (N. Y.)* 381, 43 *How. Pr.* 222, 13 *Abb. Pr.* N. S. 18; *affirmed in* 53 N. Y. 654.

305. — by fog.—A person driving a heavy team, on a foggy morning, over a track without waiting to ascertain if an approaching train was near, having been struck by the engine and killed—*held*, to have contributed to the act by his own negligence, so that his administrators were not entitled to recover damages. *Morris & E. R. Co. v. Haslan*, 33 N. J. L. 147.—APPLYING *Telfer v. Northern R. Co.*, 30 N. J. L. 189. QUOTING *Runyon v. Central R. Co.*, 25 N. J. L. 558.

Where plaintiff testified that she did not see the locomotive on account of fog, but it appeared from her own testimony that she was able to see another train at a much greater distance, and several of defendant's witnesses testified that there was no fog,

there is nothing to submit to the jury as proof that the fog prevented plaintiff from seeing the engine. *Hauser v. Central R. Co.*, 147 Pa. St. 440, 23 *Atl. Rep.* 766.

306. — by uplifted umbrella.—One who walks in broad daylight with an umbrella over him on a track, directly in front of a moving car, without looking for it, when, by looking, he could have seen its approach, and is killed, is guilty of such contributory negligence as to prevent recovery for his death, and might be so declared by the trial court. *Yancey v. Wabash, St. L. & P. R. Co.*, 93 Mo. 433, 6 S. W. Rep. 272.—DISTINGUISHED IN *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439. FOLLOWED IN *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1.

A pedestrian in a city approached a crossing, the view of which was obstructed, on a rainy day, holding an umbrella over his head and shoulders. He failed to stop, look, and listen, but walked directly upon the track, where he was killed by a passing train. *Held*, that he had been guilty of such contributory negligence as to preclude recovery for his death, notwithstanding the fact that the company was guilty of negligence in several respects. *Pennsylvania R. Co. v. Slate*, 19 Am. & Eng. R. Cas. 326, 61 Md. 108.—QUOTED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108.

The plaintiff, while traveling on a public street on a rainy night, with her umbrella up, approached a crossing. On reaching the gates, she saw that they were up, and the passage seeming safe she went on. When she was between the two gates, the gateman, without giving any warning, began to lower them, and as she was passing under the last gate it fell upon her head and injured her. *Held*, that it could not be held, as a matter of law, that the plaintiff was bound to look before passing under the second gate to see whether it was coming down, but that it was a question of fact for the jury to decide whether she was guilty of contributory negligence. *Feeney v. Long Island R. Co.*, 39 Am. & Eng. R. Cas. 639, 116 N. Y. 375, 22 N. E. Rep. 402, 26 N. Y. S. R. 729, 5 L. R. A. 544; *affirming* 42 Hun 657, 5 N. Y. S. R. 63.—FOLLOWING *Newson v. New York C. R. Co.*, 29 N. Y. 383.

307. — a question for the jury.*—(1) *Generally.*—The rule is that, as a matter

* See also *ante*, 218, 258; *post*, 311, 320.

or law, a person voluntarily going upon a track at a point where there is an unobstructed view of the track, and failing to look or listen for danger, cannot recover for an injury which might have been avoided by so looking or listening; but when the view is obstructed, or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury. *Laverens v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. Cas. 274, 56 Iowa 689, 10 N. W. Rep. 268.—QUOTING *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153.—QUOTED IN *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20.

If the view of the railroad, as a crossing is approached, is by any means so obstructed at the time as to render it impossible or difficult to learn of the approach of the train, or there are circumstances connected with the incident calculated to deceive or throw a person off his guard, then, whether it was negligence on the part of a person injured in undertaking to cross, is a question of fact for the jury. *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153, 5 Am. Ry. Rep. 469.—DISTINGUISHED IN *Correll v. Burlington, C. R. & M. R. Co.*, 38 Iowa 120. QUOTED IN *Laverenz v. Chicago, R. I. & P. R. Co.*, 56 Iowa 689.

Whether or not there were obstructions obscuring the sight of an approaching train to one about to drive upon the track is a question for the jury. *Artz v. Chicago, R. I. & P. R. Co.*, 44 Iowa 284.

Where it appears that at the date of the accident the view of the crossing was obstructed, and there is evidence that others, whose situation is not shown to have been the same as that of the plaintiff, saw and heard the train before it reached the crossing, and that at the date of the trial the train could be seen a sufficient distance on approaching the crossing to avoid the accident, contributory negligence on the part of the plaintiff is not sufficiently shown to justify the court in taking the case from the jury. *Lee v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 157, 80 Iowa 172, 45 N. W. Rep. 739.

A traveler is not compelled, under all circumstances, to stop before crossing the track, if his view is obstructed from one way. He is required to take such precaution as an ordinarily prudent man would under like circumstances, and whether he

did use such care is generally a question for the jury. *Richmond v. Chicago & W. M. R. Co.*, 49 Am. & Eng. R. Cas. 367, 87 Mich. 374, 49 N. W. Rep. 621.—FOLLOWED IN *Evans v. Lake Shore & M. S. R. Co.*, 88 Mich. 442.

If the view of the railroad is so obstructed by the act of the company as to render it difficult to learn of the approach of the train, or there are other circumstances calculated to deceive a party approaching the track, such party has the right to presume that the usual and proper signals will be given by the railroad company; and if not given, then the question whether it was negligence on his part is a question of fact for the jury to determine. *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.—FOLLOWING *Mackay v. New York C. R. Co.*, 35 N. Y. 78.

(2) *Illustrations.*—Plaintiff's intestate, a street-car driver, was killed at a railroad crossing by a collision with nine detached freight cars, running at the rate of from 8 to 10 miles per hour, without any warning of their approach other than the noise made in running. The flagman was not at his usual post of duty, and gave no warning of danger until the horse was upon the crossing. After leaving another railroad crossing, about 185 feet from the one where the accident occurred, the driver could not have seen the approaching freight cars until within about 20 feet of the crossing where he was killed, and he did not look in the direction from which the cars were approaching, after reaching said point, until his horse was upon the track. *Held*, that the question of his negligence (that of the defendant being apparent) was for the jury, who were to determine whether, under the circumstances, the driver had the right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from him, as an assurance of safety; and if they found that an ordinarily prudent man would have acted as the driver did, the plaintiff could recover. *Richmond v. Chicago & W. M. R. Co.*, 49 Am. & Eng. R. Cas. 367, 87 Mich. 374, 49 N. W. Rep. 621.—APPLYING *Glushing v. Sharp*, 96 N. Y. 676; *Cleveland, C. & I. R. Co. v. Schneider*, 45 Ohio St. 678. QUOTING *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 78 Ind. 376; *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 592; *Greenwood v. Philadelphia, W. & B. R. Co.*, 124 Pa. St. 572.

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Plaintiff, driving upon a public street across a track, was struck by a train, the approach of which he did not discover until immediately before he drove his horses across the track. The view of the track in both directions was partially obstructed. The evidence tended to show that plaintiff was mindful of the danger and watchful, according to his judgment; that at the time when he might first have seen or heard the train he had reason to suppose that no train was coming from that direction, while his attention in the opposite direction was more apparently necessary; that the cars were then close at hand, running at a high rate of speed, and he in a place where he could not safely turn his horses, nor hold them before the train. *Held*, that it was for the jury to determine whether plaintiff was negligent. *Loucks v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 305, 31 *Minn.* 526, 18 *N. W. Rep.* 651.—DISTINGUISHED IN *Rheiner v. Chicago St. P., M. & O. R. Co.*, 36 *Minn.* 170.

Plaintiff's intestate was killed at a crossing where gates were maintained, but which were up at the time. The engine was a small one with no car attached, used only by the superintendent of the division, running on no schedule time, with the cab over the boiler at the fore end of the engine, which obstructed the view of the engineer and fireman. The bell was different from those on ordinary engines, and the engine moved with but little noise, and the bell was not rung at the usual place. A strong wind was blowing and the view of the track was much obstructed. *Held*, that the question of contributory negligence was for the jury. *Palmer v. New York C. & H. R. R. Co.*, 37 *Am. & Eng. R. Cas.* 533, 112 *N. Y.* 234, 19 *N. E. Rep.* 678, 20 *N. Y. S. R.* 904; *affirming* 43 *Hun* 633, 5 *N. Y. S. R.* 436.—APPLIED IN *Beckwith v. New York C. & H. R. R. Co.*, 54 *Hun* (N. Y.) 446. FOLLOWED IN *Wall v. Delaware, L. & W. R. Co.*, 54 *Hun* (N. Y.) 454. QUOTED IN *Haywood v. New York C. & H. R. R. Co.*, 35 *N. Y. S. R.* 748, 59 *Hun* 617, 13 *N. Y. Supp.* 177; *Startz v. Pennsylvania & N. Y. C. & R. Co.*, 42 *N. Y. S. R.* 457; *Shultz v. New York C. & H. R. R. Co.*, 23 *N. Y. Supp.* 509, 69 *Hun* 515, 53 *N. Y. S. R.* 149. REVIEWED IN *Haywood v. New York C. & H. R. R. Co.*, 13 *N. Y. Supp.* 177.

Where plaintiff was struck by a backing freight train at a crossing in the night, the

train carrying no lights and giving no signals, and moving on a track covered with snow, and a view of which was obstructed, and plaintiff, before reaching the track, looked and listened, the question of his contributory negligence and the negligence of the railroad should have been left to the jury. *Fisher v. Monongahela Connecting R. Co.*, 131 *Pa. St.* 292, 18 *Atl. Rep.* 1016.

4. Passing Under or Between Cars.*

308. Passing between cars, generally.—To entitle the plaintiff to recover damages for injuries sustained by him in being caught between two cars while he was attempting to cross a street it must be shown that such injuries were directly caused by want of ordinary care on the part of the defendant and that they could not have been avoided by the exercise of reasonable care and caution on the part of the plaintiff. *Baltimore & O. R. Co. v. Fitzpatrick*, 35 *Md.* 32.

A train standing upon a highway with an engine attached is of itself notice of danger; and in the absence of a special assurance on the part of the company to one desiring to cross between two cars, over the couplings, that he may safely do so so far as any movement of the train is concerned, he assumes all risks incident to such an attempt. *Bird v. Flint & P. M. R. Co.*, 86 *Mich.* 79, 48 *N. W. Rep.* 691.—DISTINGUISHED IN *Fehrich v. Michigan C. R. Co.*, 87 *Mich.* 606.

It appearing that plaintiff, before going through the opening in the train and upon the track where the accident occurred, brought his horses to a walk, but did not stop them nor leave his wagon and go forward where he could see an approaching train; that he looked and listened for a train, but could not see or hear any signal of its approach—*held*, that the evidence does not show, as a matter of law, contributory negligence on the part of the plaintiff. *Kelly v. St. Paul, M. & M. R. Co.*, 6 *Am. & Eng. R. Cas.* 93, 29 *Minn.* 1, 11 *N. W. Rep.* 67.

* Contributory negligence in passing between cars or in climbing over train, see note, 45 *AM. & ENG. R. CAS.* 173.

Injury in passing under or between cars, see note, 13 *L. R. A.* 634.

Liability of company for injuries to persons attempting to pass under, between, or around cars on crossings, see note, 54 *AM. REP.* 272.

Injuries at crossings. Attempting to pass between stationary cars, see 32 *AM. & ENG. R. CAS.* 30, *abstr.*

The deceased, who was in charge of a team, left it at some distance from a street crossing and went over the latter in search of a bolt that had dropped from his wagon, and while beyond the crossing defendant's train backed from the north upon and covered the crossing, leaving an opening about two feet in width, through which deceased on his return attempted to pass, but was caught and killed by a backward movement of the train. There was evidence that no bell was rung and no whistle sounded before the movement of the train which caused the accident. *Held*: (1) that the deceased might rightly assume that some such signal would be given before the movement was made, and (2) that it could not be said, as a matter of law, that deceased was guilty of contributory negligence in passing through the opening. *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 93, 13 S. W. Rep. 893.

300. Doing so with knowledge or permission of company's employees.—

Though a standing train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover unless the engineer, conductor, or some other person having control of the train's movements knew of his attempt to cross or had notice of his exposure to danger. *Andrews v. Central R. & B. Co.*, 45 Am. & Eng. R. Cas. 171, 86 Ga. 192, 12 S. E. Rep. 213.

The directions of a brakeman to a person to pass through a train standing on a highway will not justify him in attempting to pass between the cars where the danger is obvious. *Lake Shore & M. S. R. Co. v. Pinchin*, 31 Am. & Eng. R. Cas. 428, 112 Ind. 592, 11 West. Rep. 247, 13 N. E. Rep. 677.—FOLLOWING Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26.

Where a person on the highway finds the crossing obstructed by a freight train, with the engine attached, and attempts to climb over the bumpers and pass between the cars, with the assurance of a brakeman that the train will not start for some time and that he can safely do so, he is guilty of such contributory negligence as will defeat a recovery for an injury received by the train being suddenly started without signals. *Renner v. Northern Pac. R. Co.*, 46 Fed. Rep. 344.

A freight train which lay on a crossing was cut in two, and as plaintiff attempted

to pass between the cars he was injured by a sudden movement of one of the sections without warning. He testified that a brakeman signaled him to cross, but this was denied. The court charged that if he was directed by the brakeman to cross, without having intended to do so, he was entitled to recover, unless the risk of injury was known to him at the time he assumed it and it was such as a prudent man would not have taken. *Held*, no error. *Eddy v. Powell*, 49 Fed. Rep. 814, 4 U. S. App. 259, 1 C. C. A. 448.

Plaintiff and her husband, who were about 60 years of age, were passing along the principal street of La Cygne, which is crossed by a track. Upon reaching the crossing they found the street blocked by a train of freight cars. Plaintiff's husband went to the north end of the train in search of a safe crossing, but finding a number of cars standing on the siding returned to the crossing and waited for the opening or departure of the train 15 minutes, when one of the trainmen, of whom plaintiff inquired how long the train would remain there, replied, "A good while," and suggested to them to climb over the train. Instead of going around the train or waiting for its departure they acted upon this suggestion and climbed over a coal car in the train, and the plaintiff, in jumping or getting down on the opposite side of the train, struck her foot against a tie of the track, which was in proper position, and broke one of the bones of her leg. *Held*, that her attempt to climb over the train under the circumstances amounted in law to contributory negligence, and the direction of the trainman to cross over the train did not justify her in encountering so obvious and great a danger. *Howard v. Kansas City, Ft. S. & G. R. Co.*, 37 Am. & Eng. R. Cas. 552, 41 Kan. 403, 21 Pac. Rep. 267.—QUOTING Kansas Pac. R. Co. v. Peavey, 29 Kan. 180; *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588.

310. Generally it is negligence.—

Where it appears that plaintiff's intestate crossed the spur track of defendant's road, at the street crossing in a town where cars were left to be unloaded, leaving a space of 20 feet for the passage of the public, and on his return half an hour later, the cars having been pushed close together by an engine which could have been seen, was killed in attempting to pass between the cars, he was guilty of contributory negligence. *Pan-*

nell v. Nashville, F. & S. R. Co., 55 Am. & Eng. R. Cas. 92, 97 Ala. 298, 12 So. Rep. 236.

If, in such case, intestate was not killed or mortally wounded by the first impact of the cars, and warnings of his perilous condition were given by those present to the yard-master in charge of the car in time for him to signal the engineer, and in time for the latter to reverse the motion of the cars, and prevent further injury, the defendant would be liable notwithstanding the contributory negligence of deceased. *Pannell v. Nashville, F. & S. R. Co.*, 55 Am. & Eng. R. Cas. 92, 97 Ala. 298, 12 So. Rep. 236.

The act of climbing over stationary cars without looking to see whether or not they are attached to an engine is such negligence as to preclude recovery for injuries received in the attempt; and this is true although the cars were obstructing the street crossing beyond the time allowed by the city ordinance. *Hudson v. Wabash Western R. Co.*, 101 Mo. 13, 14 S. W. Rep. 15.—APPLYING AND QUOTING *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588. QUOTING *Lake Shore & M. S. R. Co. v. Pinchin*, 31 Am. & Eng. R. Cas. 428, 112 Ind. 592.—FOLLOWED IN *Corcoran v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 399. QUOTED IN *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211.

Plaintiff found a crossing blocked by a freight train which was being made up, and attempted to climb over the platform of a car, but while in the act of pulling himself up the train suddenly moved and his leg was caught and crushed between two cars. He did not look or inquire whether an engine was attached to the cars. *Held*, that his conduct was contributory negligence as a matter of law. *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588, 10 Am. Ry. Rep. 521.—APPLIED IN *Hudson v. Wabash Western R. Co.*, 101 Mo. 13. QUOTED IN *Howard v. Kansas City, Ft. S. & G. R. Co.*, 37 Am. & Eng. R. Cas. 552, 41 Kan. 403; *O'Mara v. Delaware & H. Canal Co.*, 18 Hun (N. Y.) 192.

Plaintiff found a street crossing closed by a train, and after waiting some minutes for it to move, and being impatient to reach his business, attempted to climb over the platform and between the cars. Just at that moment the train started without warning, and his foot was crushed. *Held*, that his own conduct prevented a recovery. *Spencer v. Baltimore & O. R. Co.*, 4 Mackey, (D. C.) 138, 54 Am. Rep. 269.

311. When for jury.*—The question of the plaintiff's contributory negligence in passing between the cars of a train standing on a street crossing, is a question of fact for the jury. *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 479, 55 N. W. Rep. 53.

Whether a traveler upon the highway, who sees the first section of the severed train pass over the crossing, is negligent in attempting to cross the track, without looking or listening for the rear section of the train, is also a question for the jury. *York v. Maine C. R. Co.*, 84 Me. 117, 24 Atl. Rep. 790.

312. Passing under cars.—Plaintiff was injured by the starting of cars as he was passing under them after dark, whilst they were temporarily stopped taking in wood and water, the place not being a public crossing. *Held*, that the gross negligence and want of ordinary care on the part of plaintiff defeats a recovery, even if the engineer did not give the usual signal for starting the train. *Central R. & B. Co. v. Dixon*, 42 Ga. 327.—QUOTED IN *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427. REVIEWED IN *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604.

Plaintiff, in assisting a passenger to a train on defendant's road in the night-time, attempted to pass under one of a train of freight cars standing across the road, to which an engine was attached, and while under the car was injured by the starting of the train. *Held*, that he was guilty of contributory negligence. *Smith v. Chicago, R. I. & P. R. Co.*, 55 Iowa 33, 7 N. W. Rep. 398.

Where a boy, in attempting to pass under a car moving along the street, is run over and seriously injured, he is not entitled to recover damages from the company for the injury sustained, the attempt to pass under the car while in motion being such an act of carelessness as amounts in law to contributory negligence. *McMahon v. Northern C. R. Co.*, 39 Md. 438.

But where a child of tender years attempted to pass under a train, negligently left standing on the crossing of a public street, by which he was injured—*held*, that the owners of the cars were liable. *Rauch v. Lloyd*, 31 Pa. St. 358.

* See also *ante*, 218, 258, 307; *post*, 329.

5. Passing in Front of, or Behind Cars.

313. Passing in front of moving train is usually negligence.*—When the traveler knows of the immediate proximity of an advancing train, whether the warning be by signals or otherwise, and, having a safe and seasonable opportunity to stop, he voluntarily takes the risk of crossing in front of it, he is guilty of culpable negligence and forfeits all claim to redress. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61, 3 Abb. Pr. N. S. 82; *reversing* 32 Barb. 159.—APPROVED IN *Cleveland, C. & St. L. R. Co. v. Arbaugh*, 47 Ill. App. 360.—*State v. Maine C. R. Co.*, 77 Me. 538, 1 Atl. Rep. 673. *Korrad v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.—REVIEWING *Parker v. Wilmington & W. R. Co.*, 86 N. Car. 221. QUOTING *Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655.

Where a person about to cross a railroad track on a public highway is apprised of an approaching train by the noise, and ventures upon the track from a miscalculation of his danger, the error is his, and the company is not answerable for his erroneous calculation. *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.—QUOTING *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Baxter v. Troy & B. R. Co.*, 41 N. Y. 502; *Stubley v. London & N. W. R. Co.*, L. R. 1 Ex. 13; *Butterfield v. Western R. Corp.*, 10 Allen (Mass.) 532; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370. REVIEWING *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548; *Pennsylvania R. Co. v. Henderson*, 43 Pa. St. 449; *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9; *Havens v. Erie R. Co.*, 41 N. Y. 296.—APPROVED IN *Haines v. Illinois C. R. Co.*, 41 Iowa 227.

It is contributory negligence for an adult in the full possession of all his faculties, and familiar with the crossing and the move-

ment of the cars, to attempt to cross a railroad in front of a moving engine in full view and within ten or twelve feet from it. *Baltimore & O. R. Co. v. Mali*, 28 Am. & Eng. R. Cas. 628, 66 Md. 53, 5 Atl. Rep. 87.—DISTINGUISHED IN *State v. Baltimore & O. R. Co.*, 69 Md. 339, 14 Atl. Rep. 688, 12 Cent. Rep. 890.

One in the full possession of his faculties who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is, *prima facie*, guilty of negligence. *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.—REVIEWING *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504; *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.

If one sees or hears an approaching train, he must wait for it to pass. If he cross before the train, unless compelled by an imperious necessity, his negligence is a presumption of law. *Myers v. Baltimore & O. R. Co.*, 150 Pa. St. 386, 24 Atl. Rep. 747. *Thomas v. Delaware, L. & W. R. Co.*, 19 Blatchf. (U. S.) 533, 8 Fed. Rep. 729.—APPROVING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.

One who stops at a point from which he cannot see the track, then proceeds, and seeing a train whips his horse and endeavors to cross, is guilty of such contributory negligence as to justify a nonsuit. *Allen v. Pennsylvania R. Co.*, (Pa.) 12 Atl. Rep. 493.

Where the plaintiff could have avoided the injury by exercising the opportunities to look for an approaching train, he will be regarded as having made the attempt to cross after having seen the train's approach. *Indiana, B. & W. R. Co. v. Hammock*, 32 Am. & Eng. R. Cas. 127, 113 Ind. 1, 14 N. E. Rep. 737, 12 West. Rep. 297.

If one about to drive his team across a railroad track sees a train approaching, and determines to try the speed of his horses against that of the engine, he does it at his peril. So if he heedlessly drives upon the track without concerning himself to ascertain by observation that it can be done safely. *Wilds v. Hudson River R. Co.*, 29 N. Y. 315.

* Contributory negligence in crossing track in front of moving train, see note, 35 AM. & ENG. R. CAS. 424; 49 Id. 425, *abstr.*

As between a traveler on a highway and a train, the train has the right of way and it is the duty of the traveler, if he knows of its approach, to keep off the track until it passes. And if, with knowledge of its approach, he attempts to cross in front of it, he is guilty of contributory negligence so as to bar a recovery for an injury received. *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831.

Plaintiff's intestate was killed when attempting to cross defendant's track. Defendant asked the court to charge, "that if the jury believed that the deceased, before she reached the track, saw the train approaching, and notwithstanding this went upon the track, where she was hit by the car, she was chargeable with negligence and could not recover." The court refused so to charge. *Held*, error. *Madden v. New York C. & H. R. R. Co.*, 47 N. Y. 665.

314. — but may depend on facts of the case.—It is not always negligence to cross a railway track at a regular crossing in front of a moving train. All the facts and necessities of the occasion, the knowledge or means of knowledge of the person charged with negligence, are to be considered in deciding the question of negligence. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.

Whether an attempt to cross a track in front of a moving train is negligence depends upon the rate of speed of the engine and the condition of the person making the attempt. *State v. Baltimore & O. R. Co.*, 35 Am. & Eng. R. Cas. 412, 69 Md. 339, 14 Atl. Rep. 688, 12 Cent. Rep. 890.—DISTINGUISHING *Baltimore & O. R. Co. v. Mali*, 66 Md. 53.

If the injured party saw the headlight upon the locomotive, in the darkness, and in the absence of any signal or warning, either from the watchman or from the bell or whistle, he would probably be unable to discover that it was in motion; or if he saw the engine approaching, he had the right to suppose it was not moving at a rate of speed greater than was proper at that time and place, and to regulate his own conduct accordingly. *St. Louis, V. & T. H. R. Co. v. Dunn*, 78 Ill. 197.

Ordinarily one may presume that another will observe the law regulating his conduct and may act accordingly; and there may be cases where a person crossing a railroad

track when he knows a train is coming, may rely upon the presumption and be guilty of no, or only slight, negligence; but this must depend upon circumstances, and such a rule cannot apply when the calculation must necessarily be made with such nicety that the variation of a few seconds or the mistake of a few feet would inevitably be attended with fatal results, nor when it was evident that the train was, in fact, going much faster than allowed by ordinance. The law does not permit one to thus speculate with his own life. *Wabash, St. L. & P. R. Co. v. Weisbeck*, 14 Ill. App. 525.

A foot passenger is not debarred the use of the street because a train of cars occupies a portion of such street. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409, 7 Am. Ry. Rep. 244.

315. — negligence per se.—It is not negligence *per se*, to cross a track in front of an approaching train. When there is ample time, it is the daily practice of prudent men to do so. *Thomas v. Delaware, L. & W. R. Co.*, 19 Blatchf. (U. S.) 533, 8 Fed. Rep. 729.

It has never yet been announced as negligence *per se* to cross a railroad track in a public highway either in the front or rear of a standing engine and tender; and whether it is negligence to turn one's back upon the rear of such engine and tender, and take a few steps away from them (walking between the tracks), seems to depend upon the circumstances of the particular case; and, if so, the determination of the question is for a jury. *Chenrick v. Michigan C. R. Co.*, 87 Mich. 46, 49 N. W. Rep. 890.—DISTINGUISHING *Bird v. Flint & P. M. R. Co.*, 86 Mich. 79.

As plaintiff was about to cross a street he saw a car approaching and behind it a cart moving still more rapidly. He testified that he "calculated" that he could pass in front of the car "before the cart could get up;" but the facts showed that he miscalculated and was struck by the cart. *Held*, in an action against the owner of the cart, that it was negligence *per se* to attempt to so cross, and he could not recover. *Belton v. Baxter*, 54 N. Y. 245, 14 Abb. Pr. N. S. 404; reversing 1 J. & S. 182.

316. Illustrations of the rule.—If it appears that plaintiff entered upon the track immediately in front of the moving car, so close thereto that even with the

greatest care defendant's servants were powerless to avert the injury, then plaintiff's carelessness would preclude his recovery. *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198.

Where one wilfully or negligently permits his mule on which he is riding to carry him on a track in front of a rapidly approaching train, which he had both seen and heard, and the engineer after seeing such person's perilous position uses ordinary care to avoid injuring him, he cannot recover. *Prewitt v. Eddy*, 115 Mo. 283, 21 S. W. Rep. 742.—QUOTING *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480, 65 Mo. 22.

If plaintiff's evidence shows that when he received his injury he was attempting to cross in front of an approaching train which he must have seen had he used his eyesight, it is not error to enter judgment of compulsory nonsuit. *Marland v. Pittsburg & L. E. R. Co.*, 123 Pa. St. 487, 16 Atl. Rep. 624.—FOLLOWING *Carroll v. Pennsylvania R. Co.*, 12 W. N. C. 348; *Moore v. Philadelphia, W. & B. R. Co.*, 108 Pa. St. 349; *Pennsylvania R. Co. v. Bell*, 122 Pa. St. 58.—DISTINGUISHED IN *McNeal v. Pittsburg & W. R. Co.*, 131 Pa. St. 184. QUOTED IN *Pennsylvania R. Co. v. Mooney*, 39 Am. & Eng. R. Cas. 612, 126 Pa. St. 244.

In an action to recover for personal injuries there was unimpeached evidence that the bell was properly rung, and that the company had a flagman at the crossing who signaled to plaintiff's driver. *Held*, that a verdict for plaintiff should be reversed. *Chicago, S. F. & C. R. Co. v. Bentz*, 38 Ill. App. 485.

Where plaintiff, when nearing a crossing with his team, saw an advancing train which was in plain view for some considerable distance, and, supposing he could cross in time, attempted to do so, and when he found he could not, his horse became unmanageable and a collision occurred—*held*, that, owing to his own negligence, he could not recover. *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311.

The plaintiff, when 100 feet from a crossing, attempted to pass over it in front of the defendant's passenger train, which he saw coming 30 rods distant. *Held*, that he was guilty of contributory negligence. *Groves v. Maine C. R. Co.*, 69 Me. 412.

Where one drove along a highway for 40 or 50 rods in sight of the track, which is

gradually approached and finally intersected at a crossing, where the statutory sign was up and plainly visible for the distance named, and another party, who was driving in advance of plaintiff, crossed the track just in time to avoid an approaching train, the whistle of which startled the horses after which plaintiff was riding when some three or four rods from such crossing, and the driver let them go forward, thinking that the safer course to pursue and hoping to avoid a collision with the train, which struck his horses and sleigh, dislocating plaintiff's arm—*held*, that the case was properly taken from the jury, plaintiff's gross negligence preventing a recovery. *Potter v. Flint & P. M. R. Co.*, 62 Mich. 22, 28 N. W. Rep. 714.

A servant driving a carriage along a street crossing a railroad, and having, while yet at a point distant over thirty feet from the track, a view of the same for a mile to the south, drove across the track, and the rear of his wagon was struck by a train coming from the south, and the wagon was demolished and the persons within it injured. *Held*, that the negligent act of the servant contributed to the injury, and that the fact that a train was just starting from a station one quarter of a mile north, and blowing a whistle, could not have distracted the servant's attention so as to relieve him from his duty to look south. *Pennsylvania R. Co. v. Righter*, 2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180.

Plaintiff's intestate was killed at a crossing while driving a manageable team and where he was familiar. The evidence showed that he knew that a train was past due; that he saw the train when it was six hundred feet away, but hurried his horses in the attempt to cross in front of it. *Held*, that a nonsuit was properly allowed. *Smith v. New York C. & H. R. R. Co.*, 11 N. Y. S. R. 795, 46 Hun 679.

A traveler about crossing a railroad track on an embankment twelve feet high, in an open country, where an approaching train could be seen for some hundred feet, walked his horses up the ascent at a distance of ninety feet from the road, without looking up or down the road; when near the track, the train being within a short distance, going at twenty-five miles an hour, he lashed his horses to cross the track, the wagon was struck by the engine, and he was killed. *Held*, that he was guilty of con-

tributory negligence. *Gerety v. Philadelphia, W. & B. R. Co.*, 81 Pa. St. 274, 16 Am. Ry. Rep. 164.

317. When plaintiff is intoxicated.—If it appears that the deceased saw the train when about forty paces from the highway crossing, that he thought he could pass before it reached the crossing and whipped up his horse for that purpose, and it is also shown that he was under the influence of liquor, and acted recklessly, there was culpable negligence on the part of the deceased, without which he would not have been injured. *International & G. N. R. Co. v. Kuehn*, 35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484.

318. When contributory negligence is for jury.—(1) *Generally.*—The negligence of a person injured in trying to drive across a track is not conclusively shown by the fact that others had just crossed it safely; the fact may tend to prove it, but the question is for the jury. *Young v. Detroit, G. H. & M. R. Co.*, 19 Am. & Eng. R. Cas. 417, 56 Mich. 430, 23 N. W. Rep. 67.

Though plaintiff heedlessly entered upon the track in the path of the coming engine, yet there was evidence tending to prove that defendant could, by the exercise of ordinary care, have discovered the impending peril in time to have avoided the injury, which was a question for the jury. *Davis v. Kansas City Belt R. Co.*, 46 Mo. App. 180.

Whether one who, while driving across a track, had watched the engine go by and was hurt by its backing down on him without warning while he was looking out for further dangers in the rear, was guilty of contributory negligence is a question of fact for the jury. *Palmer v. Detroit, L. & L. M. R. Co.*, 56 Mich. 1, 22 N. W. Rep. 88.

Where one who approaches a crossing in a city observes an engine approaching and relying on the presumption that the persons in charge of the engine would obey an ordinance of the city limiting its rate of speed to six miles an hour, or less, attempts to make the crossing and is struck down and killed by the engine, the question of her contributory negligence is one for the jury. *Sullivan v. Missouri Pac. R. Co.*, 117 Mo. 214, 23 S. W. Rep. 149.

* See also *ante*, 212.

Injury at crossing. Intoxicated person driving along railroad is guilty of contributory negligence, see 42 AM. & ENG. R. CAS. 191, *abstr.*

Whether one who, on approaching a crossing, sees an engine at a distance of half a mile, and proceeds to cross the track under the mistaken belief that it is standing still upon a side track, and is struck and injured by such engine which was in reality moving towards him, is guilty of negligence, is a question for the jury. *Gratiot v. Missouri Pac. R. Co.*, (Mo.) 49 Am. & Eng. R. Cas. 398, 16 S. W. Rep. 384.

In an action for an injury so received, it is sufficient if the court instructs the jury that it was the plaintiff's duty to exercise such care as an ordinarily prudent and careful person would have exercised under like circumstances, and if the collision was the result of the joint negligence of both plaintiff and defendant, then the plaintiff could not recover; and that if the plaintiff approached the crossing regardless of his own safety but trusting to the obligation of the defendant to warn him, and, by reason of his failure to pay attention, was injured, then the verdict should be for the defendant. *Gratiot v. Missouri Pac. R. Co.*, (Mo.) 49 Am. & Eng. R. Cas. 398, 16 S. W. Rep. 384.

(2) *Illustrations.*—Plaintiff, a boy fourteen years old, was driving with another boy and was injured at a crossing. He testified that his companion called his attention to an approaching train when he was within ten to forty-six feet of the track and he pulled up the horse; but thinking he could not stop, he whipped him, drove on, and was struck by the train. There was nothing to prevent them from hearing the train, except the noise of the wagon. There was a conflict of evidence as to whether the statutory signals were given. *Held*, that the question of whether he exercised proper care was for the jury. *Tyler v. New York & N. E. R. Co.*, 19 Am. & Eng. R. Cas. 296, 137 Mass. 238.

In an action under the Mass. St. of 1881, ch. 199, § 2, for running over and killing a girl sixteen years old, at a place where a highway crossed a railroad at grade, there was contradictory evidence upon the question of the neglect of the defendant to give the signals required by law, but it was conceded that the headlight of the locomotive engine was burning, that the girl was familiar with the locality, that the track was visible for nearly a mile, and that, at the time, it was not dark, but twilight. The plaintiff's evidence tended to show that, when the locomotive engine was within

from three to six rods of the crossing, the whistle was blown twice, and the girl, who was then within a few feet of the track, quickened her pace and ran upon the track and was killed. *Held*, that the court could not say, as matter of law, that attempting to cross the track, under such circumstances, was gross or wilful negligence. *Copley v. New Haven & N. Co.*, 19 *Am. & Eng. R. Cas.* 373, 136 *Mass.* 6.

Plaintiff's intestate was killed at a crossing where there were ten tracks, where engines were moving back and forth on some of the tracks continually. Under the facts of the case, he was not chargeable with negligence until he had passed the seventh track, where he might have seen an approaching train, and probably did, but drove ahead. The train that struck him was moving nearly twice as rapidly as permitted by a city ordinance, and it was probable he would have crossed in safety if it had been running at proper speed. There was danger in attempting to return, as well as to go forward. *Held*, that it could not be said, as a matter of law, that he was guilty of contributory negligence. *Schmidt v. Burlington, C. R. & N. R. Co.*, 75 *Iowa* 606, 39 *N. W. Rep.* 916.

A man and his wife, riding in a cutter, were approaching a track at an acute angle. A freight train lay, apparently, across the road, but after waiting ten minutes for it to move they came nearer and found that a space of sixteen feet was left open. The cars on both sides projected somewhat over the traveled part of the road, and in avoiding them the man had to turn his horse so as to cross the track at a right angle, and the horse shied and the cutter was upset and the woman was injured. *Held*, that it could not be said as matter of law that she was guilty of contributory negligence. *Young v. Detroit, G. H. & M. R. Co.*, 19 *Am. & Eng. R. Cas.* 417, 56 *Mich.* 430, 23 *N. W. Rep.* 67.—QUOTED IN *Selleck v. Lake Shore & M. S. R. Co.*, 93 *Mich.* 375.

Uncontradicted evidence showed that plaintiff was injured while crossing a track within five or six feet of a locomotive, which was attached to a train of cars; but plaintiff and his witnesses claimed that the train was standing still, while the defendant's witnesses claimed it was moving. *Held*, that the question was properly left to the jury. *Conway v. Troy & B. R. Co.*, 1 *N. Y. S. R.* 587, 41 *Hun* 639.—DISTIN-

GUISHING *Dixon v. Brooklyn City & N. R. Co.*, 100 *N. Y.* 170; *Sykes v. Delaware, L. & W. R. Co.*, 12 *Wkly. Dig.* 430; *Burgess v. Sixth Ave. R. Co.*, 13 *Wkly. Dig.* 499. REVIEWING *Wendell v. New York C. & H. R. R. Co.*, 91 *N. Y.* 420.

Plaintiff's intestate was killed while attempting to cross a street-car track in a city, which had snow-banks thrown up on either side. When a car was within ten or fifteen feet of him he called to it to stop, and proceeded to cross the track. Having crossed, he fell on the snow-bank and was injured by the cars. *Held*, that the questions of both negligence and contributory negligence were for the jury. *Friedman v. Dry Dock, E. B. & B. R. Co.*, 33 *N. Y. S. R.* 649, 11 *N. Y. Supp.* 429.—FOLLOWING *Friedman v. Dry Dock, E. B. & B. R. Co.*, 110 *N. Y.* 676, 18 *N. Y. S. R.* 1029.

319. When it is proper to leave the question to jury.—If a person attempts to cross the track in front of a moving engine, or, conceding that it was stationary, so near it that there was danger of its being put in motion and striking him before he could effect a crossing, he is guilty of such contributory negligence as would bar an action to recover damages for injuries inflicted on him in such attempt, and it is proper to submit to the jury whether he was guilty of contributory negligence which proximately contributed to such injuries. *Montgomery v. Alabama G. S. R. Co.*, 97 *Ala.* 305, 12 *So. Rep.* 170.

The question of plaintiff's contributory negligence in returning to the crossing in face of the approaching train, which was nearly 600 feet away when he stepped upon the track, was properly left to the jury. *Retan v. Lake Shore & M. S. R. Co.*, 94 *Mich.* 146, 53 *N. W. Rep.* 1094.

There was evidence that the car, which was slowly descending an incline by the force of gravity, was in charge of a brakeman, and could have been stopped in a short distance if the brake had been applied; that plaintiff was driving at a moderate trot; that, as he approached the crossing, his head was turned towards the side from which the car was approaching; that the hind wheel of the carriage alone was struck; that as the carriage approached the crossing it was visible from the car; and that cars did not ordinarily run at that time. The plaintiff was so injured that he was unable to give any account of the oc-

currence. *Held*, that there was evidence proper to be submitted to the jury on the questions whether the plaintiff was in the exercise of due care, and whether the defendant was negligent. *Cleaves v. Pigeon Hill Granite Co.*, 145 Mass. 531, 5 N. Eng. Rep. 507, 14 N. E. Rep. 646.

The question of the contributory negligence of the driver of plaintiff's hearse in attempting to cross defendant's track depends largely upon the proximity of defendant's car to the crossing when first seen, or when, by the exercise of due diligence, it could have been seen, by the driver. The testimony was conflicting. *Held*, that the court did not err in submitting the question to the jury. *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. Rep. 1112.—FOLLOWED IN *Flagg v. Chicago, D. & C. G. T. J. R. Co.*, 96 Mich. 30.

Where a person, as he approaches a crossing, with a single track and infrequent trains, sees a train with the rear towards him, going, apparently, in an opposite direction, and is deceived by appearances, and his attention distracted by the actions of persons at a distance attempting to warn him of his danger from the train which is backing rapidly and quietly towards him, and a wagon has crossed just before him, it will be left to the jury to say whether there is want of proper care. *Bonnell v. Delaware, L. & W. R. Co.*, 39 N. J. L. 189, 14 Am. Ry. Rep. 220.

It appeared that plaintiff was driving along a highway which crossed defendant's tracks, in an open wagon; the crossing was protected by gates on each side of the railroad; as plaintiff approached the tracks he found the gates closed; a train passed, the gates were opened, and plaintiff started on, but after he had passed the first gate both were again closed, so that escape was impossible; he was struck by another train and injured. It was dark at the time of the accident, and the train which had passed obstructed the view of the approaching train; plaintiff and his witnesses testified that they neither heard nor saw the latter until a moment before the collision. *Held*, that the question as to plaintiff's contributory negligence was properly submitted to the jury. *Kane v. New York, N. H. & H. R. Co.*, 132 N. Y. 160, 30 N. E. Rep. 256, 43 N. Y. S. R. 494; affirming 56 Hun 648, 31 N. Y. S. R. 741, 9 N. Y. Supp. 879.

Where a watchman at a crossing is not present to give warning, and a boy waits at the crossing until one train passes, but is knocked down and injured by another train which he had not observed and which was passing in the opposite direction immediately afterwards, there is evidence of negligence on the part of the company to go to the jury. *Clark v. Midland R. Co.*, 43 L. T. 381.

320. Where train is running at excessive or unlawful speed.*—One approaching a crossing may presume that those in charge of a coming train will observe an ordinance in force regulating its speed. *Gratiot v. Missouri Pac. R. Co.*, 55 Am. & Eng. R. Cas. 108, 116 Mo. 450, 21 S. W. Rep. 1094.

It is not sufficient to exonerate a party from a charge of contributory negligence in attempting to cross a track in the face of an approaching locomotive, to show that he might reasonably have supposed that if the locomotive ran at its usual and lawful rate of speed for that place he could cross without harm. He has no more right to presume that the men in charge of the locomotive will obey the requirements of the law than they have that he will obey the instinct of self-preservation and not unnecessarily thrust himself into danger. *Kelley v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 638, 75 Mo. 138.—APPLIED IN *Prewitt v. Eddy*, 115 Mo. 283. DISTINGUISHED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314. QUOTED IN *Dlaui v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645.

One who is injured in attempting to cross a track at a public crossing ahead of an approaching train cannot recover, though the train approached at unusual speed without signals, if he either knew of the proximity of the train and took the hazard of a leap across the track in front of the engine, or else failed to look and listen for the train when he knew it was approaching, and when, if he had used his senses, he could not have failed both to hear and see it. *Little Rock & Ft. S. R. Co. v. Cullen*, 54 Ark. 431, 16 S. W. Rep. 169.

The mere fact that a party injured by a collision at a crossing was signaled by a flagman stationed there not to cross the tracks, will not relieve the company from

* See ante, 168-189, 268; post, 335, 346.

liability for neglecting to lower the gates on the approach of a train, and to sound a bell or whistle, and in running its train at a rate of speed prohibited by an ordinance, if the signal to stop is not given in time for the party injured to avoid the injury by the exercise of ordinary care. Any warning in such a case is not sufficient to prevent a recovery. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; affirming 33 Ill. App. 129.

It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance, that the speed was eighteen miles an hour where a municipal ordinance limited the speed at that point to ten miles an hour. *Korraday v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069.

When plaintiff was near a crossing he heard a train about a half mile distant, but walked upon the track without turning to see how near it was and was struck by reason of its running about twice as fast as usual. *Held*, that an instruction to find for the defendant was properly refused. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.—DISTINGUISHED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354. QUOTED IN *Lusby v. Atchison, T. & S. F. R. Co.*, 41 Am. & Eng. R. Cas. 93, 41 Fed. Rep. 181; *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 98 Mo. 183, 17 Mo. App. 518.

A traveler has no right to attempt to cross a track in front of an approaching train at what is nothing more than a common country crossing, although it is within the limits of a city, or to use a part of the railway within said limits as a footpath, relying solely upon the expectation or belief that the trains will be run not to exceed a certain rate of speed fixed by city ordinance. *Studley v. St. Paul & D. R. Co.*, 48 Minn. 249, 51 N. W. Rep. 115.

Although one approaching a crossing observed a train, and notwithstanding attempted to pass over, yet if he erroneously supposed it was a local switch-engine and not an express train then about due, and if he was ignorant of the fact that the express train was usually run at a rate of speed prohibited by ordinance, he had the right to assume that it was running at a lawful speed, and, if such had been the fact, he could have passed over the crossing in safety before the train could have struck

him, he was not guilty of such contributory negligence as to authorize the taking of the case from the jury. *Gratiot v. Missouri Pac. R. Co.*, 55 Am. & Eng. R. Cas. 108, 116 Mo. 450, 21 S. W. Rep. 1094.

321. Contributory negligence not excused by negligence of company.*

—If one sees an approaching train and undertakes to cross, it is such contributory negligence as to defeat a recovery for an injury received, though no signals are given on the train; but whether a plaintiff comes within the rule is ordinarily a question for the jury. *Sherry v. New York C. & H. R. R. Co.*, 1 Siltv. App. 319, 10 N. E. Rep. 128, 5 N. Y. S. R. 574, 104 N. Y. 652; reversing 40 Hun 634, *mem.*

Where one, at the very moment when a train is expected, goes upon a railroad track in front of an approaching train, which he must have seen and heard, the mere fact that the locomotive bell was not sounded as required by law will not make the company liable for the damages which may result. *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485.—DISTINGUISHING *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480; *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267.

Where one about to cross a track knowingly approaches it from a point where he may have an unobstructed view and discover the approach of a train a sufficient time to clearly avoid any injury from it, he cannot, as a matter of law, recover, although the company may also have been negligent in omitting to perform a statutory requirement, or otherwise. *Arts v. Chicago, R. I. & P. R. Co.*, 34 Iowa 153, 5 Am. Ry. Rep. 469.—REVIEWING *Skelton v. London & N. W. R. Co.*, L. R. 2 C. P. 631, 16 L. T. 563, 36 L. J. C. P. 249.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Am. & Eng. R. Cas. 184, 43 Kan. 1. FOLLOWED IN *Carlin v. Chicago, R. I. & P. R. Co.*, 37 Iowa 316; *Haines v. Illinois C. R. Co.*, 41 Iowa 227; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624. QUOTED IN *Herlich v. Louisville, N. O. & T. R. Co.*, 44 La. Ann. 280.

Although the bell was not rung or the whistle sounded it was still the duty of one traveling on the street crossed by the railroad to exercise care and diligence to dis-

* See also *ante*, 107, 263-267.

cover whether a train was about to pass, and if she failed to do so, or if, seeing the approaching train, she nevertheless undertook to cross, she was guilty of negligence, and in either case, if injured, so contributed to the accident that she can have no just cause of action. *Sherry v. New York C. & H. R. R. Co.*, 104 N. Y. 652, 10 N. E. Rep. 128, 5 N. Y. S. R. 574, 1 *Silv. App.* 319; reversing 40 Hun 634, *mem.*—DISTINGUISHED IN *Bomboy v. New York C. & H. R. R. Co.*, 47 Hun (N. Y.) 425; *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831; *Powell v. New York C. & H. R. R. Co.*, 2 *Silv. App.* 9. FOLLOWED IN *Lent v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538.

The failure of the engineer to ring a bell or blow a whistle at a street crossing, as required by Cal. Civil Code, § 486, does not abrogate the doctrine of contributory negligence, and where the driver of a wagon recklessly drives across the track at the time when the train is known to be due, without checking speed or listening for an approaching train, or adopting any precaution to prevent a collision, the company is not responsible for an injury resulting from a collision, notwithstanding the neglect of the engineer to comply with the statute. *Hager v. Southern Pac. R. Co.*, 98 Cal. 309, 33 *Pac. Rep.* 119.—APPROVING *Meeks v. Southern Pac. R. Co.*, 52 Cal. 604.

An offer of evidence that subsequent to the accident the railroad company placed an automatic bell at the crossing where the collision occurred is properly rejected. *Hager v. Southern Pac. R. Co.*, 98 Cal. 309, 33 *Pac. Rep.* 119.

Plaintiff's intestate, who was familiar with the operation of trains at a crossing, and who saw, or might have seen, an approaching train, attempted to cross the track and was killed. It appeared that she was anxious to take passage on a train and that a flagman was absent from his post and that no signal was given on the approaching train. *Held*, that a verdict for plaintiff could not be sustained. *Lake Shore & M. S. R. Co. v. Sunderland*, 2 *Ill. App.* 307.—QUOTED IN *Lake Shore & M. S. R. Co. v. Clemens*, 3 *Ill. App.* 77.

It appeared that plaintiff was approaching a crossing with his team, and when at a distance of thirty yards from the crossing he saw the smoke of the locomotive of the

approaching train; he could have stopped before reaching the track, but did not check the speed of his horse until he reached the track, when the pole of his wagon struck the train. *Held*, that plaintiff could not recover even though the bell upon the locomotive was not rung or the whistle sounded. *Chicago & A. R. Co. v. Fears*, 53 *Ill.* 115.

322. Falling on track in front of train.—It is not always contributory negligence *per se* for a person to attempt to cross a track without waiting until a train which has just passed is far enough away to leave unobstructed the view of another train approaching on a parallel track in the opposite direction. So where plaintiff had time to cross in safety, but was delayed by falling on the track, where she was struck, her contributory negligence was for the jury. *Philadelphia & R. R. Co. v. Carr*, 6 Am. & Eng. R. Cas. 185, 99 Pa. St. 505, 11 *W. N. C.* 549.—DISTINGUISHING *Central R. Co. v. Feller*, 84 Pa. St. 226; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.—DISTINGUISHED IN *Kraus v. Pennsylvania R. Co.*, 139 Pa. St. 272.

Where one has time to cross a track in safety under ordinary circumstances he is not chargeable with contributory negligence for failing to anticipate an unusual occurrence, such as falling upon the track, unless there was reason to anticipate such falling from the circumstances. *Johnson v. Gulf, C. & S. F. R. Co.*, 2 *Tex. Civ. App.* 139, 21 *S. W. Rep.* 274.

But where one in attempting to cross a track about twenty feet in front of a slowly moving engine fell and was injured the company is not liable, the fall being a risk which plaintiff assumed. *State v. Baltimore & O. R. Co.*, 35 Am. & Eng. R. Cas. 412, 69 Md. 339, 14 *Atl. Rep.* 688, 12 *Cent. Rep.* 890.

And one who attempts to cross a railroad when he knows a train is due and that he cannot make the passage in safety if the slightest delay or mishap occurs to him, is guilty of contributory negligence. *Palys v. Jewett, Receiver*, 30 N. J. Eq. 604; reversed in 32 N. J. Eq. 302.

Plaintiff's intestate approached a track when a moving train was in full view, and was warned by a companion not to attempt to cross; but she went on and slipped and fell on the track when the engine was within fifty or sixty feet of her, and before

she could recover herself she was struck and killed. *Held*, such contributory negligence as to defeat a recovery. *Collins v. Long Island R. Co.*, 31 N. Y. S. R. 973, 10 N. Y. Supp. 701.

Plaintiff went on a track for the purpose of driving off his cattle at a time when he expected a fast train to pass, and slipped and fell on the track and was struck by the train before he could get off. *Held*, that his own contributory negligence would defeat a recovery. *Farve v. Louisville & N. R. Co.*, 42 Fed. Rep. 441.

323. Imputed negligence.—Plaintiff, a young lady, was in a buggy with her little sister in her lap. Her escort, a young man, who was driving, negligently attempted to go over defendant's track at a crossing in front of a running train. Just before reaching the track, plaintiff, seeing the danger of the approaching train, cried out: "Surely you do not intend to cross!" To this he replied, "Yes." Thereupon she screamed and seized him. There was no time to decide her course and get out before the buggy was struck by the train, running at an unlawful speed, and she was injured. The team was gentle, but she had no control over it or the driver, and had no reason to believe him an imprudent person. *Held*, that she was not guilty of contributory negligence and could recover. *Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. Rep. 693.

324. Attempting to pass around engine or train on crossing.—One attempting to drive horses across a railroad crossing, in front of an engine temporarily placed there, making the usual noises by escaping steam, and who appreciates the danger, cannot recover for injuries inflicted by the frightened horses. *Union Pac. R. Co. v. Hutchinson*, 39 Kan. 485, 18 Pac. Rep. 705.—FOLLOWED IN *Union Pac. R. Co. v. Hutchinson*, 39 Kan. 488.

Where a train standing across a highway backs down to the cattle-guard for the apparent purpose of letting people pass, it is not, *per se*, negligence for one who has been waiting, to attempt to drive in front of the engine if his horse is steady; it is a question for the jury whether it was negligence in the railroad company to have failed to see the person so trying to cross, and to

have blown off steam while he was crossing. *Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675.

Whether one driving a sleigh, who left the highway with his team to avoid a car which obstructed it, and whose horse fell into a ditch, was negligent, is a question for the jury. *Corey v. Northern Pac. R. Co.*, 19 Am. & Eng. R. Cas. 352, 32 Minn. 457, 21 N. W. Rep. 479.

It is not contributory negligence *per se* for a person to attempt to cross a street in front of an engine after the gates are opened, where he has been waiting some 20 minutes for an opportunity to cross, as the opening of the gates is an invitation by the company to cross. *Scaggs v. Delaware & H. Canal Co.*, 26 N. Y. Supp. 323, 56 N. Y. S. R. 319, 74 Hun 198.

A weak-minded girl between twelve and thirteen years of age, while passing along a footpath in a small village, approached the crossing of three tracks. When on the first track, an engine approached and stopped directly in front of her on the third track. She started to walk down the first track, so as to pass around the engine, but was struck by cars that had been cut loose from the engine three quarters of a mile away, and were running of their own momentum at a speed of fifteen to eighteen miles an hour, and had been switched onto the first track. No signal or alarm of any kind was given. *Held*, that the evidence did not disclose contributory negligence, or at least such as to require the court to instruct for the defendant. *Philadelphia & R. R. Co. v. Troutman*, (Pa.) 6 Am. & Eng. R. Cas. 117, 11 W. N. C. 453.

Plaintiff's intestate was driving on the highway, and upon approaching a track found it obstructed by a train of cars, and attempted to drive around at a dangerous place, and his cart was overturned and he was killed. *Held*, that the negligence of the company in obstructing the crossing could not be considered the proximate cause of the death. *Jackson v. Nashville, C. & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 433, 13 Lea (Tenn.) 491, 49 Am. Rep. 663.—FOLLOWED IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea 128.

As plaintiff approached a village street crossing he found the main track obstructed by a train and stopped on a side track for about a minute and a half, and was looking

* See also *ante*, 210; also title IMPUTED NEGLIGENCE.

in one direction along the track when he was struck by an engine approaching from the opposite direction at a rate of sixty-eight miles an hour without signals. *Held*, that the question of his contributory negligence was for the jury. *Brown v. Griffin*, 71 *Tex.* 654, 9 *S. W. Rep.* 546.

325. Injuries caused by backing trains.*—(1) *Generally.*—A pedestrian along the sidewalk of a public street has a right to expect some warning before any sudden movement of a train of cars which had before been standing still; and where he is injured by the sudden backing of a standing train, without warning, across the walk along which he is passing, there would need to be very positive proof of negligence on his part to defeat his right of recovery. *McWilliams v. Detroit C. Mills Co.*, 31 *Mich.* 274.

Where a train is backing on a city street at night, without signals or warnings at the rear, and has stopped, or so nearly stopped that one on the street could perceive no motion, it is not negligence *per se* to attempt to cross the street behind it. *Magnus v. New York C. & H. R. R. Co.*, 52 *N. Y.* 215, 4 *Am. Ry. Rep.* 506.—REVIEWED IN *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.

When one enters upon a track under circumstances which make it obviously an act of imminent danger on account of the rapid approach of an engine and tender, and receives hurt therefrom, he cannot, on account of his own negligence, recover damages; and this though the injury was inflicted in an incorporated city by an engine running backward with tender in front, without ringing the bell or sounding the whistle, and at a rate of speed forbidden by the ordinances of the city. *Hoover v. Texas & P. R. Co.*, 61 *Tex.* 503.

(2) *Illustrations.*—It appeared that plaintiff was injured by a collision while attempting to cross the defendant's track upon a public street; that there were two or more main tracks at the place of the accident, and that the plaintiff was detained with his horse and wagon by a train of cars of another company on the track next to him, and that as soon as this train passed he started to drive across the track, there being a train of defendant backing across the street on one of the other tracks, which struck his horse and wagon. It also appeared that this train

was moving at the speed of four or five miles an hour, that the bell was being rung, that a sufficient number of men were in charge of the train, and that there was a flagman at the crossing in the discharge of his duty. The weight of evidence also showed that the flagman halloosed to plaintiff to stop, and made efforts to keep him from crossing. *Held*, that a verdict in favor of plaintiff could not be sustained. *Chicago, B. & Q. R. Co. v. Rosenfeld*, 70 *Ill.* 272.

Plaintiff stopped with his team at a crossing in a city where there were two tracks, to wait for a train drawn by a switch-engine to pass. As soon as the rear car of the train had passed the crossing the train stopped, and plaintiff, though familiar with the movement of cars at the place, and anticipating that the train might immediately back up, undertook to cross the track, and was struck and injured by the backing train. *Held*, that he was guilty of contributory negligence and could not recover. *Kennedy v. Chicago & N. W. R. Co.*, 68 *Iowa* 559, 27 *N. W. Rep.* 743.—APPROVED IN *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 *Am. & Eng. R. Cas.* 109, 70 *Wis.* 216, 35 *N. W. Rep.* 278.

Plaintiff was injured at a crossing where there were several tracks. She was detained in crossing one track by a moving train, but as soon as it had passed she and others started on and she was struck by a backing engine on another track, which was not seen in time to avoid a collision. *Held*, that she was not guilty of contributory negligence as a matter of law. *Crone v. New York C. & H. R. R. Co.*, 48 *N. Y. S. R.* 408, 20 *N. Y. Supp.* 529.

Where a plaintiff, acquainted with a crossing, and aware that the place was used for shifting cars, was seen by the engineer of the shifter, that had just passed, to drive his one-horse wagon safely across the track within a few feet of the shifter, the horse not noticing it, and to proceed some nine feet from the track, when, the engineer not observing, the horse balked and backed the wagon onto the track into collision with the shifter, which, having coupled onto a train of cars, was backing down the track, whereby injury resulted to wagon, horse, and plaintiff—*held*, error to refuse to set aside the verdict for the plaintiff as not warranted by the evidence. *Richmond & D. R. Co. v. Yeamans*, 86 *Va.* 860, 12 *S. E. Rep.* 946.

Plaintiff saw a switch-engine pass a cross-

* See also *ante*, 166.

ing as he approached, but at a short distance away his further view of it was cut off, and he drove on and was injured by its backing against him. It appeared that it was passing back and forth almost continuously, but that the bell was not rung all the time. *Held*, that a failure to stop, look, and listen was not such contributory negligence as to justify taking the case from the jury. *Northern Pac. R. Co. v. Holmes*, 3 Wash. T. 543, 18 Pac. Rep. 76.—APPLYING *Continental Imp. Co. v. Stead*, 95 U. S. 161. DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Scofield v. Chicago, M. & St. P. R. Co.*, 2 McCrary (U. S.) 268.—REVIEWED IN *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38.

Plaintiff's intestate was killed at a crossing where there were two tracks about nine feet apart. As she approached the second track a train came by and she stepped back onto the first track, and was struck by a backing engine. *Held*, that there can be no recovery. *McClary v. Chicago, M. & St. P. R. Co.*, 46 Fed. Rep. 343.

326. Colliding with a second train on crossing immediately after one has passed.—(1) *Contributory negligence.*—A person who started to cross a double-track railroad immediately after the passage of one train without looking for the approach of another, was guilty of negligence contributing to injuries sustained by being run down while attempting to cross, especially where the gates upon the highway were down, and the train which struck him approached slowly with the brakes set, preparatory to stopping, and must have been observed if any watch had been kept for it. *Allerton v. Boston & M. R. Co.*, 34 Am. & Eng. R. Cas. 563, 146 Mass. 241, 5 N. Eng. Rep. 825, 15 N. E. Rep. 621.

Where a person walking on a public street comes to a crossing while a north-bound train is passing on the further track, and just as soon as or even before it has completely passed starts to cross the nearer track, and either stands or walks near enough to be struck by a south-bound train, recovery is barred by contributory negligence. *Schmidt v. Philadelphia & R. R. Co.*, 149 Pa. St. 357, 24 Atl. Rep. 218.—DISTINGUISHING *Pennsylvania R. Co. v. Werner*, 89 Pa. St. 59; *Aiken v. Pennsylvania R. Co.*, 130 Pa. St. 380.

(2) *Not contributory negligence.*—It may not be negligence—that is, a degree of neg-

ligence which shall deprive a party of damages—to cross a track immediately after a train has rapidly passed with much noise and ringing of bells, although another train, giving no signal of its approach, may be noiselessly approaching from an opposite direction on a contiguous and parallel track. *McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144.

The deceased waited until a train had passed so as to leave an unobstructed view of the track for a sufficient distance to authorize a jury to find that a person of reasonable caution might believe that the tracks were free, and that it was safe to attempt to cross. *Held*, in an action for being struck by a train passing in the opposite direction, that contributory negligence was not imputable to him. *Puff v. Lehigh Valley R. Co.*, 71 Hun (N. Y.) 577.—DISTINGUISHING *Heaney v. Long Island R. Co.*, 112 N. Y. 122; *Foran v. New York C. & H. R. Co.*, 64 Hun (N. Y.) 510; *Daniels v. Staten Island Rapid Transit Co.*, 125 N. Y. 407.

Plaintiff was injured at a street crossing. The evidence showed that a long train of cars was passing in the opposite direction and making a great deal of noise, which tended to show that if the bell was rung on the train injuring him it could not be heard, and that a view of the approaching train was cut off. *Held*, that he could not be charged with negligence in failing to see or hear the train. *Leonard v. New York C. & H. R. Co.*, 10 J. & S. (N. Y.) 225.—APPLYING *Weber v. New York C. & H. R. Co.*, 3 Wkly. Dig. 472. CRITICISING *Sutherland v. New York C. & H. R. Co.*, 9 J. & S. 17. REVIEWING *Borst v. Lake Shore & M. S. R. Co.*, 4 Hun (N. Y.) 349; *Thurber v. Harlem B. & F. R. Co.*, 60 N. Y. 331; *Ingersoll v. New York C. & H. R. Co.*, 6 T. & C. (N. Y.) 416.

When a train has passed a crossing within the view of a person intending to pass over it, under such circumstances that he has no reason to expect the approach of any train from the direction in which such train went, the rule which requires persons approaching a crossing to look and listen for the approach of a train has no application, if such person was killed or injured by the backing of such train without warning. *Duane v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394.—QUOTING

Eaton v. Erie R. Co., 51 N. Y. 551. REVIEWING *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 72; *Curtis v. Detroit & M. R. Co.*, 27 Wis. 158; *Bower v. Chicago, M. & St. P. R. Co.*, 61 Wis. 457.—APPLIED IN *Endress v. Lake Shore & M. S. R. Co.*, 19 N. Y. S. R. 481, 2 N. Y. Supp. 719. REVIEWED IN *Abbot v. Dwinell*, 74 Wis. 514, 43 N. W. Rep. 496.

A person approaching a crossing with a team, and having reason to suppose that a regular passenger train has recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction, especially when it would be impossible to see or hear an approaching train because of an embankment or other obstruction to sight and sound. *Bower v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 301, 61 Wis. 457, 21 N. W. Rep. 536.

(3) *Question for jury*.—Where a person familiar with the surroundings attempted to cross a track upon the sidewalk, after seeing a train pass over it, and was run over and killed by detached cars which were following said train, it was for the jury to say whether he took that care and caution, under all of the surrounding circumstances, that a prudent man, exercising ordinary care and caution, should have exercised. *Breckenfelder v. Lake Shore & M. S. R. Co.*, 79 Mich. 560, 44 N. W. Rep. 957.—DISTINGUISHED IN *Guta v. Lake Shore & M. S. R. Co.*, 81 Mich. 291.

The evidence showed that plaintiff's intestate approached the tracks from the west, when one train was going south on a down grade with steam on, and without giving signals or carrying a headlight, and another train was going in the opposite direction, carrying a light and ringing a bell, and the engine exhausting steam. The intestate was found a little south of the street line with wounds on his left side. *Held*: (1) that the question of his contributory negligence was properly submitted to the jury; (2) that the evidence was not sufficient to conclusively show that he was struck when south of the street line. *Smedis v. Brooklyn & R. B. R. Co.*, 8 Am. & Eng. R. Cas. 445, 88 N. Y. 13; *affirming* 23 Hun 279.—FOLLOWING *Kellogg v. New York C. & H. R. R. Co.*, 79 N. Y. 72.

The intestate had a right to go on the track south of the crossing, so long as it was on the street; and if there was no want

of care on his part, and the company was negligent while he was there, the plaintiff could recover. *Smedis v. Brooklyn & R. B. R. Co.*, 8 Am. & Eng. R. Cas. 445, 88 N. Y. 13; *affirming* 23 Hun 279.—QUOTED IN *Louisville, N. A. & C. R. Co. v. Phillips*, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59.

327. — illustrations.—Where plaintiff waited at a crossing for an approaching train going east to pass, and immediately upon its passage attempted to cross the track, and was struck by a train going west and severely injured—*held*, to be such contributory negligence as would bar a recovery, it appearing that the track was perfectly straight, and a view of it for a long distance either way was in no way obscured, and that plaintiff was familiar with the crossing and knew that trains going either way with great rapidity might be expected at any moment. *Benson v. Chicago & N. W. R. Co.*, 41 Ill. App. 227.

Plaintiff, who was driving a heavy team of gentle horses, stopped near a track where his view one way was obstructed by a building, to allow a train to pass, approaching from the opposite direction, and as soon as it passed went upon the track and was struck by a train going in the opposite direction. *Held*, that he was guilty of contributory negligence. *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302.—DISTINGUISHING *French v. Taunton Branch R. Co.*, 116 Mass. 537. *Griffin v. Boston & A. R. Co.*, 148 Mass. 143; *Hanks v. Boston & A. R. Co.*, 147 Mass. 495. QUOTING *Marty v. Chicago, St. P., M. & O. R. Co.*, 38 Minn. 108; *McCrary v. Chicago, M. & St. P. R. Co.*, 31 Fed. Rep. 531.

Plaintiff, who was driving, stopped to allow one train to pass, but was struck in crossing the track by a train running rapidly on another track. There was evidence to the effect that the bell was not rung until the train was very near the crossing, and it was then too late to be useful. *Held*, sufficient to authorize the jury in finding that the plaintiff exercised due care. *Stott v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 500, 66 Hun 633, *mem.*, 21 N. Y. Supp. 353.

Plaintiff waited at a crossing until a train passed and then, in attempting to cross, was struck by another train running in the opposite direction. There was nothing to prevent her seeing the train striking her,

except the smoke from the other train. *Held*, that the company was entitled to a nonsuit on the ground of contributory negligence. *Whalen v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 566, 61 Hun 623, 15 N. Y. Supp. 941.—FOLLOWING *Heaney v. Long Island R. Co.*, 112 N. Y. 122, 20 N. Y. S. R. 296.

A person driving a team stopped at a crossing to allow a train to pass, and immediately upon its moving off the crossing the gate-keeper raised the gate and signaled him to cross. The approach to the track was on a down grade and the view obstructed. *Held*, that he was not negligent in proceeding across the track at a trot, or in failing to act with the best judgment when he found himself in imminent danger from an approaching train. *Bond v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 450, 52 N. Y. S. R. 637, 69 Hun 476.

While plaintiff with a team was approaching the place where defendant's track crossed the highway, she observed a passenger train pass, but did not expect any other train at that time, although she had seen a freight train standing on the track, headed that way, in the town she had just left. The railroad at that point cuts through a hill, so as to obstruct the view from the wagon road. Plaintiff had passed the crossing many times before and was familiar with it. She had always used great care in looking for trains, but on this occasion she did not stop to look or listen. Her team came into collision with a passing engine and she sustained considerable damage. *Held*, that the plaintiff was guilty of contributory negligence. *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 *Oreg.* 5, 11 Am. St. Rep. 778, 17 *Pac. Rep.* 5.—QUOTED IN *Louisville & N. R. Co. v. Crawford*, 89 Ala. 240.

328. Colliding with express wagon in so crossing.—Plaintiff was struck by an express wagon in passing a train at a crossing. It appeared that two trains lay on the track headed in opposite directions and an engine exhausting a great amount of steam, and as one train moved up he started to cross and when near the engine the wind puffed the steam and smoke over him just at the moment that plaintiff was struck. Plaintiff was charged with contributory negligence in his manner of crossing. *Held*, that the question of negligence was

for the jury. *Post v. United States Exp. Co.*, 76 Mich. 574, 43 N. W. Rep. 636.

329. When negligence in attempting to so cross is for jury.*—It appeared that the plaintiff, in attempting to cross the track, was struck by a car of a freight train which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's evidence tended to show that she was driving with care, and in approaching the crossing saw a train pass, but saw no flagman and received no warning that another car was coming. At a point forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the car came; at thirty feet from the crossing she could have seen the track for more than half a mile, but she did not look in that direction from those points, and gave as a reason therefor that she did not suppose that one train would follow another so closely. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury. *French v. Taunton Branch R. Co.*, 116 Mass. 537, 7 Am. Ry. Rep. 460.—DISTINGUISHED IN *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257. NOT FOLLOWED IN *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354. REVIEWED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

Where a girl, just after the passage of a train, attempted to cross a track and was injured by a train approaching from the opposite direction without sounding the whistle or ringing the bell, the question as to her contributory negligence should be allowed to go to the jury, and it is improper for the court to order a nonsuit. *McGrath v. Hudson River R. Co.*, 19 *How. Pr. (N. Y.)* 211, 32 *Barb.* 144.

Plaintiff, a girl sixteen years old, was passing along a street in the city of Buffalo, going south, across defendant's tracks (five in number). She had crossed two of these tracks. She looked both ways and saw a train approaching from the east, on the fifth track. She stopped for this train to pass, standing between the second and third tracks, within about a foot of the third. She had been standing thus a short time, and about as the train passed which

* See also *ante*, 218, 258, 307, 311.

Injuries at crossings. Whether failure to look for detached cars is contributory negligence is for the jury, see 42 AM. & ENG. R. CAS. 191, *abstr.*

she was watching, was struck and injured by the tender of a locomotive backing up from the west, on the third track, which gave no warning, by ringing a bell or sounding a whistle, of its approach. Plaintiff was nonsuited at the circuit on the ground of contributory negligence. *Held*, error; that the question was one of fact for the jury. *Haycroft v. Lake Shore & M. S. R. Co.*, 64 N. Y. 636; *affirming* 2 Hun 489, 5 T. & C. 49.

Plaintiff approached a village crossing at dusk when two trains were passing, going in opposite directions. She waited until the one nearest to her had passed the crossing, and upon stepping on the track was struck by a hand-car which was following the train without lights or signals. The crossing was not lighted and there was nothing to enable one to see the hand-car. *Held*, that the question of contributory negligence was for the jury. *Suiter v. New York, L. E. & W. R. Co.*, 7 N. Y. S. R. 687, 44 Hun 627.—*DISTINGUISHING* *Hart v. Hudson River Bridge Co.*, 84 N. Y. 62. *QUOTING* *Stackus v. New York C. & H. R. Co.*, 79 N. Y. 469.

Plaintiff approached a familiar crossing in the evening, where there were several tracks but no flagman. He stopped on one track to allow a train on another to get out of the way and was injured by a second train running without signals. He testified that he did not know the main tracks on which the regular trains ran. *Held*, that the facts did not disclose contributory negligence as a matter of law. *Blaiser v. New York, L. E. & W. R. Co.*, 110 N. Y. 638, *mem.*, 17 N. E. Rep. 692, 17 N. Y. S. R. 145, 13 Cent. Rep. 231.

Plaintiff stood at a crossing on a dark night where there were several tracks until a train passed, and then was struck by a train going in the opposite direction as he was crossing. The first train passing made considerable noise, and there was a conflict of evidence as to whether the statutory signals were given by the second train. The second train carried a headlight, but there were various other lights near the crossing that would tend to confuse the sight. *Held*, that the question of contributory negligence was properly left to the jury. *Beckwith v. New York C. & H. R. Co.*, 7 N. Y. Supp. 719, 28 N. Y. S. R. 130, 54 Hun 446; *affirmed in* 125 N. Y. 759. *mem.*—*QUOTING* *Parsons v. New York C. &*

H. R. R. Co., 113 N. Y. 364, 21 N. E. Rep. 145.

VII. PROCEDURE.

1. Pleadings.*

330. Generally.—A recovery for personal injuries cannot be had under a statute conferring a right of action where a person is injured at a crossing of a highway at grade, and the employes in charge of the engine neglect to ring the bell or blow the whistle, when the counts in the declaration are founded upon other statutory provisions which make a railroad company liable for the loss of the life of a passenger through its negligence or for the life of a person in the exercise of due diligence and not a passenger. *Allerton v. Boston & M. R. Co.*, 34 Am. & Eng. R. Cas. 563, 146 Mass. 241, 5 N. Eng. Rep. 825, 15 N. E. Rep. 621.

A complaint under the Mass. Act of 1874, ch. 372, § 164, making railroads liable for damages by reason of the failure to ring a bell or sound a whistle at grade crossings, must allege that the accident occurred at a grade crossing; that such signals were not given, and that the failure caused or contributed to the injury. *Wright v. Boston & M. R. Co.*, 2 Am. & Eng. R. Cas. 121, 129 Mass. 440.

The complaint substantially set out that the plaintiff, before attempting to drive over the crossing, stopped, looked, and listened, but by reason of a deep cut on the defendant's line and intervening underbrush was unable to see an approaching train, and then upon endeavoring to drive over said crossing, which was slightly higher than the rest of the highway so as to impede the vehicle, was run down and driven over by an engine on defendant's road, which came through the cut above mentioned at a reckless rate of speed, viz., fifty miles an hour, giving no signal and making no sound to alarm the plaintiff, in consequence of which he was injured without any negligence on his part, by the negligence of the company defendant. *Held*, that said complaint did not contain anything from which contributory negligence on the part of the plaintiff could be inferred, and that it was therefore not demurrable on that ground. *Pittsburgh,*

* See also *ante*, 83, 150, 227; and also PLEADING, 26, 115.

Variance between pleading and proof, see PLEADING, 139.

C. & St. L. R. Co. v. Wright, 5 *Am. & Eng. R. Cas.* 628, 80 *Ind.* 182.

The complaint alleged that the plaintiff was driving in the night-time along a public highway which crossed the defendant's railroad; that a train of the defendant was backed toward and over said crossing, and the defendant carelessly and negligently omitted, while approaching said crossing, to give any signal by bell or whistle, or otherwise; that before crossing the railroad track the plaintiff stopped and listened, but, on account of the negligence of the defendant, he neither saw nor heard any train approaching; and that the accident occurred without any fault or negligence on his part. *Held*, that the complaint showed that the plaintiff was not guilty of contributory negligence. *Ohio & M. R. Co. v. McDaniel*, 5 *Ind. App.* 108, 31 *N. E. Rep.* 836.—FOLLOWING *Chicago, St. L. & P. R. Co. v. Nash*, 1 *Ind. App.* 298.

331. As to defects in crossings.*—

In an action to recover damages for personal injuries sustained in consequence of a defective railroad crossing, a complaint is bad which does not show with sufficient certainty that the defendant ever held out any invitation, express or implied, to cross at the crossing in question, which is not shown to have been part of a public highway. The averment that the defendant gave a license to the public to cross at that point is insufficient to render it liable. *Stewart v. Pennsylvania R. Co.*, (*Ind.*) 14 *Am. & Eng. R. Cas.* 679.

The defects in a complaint may, in some cases, be aided by an answer. The answer in the above case averred that after the public had begun to use the place in question as a crossing, the same was constructed and repaired, as alleged in the complaint, for the accommodation and convenience of the persons crossing said railroad, and not otherwise. *Held*, that this averment practically admitted that the company had invited the public to use the crossing, and that it was liable accordingly. *Stewart v. Pennsylvania R. Co.*, (*Ind.*) 14 *Am. & Eng. R. Cas.* 679.

In the law all crossings of highways by a railroad are classed together, and if there is any reason why a particular crossing is more dangerous than others, it should be averred and proved. *Klanowski v. Grand*

Trunk R. Co., 64 *Mich.* 279, 31 *N. W. Rep.* 275.

When the negligence alleged in the petition is that the defendant "failed and neglected to construct and maintain a good and sufficient crossing," and permitted "said crossing to be and remain in a dangerous condition," an instruction that it was the duty of the defendant to maintain a crossing which would be "reasonably safe and convenient" for public travel is justified by the pleadings. *Brown v. Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 87, 99 *Mo.* 310, 12 *S. W. Rep.* 655.

A plaintiff seeking to recover for injuries sustained by him on account of the alleged failure of the defendant company to keep in repair a good, safe, and substantial crossing over its road track, is not required to allege with specific particularity the character of the defects in such crossing. A general allegation in the petition of the insufficiency of the crossing, that it had not been properly prepared, fixed, or kept in repair, and that it was rotten, and otherwise defective and insufficient, puts the defendant on notice of the case he is required to meet. *East Line & R. R. Co. v. Brinker*, 68 *Tex.* 500, 3 *S. W. Rep.* 99.—DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 146, 71 *Mo.* 514.

332. As to manner of locating and constructing track.—In a suit for an injury caused by the condition of its track at a place where it crossed a highway, the declaration alleged that the company was chartered with authority to construct and operate a steam railroad and had constructed it at the crossing in question before the injury complained of. *Held*, to be a sufficient averment that the structure was legally placed upon the highway. *Allen v. New Haven & N. Co.*, 14 *Am. & Eng. R. Cas.* 615, 50 *Conn.* 215.

In an action for injuries at a highway crossing an allegation in the complaint that the railroad was so located and constructed at said crossing that a train or engine could not be seen by a person on the highway until so near that it was difficult or impossible to avoid being struck, and that it was negligent thus to locate and construct it, is sufficiently certain. *Lehnertz v. Minneapolis & St. L. R. Co.*, 15 *Am. & Eng. R. Cas.* 370, 31 *Minn.* 219, 17 *N. W. Rep.* 376.—FOLLOWING *Madden v. Minneapolis & St. L. R. Co.*, 30 *Minn.* 453.

* See also ante, 20-44, 224.

333. Leaving cars on crossings. —

In an action to recover damages for injuries sustained through plaintiff's horse being frightened by a car standing upon a crossing, the complaint need not necessarily aver what employes left or placed the cars upon the track, and that it was the duty of such employes to have moved the car. *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 37 *Am. & Eng. R. Cas.* 511, 118 *Ind.* 152, 20 *N. E. Rep.* 727.

A declaration states a good cause of action in alleging that defendant, in placing its cars so as to obstruct a highway crossing, and in leaving them there, has so negligently, conducted itself as to cause the injury. *Young v. Detroit, G. H. & M. R. Co.*, 19 *Am. & Eng. R. Cas.* 417, 56 *Mich.* 430, 23 *N. W. Rep.* 67.

334. Negligence in operating cars at crossings.*—

The complaint, under the Illinois statute, to recover a penalty for the failure to ring a bell or sound a whistle on approaching a public crossing, must describe the highway, either by name, location, or termini, so that the company may have notice of where the injury occurred. *Chicago & A. R. Co. v. Howard*, 38 *Ill.* 414.

The allegation that the defendant, with gross negligence and in a careless and reckless manner, caused one of its locomotives, then and there operated by its servants and agents, to rapidly approach the street crossing where the accident occurred, without having the headlight lit in said locomotive, and without giving any reasonable, timely, or proper warning, notice, or signal of its approach, either by ringing the bell or blowing the whistle at a safe and reasonable distance from said crossing, fails to show that the accident or injury was caused by the negligence of the defendant. *Pittsburgh, C. & St. L. R. Co. v. Conn*, 104 *Ind.* 64, 3 *N. E. Rep.* 636.

An averment that defendant negligently and carelessly drove a certain locomotive upon the railroad up to, upon, and across a certain public highway at the crossing of the same and the said railroad, without giving the necessary statutory signals, viz., ringing a bell or sounding a whistle, was a sufficiently specific averment of defendant's negligence when taken in connection with the averment of consequential injury, and it entitled plaintiff to support it by evi-

dence, under defendant's plea to the general issue. *Chicago & N. E. R. Co. v. Miller*, 6 *Am. & Eng. R. Cas.* 89, 46 *Mich.* 532, 9 *N. W. Rep.* 841.

A complaint that defendants, "by the culpable negligence, carelessness, unskillfulness, and mismanagement of said defendants and their employes, wrongfully ran a locomotive, with a train of cars thereto attached," against the plaintiff's horses and wagon, while lawfully traveling along the public highway—*held*, not bad for failing to allege the physical facts constituting the negligence. *Clark v. Chicago, M. & St. P. R. Co.*, 28 *Minn.* 69, 9 *N. W. Rep.* 75.

335. — in approaching crossing at too great speed.*—

In an action for injuries from a collision at a street crossing, the facts were sufficiently stated in the allegation that the company's train was run across a street "at a dangerous, reckless, and unusual rate of speed of fifty miles per hour, over and across said street, where a great many persons were constantly passing and crossing," thereby injuring the plaintiff and demolishing her wagon; and the averment that those in charge of the train made no effort to stop or check the same, but ran it at that speed upon plaintiff and injured her without any negligence on her part, is a sufficient charge of negligence on the part of the company's agents. Whether the facts were as alleged was for the jury to determine from the evidence. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

A complaint alleged that plaintiff was driving along a highway towards a crossing, and that the defendant negligently caused one of its locomotives with a train attached to approach said crossing and then and there to pass the same at a great and unusual rate of speed without proper care, and negligently omitted while so approaching and crossing, to give any reasonable, proper, or timely signal by ringing the bell or sounding the whistle at a proper distance from the crossing, by reason of which plaintiff, being unaware of the approach of said train and by reason of said negligence and without any fault of his own, was struck by said train and injured. *Held*, that the complaint was sufficiently specific. *Pittsburgh,*

* See also *ante*, 227.

* See also *ante*, 168-180, 268, 320; *post*, 346.

C. & St. L. R. Co. v. Martin, 8 Am. & Eng. R. Cas. 253, 82 Ind. 476.

A complaint to recover damages for an injury received at a crossing, and alleged to have been "caused by the reckless, negligent, and wilful conduct of the defendant's employes" in propelling a locomotive backwards over the crossing, the track being hidden from view by intervening buildings, at a dangerous rate of speed without giving warning by bell or whistle, is not good as charging a wilful injury, and, there being no averment negating contributory negligence, it is bad on demurrer. *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. Rep. 807.—FOLLOWED IN *Belt R. & S. Y. Co. v. Mann*, 107 Ind. 89. REVIEWED IN *Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 437.

2. Evidence.

336. Generally.*—In a suit for an injury inflicted by a train, alleged to have belonged to the company, or operated by it, full and undoubted proof of the fact that the company owned the train, or was operating the same, is not required of the plaintiff. In the absence of positive proof on the subject by the company, it will be sufficient if the plaintiff's evidence is *prima facie* sufficient to show the fact. *Pittsburg, C. & St. L. R. Co. v. Knutson*, 69 Ill. 103.

It having been proved that the injury was caused by an engine and car while being operated on a track belonging to the defendant, and it being admitted by counsel for defendant, upon the trial, that the defendant was a corporation, and that at the time of the accident it owned and operated the railroad upon which the injury complained of occurred, it was not necessary for the plaintiff to prove the ownership of the car which struck his horse, or of the engine which was pushing the car, or that the fireman and engineer were the employes or agents of the defendants. *Lake Erie & W. R. Co. v. Carson*, 4 Ind. App. 185, 30 N. E. Rep. 432.

It was not necessary that proof be given of notice to defendant of the condition and surroundings of a crossing, where the crossing in question was a part of defendant's own roadway, across which the company's agents and employes were constantly

passing. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 Am. & Eng. R. Cas. 200, 134 Ind. 380, 33 N. E. Rep. 280.

Defendant company was sued for an injury at a crossing, and was charged with negligence, in that its flagman did not give sufficient warning. At the trial the company offered in evidence a flag similar to the one used by the flagman at the time of the accident, which was excluded. *Held*, that inasmuch as the flag was not the only means available to the company for the purpose of illustrating the one used by the flagman at the time of the accident, its exclusion was not such error as to entitle the company to a new trial. *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313, 32 N. Y. S. R. 612, 11 N. Y. Supp. 80; *affirmed* in 126 N. Y. 629, *mem.*; 36 N. Y. S. R. 1012.

Where a company has set up the defense of contributory negligence to an action against it to recover for injuries to a wagon and team at a crossing through its neglecting to give proper warnings, it is error to exclude evidence tending to show contributory negligence. *Missouri, K. & T. R. Co. v. Moore*, 4 Tex. App. (Civ. Cas.) 323, 15 S. W. Rep. 714.—QUOTING *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643.

In an action for injuries at a crossing, evidence as to the manner in which the plaintiff had crossed the tracks a few hours before the accident, to show negligence on his part, is irrelevant. *Delaware, L. & W. R. Co. v. Converse*, 49 Am. & Eng. R. Cas. 323, 139 U. S. 469, 11 Sup. Ct. Rep. 569.

337. Burden of proof.*—A plaintiff suing for an injury at a crossing has the burden of proof both to show negligence of the company and his own freedom from contributory negligence. *Tucker v. Duncan*, 6 Am. & Eng. R. Cas. 268, 4 Woods (U. S.) 652, 9 Fed. Rep. 867. *Lesau v. Maine C. R. Co.*, 23 Am. & Eng. R. Cas. 245, 77 Me. 85.

The burden is on plaintiff injured in a collision at a crossing to show by a preponderance of the evidence that he was vigilant to ascertain the approach of a train. *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. Rep. 892.

While Mo. Rev. St. 1889, § 2608, requiring signals by bell or whistle on a loco-

* See also *ante*, 84, 90, 160, 161, 234.

3 D. R. D.—41.

* See also *ante*, 102, 220; and also CONTRIBUTORY NEGLIGENCE, 103-107; PLEADING, 122.

motive approaching highways, shifts the burden of proof to the railroad as to the cause of injuries sustained by persons at public crossings where no statutory signal was given, yet it does not change the established rule that if the plaintiff's proof discloses that the damages resulted from another cause than the negligence of the railroad in omitting the required signal there can be no recovery. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837.

338. When sufficient to sustain verdict for plaintiff.—In an action to recover for injuries at a highway crossing, where the verdict is fairly supported by the evidence and there is no substantial error committed by the trial court, the appellate court will not interfere with the verdict. *Chicago, M. & St. P. R. Co. v. Maher*, 27 Ill. App. 24.

Proof that plaintiff's intestate was killed at a crossing where it appeared that the gates were up and that the train was running at an unlawful speed without signals shows such negligence as will sustain a verdict for plaintiff. *Pennsylvania Co. v. Swan*, 27 Ill. App. 83.

Where plaintiff, before crossing the track, stopped and looked each way for cars and saw none, and the engine which struck him was running backwards at a high rate of speed, forbidden by the city ordinance, and neither the engineer nor the fireman was looking out upon the side of the track the plaintiff was approaching, and no whistle was sounded, and the evidence was conflicting as to whether or not the engine bell was rung, the evidence is sufficient to support a verdict for the plaintiff, and a motion of defendant for a verdict is rightly overruled. *Clampit v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 71, 50 N. W. Rep. 673.

A verdict for plaintiff in an action for injuries caused by a train striking his wagon at a crossing will not be reversed where the evidence shows that the track about the crossing was in bad condition and that the train was running at a high rate of speed and gave no signals of its approach; and where it appears that the plaintiff looked and listened for trains before driving on the track; that the wheels of his carriage caught in a rail, delaying him, when he was almost immediately struck by the train;

that the persons on the train might have seen plaintiff when two or three hundred yards away, but from his position on the wagon he could not have seen the train that distance. *Galveston, H. & S. A. R. Co. v. Matula*, (Tex.) 19 S. W. Rep. 376.

Evidence that, by reason of excavations, the formation of the land in the vicinity of a railroad crossing, and the presence of timber near the crossing, it was somewhat difficult for persons near it on the highway to see an approaching train, would support a finding by the jury that a failure to signal the approach of the train by bell or whistle was negligence, although such signals were not required by statute. *Eilert v. Green Bay & M. R. Co.*, 48 Wis. 606, 4 N. W. Rep. 769.

Such a finding may be supported by mere negative testimony, notwithstanding positive testimony on defendant's part that signals were given. *Eilert v. Green Bay & M. R. Co.*, 48 Wis. 606, 4 N. W. Rep. 769.—FOLLOWING *Urbanek v. Chicago, M. & St. P. R. Co.*, 47 Wis. 59.

In an action on the case to recover for a personal injury alleged to have resulted from the negligence of defendant, where there was evidence tending to show that the plaintiff was struck by cars being moved by defendant at a street crossing; that the train was being run at an unusual rate of speed; that no bell was rung or whistle sounded; that there was no light on the forward car that struck the plaintiff, and that plaintiff was observing due care for his safety—*held*, that such facts, assuming them to have been proven, established a clear right of recovery in the plaintiff. *Lake Erie & W. R. Co. v. Zoffinger*, 15 Am. & Eng. R. Cas. 371, 107 Ill. 199.

On the trial of an action based on defendant's negligence in constructing a street crossing, in consequence of which the plaintiff caught her foot in an opening therein, the court submitted to the jury this question: "Was the plaintiff, when she got her foot caught, passing over the crossing in the usual way, and going directly across the same?" to which the jury answered, "We do not know." *Held*, that such answer was no finding whatever, and therefore was not inconsistent with a general verdict for the plaintiff. *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. Rep. 729.

Plaintiff was driving a team with a loaded wagon across a track and was injured by his

* See also *ante*, 219, 220; *post*, 350.

horses taking fright at a train backing very near to them and running away and throwing him out. *Held*: (1) that he was not negligent in attempting to cross when there was space enough before the train commenced to back; (2) that the company was negligent in continuing to back after the employes saw that the horses were excited, when by pulling up a little plaintiff could have passed, and proof of such facts justified a verdict for plaintiff. *Illinois C. R. Co. v. Larson*, 42 Ill. App. 264.

The defendant company was engaged in the operation of two parallel railroad tracks which ran north and south. A highway crossed both tracks. Plaintiff and another person approached the crossings going east about dark. Before reaching the first crossing they stopped twice to look and listen for trains, the last time within 50 or 60 feet west of the crossing. Seeing or hearing nothing, the team was started at a slow trot across the track. When it had about reached it plaintiff saw a flash from the headlight of an approaching engine, and before the wagon had cleared the track more than a few feet a passenger train passed at great speed. When the locomotive was almost at the crossing the whistle was blown, frightening the team of mules, which ran towards the east crossing. The distance between the two tracks was 216 feet. When the mules commenced to run a train was approaching the east crossing. The engineer saw that the team was frightened and unmanageable and thought that it was trying to cross the track ahead of the train. He was about 300 feet and the team about 110 feet from the crossing. He testified that he could not stop the train in time and that he increased the speed in order, if possible, to pass the crossing before the team reached it. As the team reached the crossing the engine struck one of the mules, overturned the wagon, throwing plaintiff out and severely injuring him. *Held*, that although the testimony was conflicting as to the distance that a train upon the first track might have been seen and also as to the nature of the train which first passed, the evidence was sufficient to sustain a verdict for the plaintiff. *Pence v. Chicago, R. I. & P. R. Co.*, 42 Am. & Eng. R. Cas. 126, 79 Iowa 389, 44 N. W. Rep. 686.

330. When not sufficient.—Plaintiff's intestate was found on the track on a

dark night at a crossing mortally wounded just after a train had passed, with everything to indicate that he had been struck by the cars. No flagman was stationed at the crossing, but on the other hand there was evidence that the deceased was somewhat intoxicated. *Held*, that the evidence did not justify a verdict for the plaintiff. *Church v. Northern Pac. R. Co.*, 31 Fed. Rep. 529.

Plaintiff was struck by defendant's engine while driving a gentle horse over the track at a street crossing. For fifty feet before he reached the track defendant's engine, with headlight burning, could be seen by him for a distance of 350 feet from the crossing. In view of this physical fact testimony that he looked and listened for an approaching train did not even create a conflict of evidence as to his contributory negligence; and since there was no evidence from which the jury could properly have found that the accident might have been avoided by the exercise of proper care after the engineer discovered the danger, the verdict for plaintiff could not be sustained. *Bloomfield v. Burlington & W. R. Co.*, 74 Iowa 607, 38 N. W. Rep. 431.

In an action for negligently killing plaintiff's intestate the fact that while he was driving on the highway across the defendant's track, a train going at the rate of ten miles an hour and making the usual signals ran upon and killed him, is not sufficient evidence of negligence to justify a verdict for plaintiff. *Harris v. Minneapolis & St. L. R. Co.*, 33 Minn. 459, 23 N. W. Rep. 850.

Plaintiff's team was injured at a crossing while being driven by his son, who testified that he looked and listened as he approached the crossing, but neither saw a train nor heard any signal; that when nearer the track he saw the train and whipped up his horses and tried to pass. It appeared that, after certain buildings were passed, twenty-five feet from the track, the view was unobstructed, and while plaintiff's witnesses claimed that the view was obstructed by certain standing cars on a side track, yet it was shown by actual measurement that the nearest side track was one hundred and twelve feet from the street. *Held*, not sufficient evidence to support a verdict for plaintiff. *Fleissner v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 711, 61 Hun 623, 16 N. Y. Supp. 18.

340. Sufficiency as showing the plaintiff's due care.—The fact that a person injured while crossing a track was not affirmatively shown to have listened for a coming train is not sufficient to preclude a recovery, when there is evidence that witnesses standing in the immediate neighborhood heard no sound of an approaching train until the alarm whistle was sounded upon the engineer's discovering the danger of an accident, although the engineer may have testified that he rang the bell as he approached the crossing. *Hanks v. Boston & A. R. Co.*, 35 *Am. & Eng. R. Cas.* 321, 147 *Mass.* 495, 7 *N. Eng. Rep.* 139, 18 *N. E. Rep.* 218.

The fact that plaintiff stopped, looked, and listened before attempting to cross the track is sufficient to authorize the jury in finding that he exercised due care. *Moore v. New York C. & H. R. R. Co.*, 49 *N. Y. S. R.* 516, 2 *Misc.* 23, 21 *N. Y. Supp.* 436.

And whether he ought to have taken any additional precaution was, on the evidence, a question for the jury. *Beanstrom v. Northern Pac. R. Co.*, 46 *Minn.* 193, 48 *N. W. Rep.* 778.—FOLLOWED IN *Dupee v. Northern Pac. R. Co.*, 50 *Minn.* 556.

341. Presumption as to due care.*—One crossing a track at a public crossing will be presumed to have exercised due care and diligence, in the absence of evidence to the contrary. Such person has a right to assume that the statutory signals will be given, and to so act. *Crumpley v. Hannibal & St. J. R. Co.*, 111 *Mo.* 152, 19 *S. W. Rep.* 820.

While want of contributory negligence on the part of a person killed at a railroad crossing may be established by inferences drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. *Wiwironoski v. Lake Shore & M. S. R. Co.*, 124 *N. Y.* 420, 26 *N. E. Rep.* 1023, 36 *N. Y. S. R.* 405; reversing 58 *Hun* 40, 33 *N. Y. S. R.* 666, 11 *N. Y. Supp.* 361.

342. Proof of accident does not raise a presumption of negligence.—The fact alone that a traveler on a highway is killed by a passing train at a crossing raises no presumption of negligence on the part of the company. *Pennsylvania R. Co. v. Goodman*, 62 *Pa. St.* 329.

A company having the general right to lay a track and run their cars across a street must be shown to have committed some fault in the manner of doing it before they can be made liable for a personal injury sustained by an individual. It is not enough to point to the injury which ensued, and show that it was attributable to the running of the train across the street, but it must be shown that there was something improper in the manner of running the train before the company can be made responsible for the consequences. *Wilds v. Hudson River R. Co.*, 29 *N. Y.* 315.

343. Admissibility upon the question of defendant's negligence.—When the declaration charged the company with negligence in allowing its trains to stand in the vicinity so as to obstruct from view the approaching train, defendant proved that plaintiff was in the habit of crossing the track at that place frequently, and proposed to show the manner in which the several companies having tracks in the vicinity were accustomed to use such tracks. *Held*, that the court erred in refusing to admit the evidence. *Chicago, B. & Q. R. Co. v. Notzki*, 66 *Ill.* 455.

In an action for negligence in operating trains at a city crossing, plaintiff introduced a rule of the company to the effect that a red flag by day or a red light at night signified that a train must come to a full stop; but the company offered to prove that the rule did not apply to city crossings, but the evidence was excluded. *Held*, that the evidence should have been admitted. *Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 74.

It was not objectionable to show how far the city extended beyond the locality in question, and that the accident did, in fact, occur within the city, even with the purpose of showing that the rate of speed of the train at the place of the accident was excessively great, where the chief negligence charged was the high rate of speed of the train within the city, at a certain crossing used by many of the people. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

The plaintiff alleged that the engineer or fireman did not watch while the locomotive was approaching the crossing. *Held*, that it was proper to permit the plaintiff to show, by his own testimony, that at the time of the injury he saw no one upon the

* See also *ante*, 234.

rear end of the tender of the locomotive, which was backing towards him. *Clampitt v. Chicago, St. P. & N. W. R. Co.*, 49 Am. & Eng. R. Cas. 468, 84 Iowa 71, 50 N. W. Rep. 673.

While companies are not bound to remove obstructions to observation of persons crossing the track at public crossings, nor to maintain flagmen at such places, yet a failure to do so may always be proved as tending to show negligence where persons are injured at crossings. *Vandewater v. New York & N. E. R. Co.*, 74 Hun 32, 26 N. Y. Supp. 397, 56 N. Y. S. R. 208.

344. Sufficiency of, to show defendant's negligence.—(1) *Sufficient*.—Plaintiff stepped on the track to avoid a runaway team, and was injured by a hand-car. One of the men on the car saw him before the car struck him, and gave an alarm, but it was disregarded until he was seen by the foreman and the brakes were applied, but not in time to avoid the injury. *Held*, sufficient evidence of negligence to support a verdict for plaintiff. *Moore v. Central R. Co.*, 47 Iowa 688.

Plaintiff was driving on a highway with a threshing outfit, composed of a traction engine, tank, separator and stacker, all attached, and was injured by a train in crossing a track. The evidence showed that the engineer saw plaintiff when several hundred yards away, while his train was running thirty-five miles an hour; that he reduced it to twenty miles, and could have stopped before reaching the crossing, but increased the speed, claiming that he thought there was time to get fully across. *Held*, sufficient to show negligence on the part of the company. *Atchison, T. & S. F. R. Co. v. Walz*, 40 Kan. 433, 19 Pac. Rep. 787.

Plaintiff, while crossing the railway of defendant upon a public street, driving a span of horses with a wagon, was struck by a train of cars propelled by an engine. Evidence that the train was propelled at an unlawful rate of speed; that no bell was rung, or signal given, as required by law; that it was an unusually dangerous crossing and that no flagman was stationed there to warn travelers; and that a view of the passing train was obstructed from one approaching on the street by a train of cars left standing upon a side track, extending across the street, with an opening in the train for passage upon the street—*held*, sufficient to charge the defendant with negligence.

Kelly v. St. Paul, M. & M. R. Co., 6 Am. & Eng. R. Cas. 93, 29 Minn. 1, 11 N. W. Rep. 67.

Plaintiff was injured while attempting to pass between cars in a train standing on a street crossing. *Held*, upon the evidence in the case, that the jury were justified in finding that the defendant's engineer in charge of the train saw the plaintiff, and negligently backed up the train while he was between the cars, and without giving him sufficient time to pass through safely. *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 479, 55 N. W. Rep. 53.

(2) *Insufficient*.—A fireman saw an omnibus at some distance from the crossing, but did not call the attention of the engineer to it until it was again seen, just before the collision. *Held*, that the company was not made liable by this fact. *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9, 17 Atl. Rep. 137.

Defendant's freight train broke in two at a crossing, and the engineer's signal for down-brakes frightened plaintiff's horses, which ran upon the crossing and were injured by the rear section. *Held*, not sufficient proof of negligence to warrant a recovery, in the absence of evidence tending to show negligence in causing the break or in discovering the team. *Buster v. Humphreys*, 34 Fed. Rep. 507.

An engine had passed a street crossing a short distance when the engineer was signaled to back, which he did without signal or warning. In doing so the engine struck and killed a person on the crossing. *Held*, not such negligence as to make the company liable. *Sullivan v. Pennsylvania Co.*, (Pa.) 7 Atl. Rep. 177.

Plaintiff was injured while attempting to cross the track in the night-time, in front of three gravel cars which were being lawfully pushed in front of a locomotive. The cars were moving at a reasonable and lawful rate of speed; the headlight of the engine was in proper condition, and lighted; a brakeman was upon the extreme front of the train with a lighted lantern; and the engine-bell had been rung constantly while the train was passing from a point more than 230 feet distant to the place of the injury. *Held*, that the company was not guilty of any negligence which caused the injury. *Bohan v. Milwaukee, L. S. & W. R. Co.*, 19 Am. & Eng. R. Cas. 276, 61 Wis. 391, 21 N. W. Rep. 241.

Where the plaintiff was injured by a train at a street crossing, and it appeared that there was a sign-board indicating the crossing, and that the bell was rung and the whistle sounded to warn passers of the approaching train—*held*, that the plaintiff could not claim damages from the company. *Roy v. Grand Trunk R. Co.*, 1 *Montr. L. R.* 353.

Plaintiff, in attempting to cross the tracks of defendant's road after dark, caught his foot between a rail and the planking, and before he could extricate himself was struck by the tender of an engine backing upon the track, and injured. In an action to recover damages the negligence charged was that the bell of the engine was not rung; that there was no flagman at the crossing, although one had usually been stationed there; that the regular fireman was not at the time upon the engine; and that there was no light on the rear of the tender. Plaintiff testified that he saw the engine while it was standing still, and when it was backing. He could have passed over the track in safety if his foot had not caught. It did not appear, and was not claimed, that the engineer could have seen plaintiff in time to have avoided the accident, and it did not appear that the absence of the fireman in any way contributed to the accident. *Held*, that the evidence failed to show any negligence on the part of defendant which caused or contributed to the injury. *Pakalinsky v. New York C. & H. R. R. Co.*, 2 *Am. & Eng. R. Cas.* 251, 82 *N. Y.* 424.—*QUOTED IN Cincinnati, I., St. L. & C. R. Co. v. Long*, 31 *Am. & Eng. R. Cas.* 138, 112 *Ind.* 166, 11 *West. Rep.* 328, 13 *N. E. Rep.* 659.

Action against defendants for an injury sustained by plaintiff being run over by defendants' train at a highway crossing, caused, as alleged, by the omission to ring the bell or sound the whistle. The persons in charge of the train swore that the whistle was sounded in compliance with the statutory requirements. The plaintiff said he heard a whistle which he thought came from a round-house near by, but which might have been from the approaching train; and though the plaintiff's witnesses stated they did not hear the whistle, it was quite consistent with their evidence that the whistle was sounded. *Held*, that no negligence on defendant's part was proved, for it could not be held on the evidence that the whistle was not sounded as required.

Blake v. Canadian Pac. R. Co., 17 *Ont.* 177.

345. Evidence of kind and condition of crossings.—The declaration alleged that the company neglected to keep the crossing in repair, there being no averment that the condition of the crossing contributed to the injury; but the gravamen of the action was the neglect to give the statutory signal or warning before reaching the crossing, and neglect in not slackening the speed of the train. *Held*, that evidence of the condition of the crossing was not admissible. *Toledo, W. & W. R. Co. v. Jones*, 76 *Ill.* 311.

Where a petition alleges that a crossing was used as "a public crossing or footway for footmen," evidence is properly admitted tending to show that the crossing had been used for a considerable time by pedestrians. *Clampitt v. Chicago, St. P. & K. C. R. Co.*, 84 *Iowa* 71, 50 *N. W. Rep.* 673.

Where a person is injured at a crossing by a moving train, evidence that a highway had existed at the place for more than 30 years, and before the railroad was built, is competent to show that the company knew that the crossing was on a public highway. *Delaware, L. & W. R. Co. v. Converse*, 49 *Am. & Eng. R. Cas.* 323, 139 *U. S.* 469, 11 *Sup. Ct. Rep.* 569.

346. Rate of speed.*—Evidence of the running time of the defendants' trains over the whole road, and over any given part of it, is relevant on the question of the rate of speed at any given point on the road. *Nutter v. Boston & M. R. Co.*, 60 *N. H.* 483.

The question of the admissibility of evidence of the rate of speed of the defendants' trains, at other times and places than the time and place in question, as tending to show the rate of speed there, is one of fact, depending upon remoteness of time and place, and is to be determined by the court at the trial. *Nutter v. Boston & M. R. Co.*, 60 *N. H.* 483.

347. Evidence of subsequent repairs or other safeguards.—Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence. *Terre Haute & I. R. Co. v. Clem*, 42 *Am. & Eng. R. Cas.* 229, 123 *Ind.* 15, 23 *N. E. Rep.* 965, 7 *L. R. A.*

* See also *ante*, 168-180, 268, 320, 335.

588.—DISAPPROVING *Goshen v. England*, 119 Ind. 368. FOLLOWING *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465.

It was error to permit the plaintiff to prove that after the accident occurred the defendant changed and repaired the crossing. *Terre Haute & I. R. Co. v. Clem*, 42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 965; 7 L. R. A. 588.—QUOTED IN *Isaacs v. Southern Pac. R. Co.*, 49 Fed. Rep. 797.

Plaintiff having been run over by a train at a certain crossing, not a public street, evidence is admissible to show that, after the occurrence of the accident, the company defendant adopted the practice of giving notice of the approach of its trains to that place, thus recognizing its duty so to do. *Specht v. Pennsylvania R. Co.*, 19 Phila. (Pa.) 365.

348. Positive and negative evidence, weight of.—On a charge of negligence in a company in failing to ring a bell on approaching a highway crossing, there is no error in permitting witnesses to testify that they would have heard the bell if it had been rung. *Illinois C. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. Rep. 330; affirming 39 Ill. App. 69.—FOLLOWING *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570.

Where the witnesses are of equal credit, positive evidence that a signal was given is, as a general rule, of more weight than that of witnesses who say they did not hear it; but much depends upon the position, attention, and credibility of the witnesses, and the ultimate question, whether the signal was given or not, is one of fact for the jury. *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. Rep. 817.—APPROVING *Isaacs v. Skrainka*, 95 Mo. 517.

Where there is a dispute as to whether a train gave signals when approaching a crossing, evidence that they were given is entitled to greater weight than mere negative statements of witnesses that they did not hear them. *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499.—DISTINGUISHED IN *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill. 235. EXPLAINED AND FOLLOWED IN *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.

Two witnesses testified for plaintiff that they heard no bell though present and listening, while five witnesses testified for defendant positively that it did ring; that

they both heard it and saw it ringing. *Held*, that the weight of evidence was with defendant and the verdict should have been accordingly. *Culhane v. New York C. & H. R. R. Co.*, 67 Barb. (N. Y.) 562.

One witness who hears the ringing of the bell is worth more than the testimony of a dozen witnesses who did not hear it, unless in some manner their attention had been especially called to it. The witness who heard the bell either tells the truth or he tells a deliberate and wilful falsehood, while the witness who did not hear the bell may be and is probably truthful. The bell may be rung or the whistle blown without attracting the attention of persons who are familiar with such sounds. *Urias v. Pennsylvania R. Co.*, 152 Pa. St. 326, 25 Atl. Rep. 566.

While testimony that witnesses did not hear a signal given by blowing the whistle, is not as a rule so conclusive as testimony of the same number of witnesses that they did hear it, yet this rule may be greatly modified in a given case by the character and interest of the witnesses, their means of knowledge and manner of testifying, and other circumstances; and in this case there is no such preponderance of evidence against the special finding of the jury on that question, as will warrant a reversal of the judgment. *Urbanek v. Chicago, M. & St. P. R. Co.*, 47 Wis. 59, 1 N. W. Rep. 464.—FOLLOWED IN *Eilert v. Green Bay & M. R. Co.*, 48 Wis. 606.

340. Proving negligence of company as affecting contributory negligence.—Where a plaintiff, who sues for an injury at a crossing, is charged with contributory negligence, a city ordinance, showing that trains were limited to a speed much less than the one injuring him was going, is admissible in evidence as having a bearing on the question of his negligence, as well as to show negligence of the company. *Meek v. Pennsylvania Co.*, 13 Am. & Eng. R. Cas. 643, 38 Ohio St. 632.

In an action by a traveler, to recover for injuries by collision with a passing train at a public crossing, alleged to have been caused by negligence in the management of the train, where the evidence tends to show that he did not exercise proper care and caution to avoid the injury, it is competent for him to show that there was no sign-

* See also *ante*, 160.

* See also *ante*, 197.

board up, as is required by law, as reflecting upon the question of his want of care, although the want of such sign-board is not alleged as a ground of recovery. *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627.

350. Granting a nonsuit.*—Plaintiff's intestate was killed at a city street crossing where the company maintained four tracks. It appeared that she was seventy-three years old and lived near the crossing and was familiar with it; that gates were maintained on each side of the track, but they did not cover the sidewalk; that a passenger train lay on one of the tracks partially covering the crossing, with freight trains approaching on two other tracks; that a watchman told her not to attempt to cross, but she passed on till the fourth track was reached and was struck by a train. *Held*, that a verdict for the defendant, on the ground of contributory negligence, was properly directed. *Salmon v. New York C. & H. R. R. Co.*, 23 N. Y. S. R. 442, 52 Hun 612, 1 Silv. Sup. Ct. 237, 5 N. Y. Supp. 225.

Plaintiff's evidence showed that his intestate was killed while going south on the west side of an avenue running north and south; that the company had a yard for engines on the east side of the avenue, with a number of curving tracks running thereto; that the view of the yard by persons approaching from the north was obstructed until the track was reached. The intestate stopped near the first track until a train passed and as she started on was struck and killed by an engine leaving the yard on another track and running ten to twelve miles an hour backward with tender in front, without giving signals, and with no flagman at the crossing. *Held*: (1) that the questions of negligence and contributory negligence were for the jury, and a nonsuit was properly denied; (2) that it was a question of fact whether the intestate could have seen the engine in time to have avoided the accident; (3) that evidence that it was the custom of the company to keep a flagman at the crossing was competent. *Cass v. New York C. & H. R. R. Co.*, 78 N. Y. 518; *affirming* 8 Daly 220; 6

* See also *ante*, 219.

Undisputed evidence of contributory negligence of person killed at a public crossing justifies an order of nonsuit, see 43 AM. & ENG. R. CAS. 192, *abstr.*

Abb. N. Cas. 104. — DISTINGUISHED AND QUOTED IN *Barry v. Second Ave. R. Co.*, 41 N. Y. S. R. 342, 16 N. Y. Supp. 518. QUOTED IN *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 3 Am. & Eng. R. Cas. 502, 78 Ind. 373, 41 Am. Rep. 580. REVIEWED IN *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 Am. & Eng. R. Cas. 459, 48 Ark. 333. *Waldele v. New York C. & H. R. R. Co.*, 19 Am. & Eng. R. Cas. 400, 95 N. Y. 274.

In an action for an injury to a person on a railroad crossing it is only when the inference of negligence or contributory negligence, or the absence thereof, is necessarily deducible from the undisputed facts and circumstances proved, that a court is justified in taking the case from the jury; and if such facts and circumstances, though undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, might disagree as to the inference or conclusion to be drawn from them, the case should be submitted to the jury. Nonsuit held improperly granted. *Hoye v. Chicago & N. W. R. Co.*, 19 Am. & Eng. R. Cas. 347, 62 Wis. 666, 23 N. W. Rep. 14.

3. Instructing the jury.*

351. Generally.—(1) Duty to instruct.

—The evidence showed that an accident happened either at a street crossing, or on the company's right of way. *Held*, that if one rule of duty prevailed at the street crossing, and another within the exclusive right of way of the company, the jury should be so instructed. *Lake Erie & W. R. Co. v. Zoffinger*, 10 Ill. App. 252.

It is not incumbent upon the court to instruct the jury that it is the duty of one who attempts or intends to cross a track to use his senses of hearing and seeing before stepping on the track. *Richmond & D. R. Co. v. Howard*, 79 Ga. 44, 3 S. E. Rep. 426.

(2) Instructions properly given.—An instruction which merely informs the jury that what a person, on approaching a crossing, should do in order to exercise ordinary care for his safety, and what should be done in operating a railway in order to exercise the same degree of care for the safety of others, is a question of fact for the jury to determine from the evidence, is substantially good, and there is no error in giving the

* See also *ante*, 120, 221, 279 (2), 280 (2), 291 (2); and also *TRIAL*, 125, 150.

same. *Pennsylvania Co. v. Frana*, 112 Ill. 398.

The court may instruct the jury as a matter of law that a company has no right to suffer a hedge-row to grow upon or overhang its right of way so as to materially obstruct the view at a highway crossing; but whether these obstructions are of such character as described in the instruction must be determined by the jury. *Chicago & E. I. R. Co. v. Tilton*, 29 Ill. App. 95; denying rehearing in 26 Ill. App. 362.

(3) *Instructions which should be refused.*—In an action to recover for injuries received in jumping from a vehicle to avoid collision with a moving train at a crossing, it is error to instruct for plaintiff that, in determining whether the engineer did all he should have done to avoid the collision after he saw the vehicle and its danger, the jury might consider certain stated facts which throw no light on that inquiry, but merely tend to show negligence before seeing the vehicle. *Alabama & V. R. Co. v. Phillips*, 70 Miss. 14, 11 So. Rep. 602.

Plaintiff was injured at a crossing by a backing engine, where his view was somewhat obstructed by standing cars. At the trial the company asked instructions that the company was not negligent in using that particular engine, nor in leaving empty cars on the track. No evidence or claim had been made that the engine was not in all respects proper, and the evidence introduced as to the standing cars was only to rebut a charge of contributory negligence, and not as affecting the company's negligence. *Held*, that the charge asked was irrelevant and a refusal to give it was not error. *Kissenger v. New York & H. R. Co.*, 56 N. Y. 538, 6 Am. Ry. Rep. 154; affirming 4 J. & S. 572.

In an action by a father to recover for injuries to his infant child at a crossing, the court charged that it was the duty of the child "to take means of ascertaining whether a train was approaching," and then called the attention of the jury to the fact that the child testified that he both looked and listened, but refused to charge that it was his duty "to look for a train before entering upon the track," and there could be no recovery if the injury might have been avoided by doing so. *Held*, that such refusal was no ground for reversal. *Lennon v. New York C. & H. R. R. Co.*, 48 N. Y. S. R. 806, 65 Hun 578, 20 N. Y. Supp.

557.—*QUOTING Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 309, 36 N. Y. S. R. 272.

Where the court has already fully instructed the jury on the questions of negligence and contributory negligence, and that, if there were obstacles in the way of seeing a train as it approached a crossing, it was plaintiff's duty to use greater efforts to see and hear, it is not error to refuse an instruction to the effect that if plaintiff knew that it was difficult to see or hear the train, or that the crossing was dangerous, it was his duty to stop and listen. *Olsen v. Oregon S. L. & U. N. R. Co.*, 9 Utah 129, 33 Pac. Rep. 623.

(4) — *misleading instructions.* — The court instructed the jury that they must determine first whether the company performed the positive duty of ringing a bell and giving a signal; and then whether it performed the general duty which it owed the public, to exercise all the care of ordinarily prudent persons in the transaction of their business. *Held*, that the latter part was calculated to mislead the jury in failing to specify what other duties, besides the statutory signals, the company owed the public. *Jones v. Utica & B. R. R. Co.*, 36 Hun (N. Y.) 115.—*QUOTING Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 461. *REVIEWING Johnson v. Hudson River R. Co.*, 20 N. Y. 65.

Where an instruction asked for by defendant was "that if plaintiff, by the exercise of her senses, could have heard the approaching engine and failed to do so, and her injury was caused thereby, it was negligence on her part, and the answer to the issue (as to contributory negligence) should be 'Yes'";—*held*, that while it would have been proper to give the conclusion "the answer should be 'Yes,'" yet the refusal to give it was not error, since the failure to do so could not mislead the jury or prejudice the defendant. *Alexander v. Richmond & D. R. Co.*, 112 N. Car. 720, 16 S. E. Rep. 896.

Where there is some evidence that the train struck the oxen drawing plaintiff's wagon, an instruction upon the hypothetical case of a collision between the engine and plaintiff's wagon cannot be deemed misleading to the prejudice of the defendant. *Gulf, C. & S. F. R. Co. v. Greenlee*, 35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129.

352. As to duty to give signals.—An instruction that it is the duty of those in charge of a train in approaching a crossing to give "reasonable warning" of its approach is erroneous, as an intimation to the jury that more than the statutory signals may be required. *Lake Shore & M. S. R. Co. v. Elson*, 15 Ill. App. 80.—*QUOTING Chicago & A. R. Co. v. Robinson*, 106 Ill. 146.

And the above rule applies to the term "sufficient warning." *Peoria, D. & E. R. Co. v. Berry*, 15 Ill. App. 155.—*FOLLOWING Chicago & A. R. Co. v. Robinson*, 106 Ill. 142.

It is error to instruct the jury to find defendant guilty of negligence from the fact that a bell was not rung or whistle sounded as required by law, regardless of the fact whether the failure contributed to the accident or not. *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311.—*FOLLOWED IN Chicago & A. R. Co. v. Logue*, 47 Ill. App. 292.

Where the question is whether a bell was rung or a whistle blown on a train in approaching a crossing, the court has no right to tell the jury that greater weight is to be given to evidence produced by the company than to that of the opposite party. *Atchison, T. & S. F. R. Co. v. Feehan*, 47 Ill. App. 66.

Where the failure of those in charge of a train to give a signal of approach to a public crossing was relied upon to show wilful negligence, there being testimony tending to show that no signal was given, the court erred in instructing the jury to find for defendant, as it was a question for the jury whether there was a failure to give the signal, and if so, whether such failure constituted wilful negligence as to a traveler on a public highway about to cross the railroad with a team. And if they should find that the negligence was not wilful, then it was a question for them whether, under all the circumstances, the decedent was guilty of contributory neglect. *Eskridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580.

Where there is conflicting testimony as to whether a bell was rung or not before a train approached a grade crossing, the court should pointedly call the attention of the jury to the difference between positive and negative testimony upon a question of this kind. *Urias v. Pennsylvania R. Co.*, 152 Pa. St. 326, 25 Atl. Rep. 566.

An instruction that if the company failed

to ring the bell and blow the whistle, and ran the train at high speed, and the deceased knew or might have known of the presence of the approaching train and its danger, and stepped upon the track in front of it, so near that it was impossible by the use of any effort on the part of defendant's employes to stop the train and avoid injuring him, the jury must find for the defendant, is erroneous as requiring the jury to believe, before they could find for the defendant, that it was impossible for defendant's employes by the use of any means or effort to prevent the injury after they discovered deceased's peril. *International & G. N. R. Co. v. McDonald*, 42 Am. & Eng. R. Cas. 211, 75 Tex. 41, 12 S. W. Rep. 860.

It was not error to charge that it was the peculiar province of the jury to decide whether the whistle was blown at the whistling-post, or the engine-bell rung before and while passing over the crossing, as well as the rate of speed at which the train approached the same. *Piper v. Chicago, M. & St. P. R. Co.*, 77 Wis. 247, 46 N. W. Rep. 165.

353. — Illustrations.—(1) *Generally.*—On an issue whether a bell on an engine of a passenger train was rung eighty rods before the train reached a public road crossing, and kept ringing until the crossing was reached, witnesses for the plaintiff testified, in substance, that they did not hear the bell or whistle, although near enough to have heard it had one been rung or the other blown, while on the other hand there was proved by the fireman and engineer the size of the bell, its character and condition, and that the bell was rung and the whistle sounded as required by the statute. *Held*, that it was a matter of grave importance that the law should be accurately given to the jury. *Chicago, B. & Q. R. Co. v. Dougherty*, 19 Am. & Eng. R. Cas. 292, 110 Ill. 521; reversing 14 Ill. App. 196; further appeal 125 Ill. 127.

(2) *Good instructions.*—The court charged: "If the jury believe that the defendants omitted to ring a bell or sound a whistle in the manner required by law, such omission constitutes a *prima-facie* case of negligence, and defendants are liable for the loss and damage proved to have been sustained by reason of such negligence." *Held*, that the only instruction to be given was the instruction that the proof must show the damage was occasioned by reason of such neglect,

and the instruction therefore was not erroneous. *Chicago & A. R. Co. v. Elmore*, 67 Ill. 176.

The court also gave the following instruction: "The jury are instructed that if they believe from the evidence that a bell was not rung or a whistle sounded at a distance of eighty rods from the crossing, and kept ringing or whistling until the crossing was reached, and the plaintiff was lulled into security by reason of such neglect on the part of the defendant, then plaintiff would have the right to recover, even though he was guilty of slight negligence." *Held*, that the instruction was not erroneous. *Chicago & A. R. Co. v. Elmore*, 67 Ill. 176. —DISTINGUISHED IN *Chicago, R. I. & P. R. Co. v. Fitzsimmons*, 40 Ill. App. 360. OVERRULED IN *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 114.

In an action by the widow and children of a decedent to recover for an injury occurring at a crossing of a public street within the limits of a city—*held*, that it was not error to instruct the jury that, if the whistle of the engine was not sounded, nor any other usual notice given of the approach of a train, the deceased had a right to presume that the track was clear, and that unless the jury were satisfied by affirmative proof that the deceased did not use ordinary care, the defendants were liable for the consequences of his injury. *Philadelphia & T. R. Co. v. Hagan*, 47 Pa. St. 244.—REVIEWED IN *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41.

The jury were instructed that if they found that defendants' employes were guilty of negligence which caused the injury, they should further, in their special verdict, "specify particularly in what that negligence consisted—whether it was in the management of the car, in letting the car cross loose, not having a brakeman on the car, in having no switchman or flagman at the crossing, or whatever you find the negligence to be." The jury found that the negligence consisted "in giving no sufficient warning as the car approached the crossing, and in having the view of the track shut off by box-cars standing near the highway." *Held*, that such instruction did not give the jury the right to infer that each of the matters mentioned was negligence as a matter of law, and the finding shows that they did not so understand it. *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. Rep. 496.

(3) *Bad instructions.*—The court instructed the jury that, if plaintiff was injured by one of defendant's engines at a street crossing, and at the time there was no bell ringing or whistle sounding upon such engine, they should find for plaintiff, unless he, by his own negligence, materially contributed to the injury. *Held*, that the instruction was erroneous as invading the province of the jury. *Chicago, B. & Q. R. Co. v. Notzki*, 66 Ill. 455.

The court instructed the jury, in substance, that it was the duty of the company, when its trains were about to cross a highway on a common level, to give "due warning," so that a person traveling on the highway with a team and carriage might stop and allow the train to pass. *Held*, that the instruction ought not to have been given, as it might have led the jury to believe that the company was bound to do more than to ring a bell or sound a whistle. *Chicago & A. R. Co. v. Robinson*, 19 Am. & Eng. R. Cas. 396, 106 Ill. 142; reversing 9 Ill. App. 89.—FOLLOWED IN *Peoria, D. & E. R. Co. v. Berry*, 15 Ill. App. 155. QUOTED IN *Lake Shore & M. S. R. Co. v. Elson*, 15 Ill. App. 80.

In an action for injuries to a girl twelve years of age at a crossing in a town, the judgment of the lower court, for \$11,000 damages, was reversed, for errors of the court in instructing the jury in effect that it was the duty of the hands on the train to ring its bell or blow its whistle continuously until it passed the crossing. *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338.

354. As to trains behind time.—In a suit for injuries sustained by a collision with a train, it is error to instruct the jury that if the train was behind time a higher degree of care on the part of the company was required in approaching a road crossing. *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311.

It is erroneous to instruct the jury, in a suit for injuries received at a crossing, that if the train inflicting the injury was behind its regular time, this excused plaintiff from using the same care and caution. required of him had the train been on time. *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311.

355. As to negligence respecting watchmen.—An instruction which tells the jury that if they found the injury was caused by the failure of defendant to station

a watchman at the crossing in question, the defendant was liable, unless the plaintiff was guilty of negligence directly contributory to the accident, is not erroneous because it does not require that the absence of the watchman must have been the direct and proximate cause of the accident. *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, 16 S. W. Rep. 381.

In an action for a personal injury, charged to have resulted from the negligence of a flagman at a street crossing in signaling the plaintiff to cross the track at a time of danger and peril, the use of the words, in an instruction, that if the jury believe from the evidence that defendant's flagman "improperly and inopportunistly" signaled the plaintiff's team, etc., instead of using the words "carelessly and negligently," was urged as error. *Held*, that while the use of the latter words would have been technically more correct, yet the use of the former words was not sufficiently inaccurate to mislead the jury. *Pennsylvania Co. v. Sloan*, 35 Am. & Eng. R. Cas. 440, 125 Ill. 72, 17 N. E. Rep. 37; *affirming* 24 Ill. App. 48.

If, in an action for an injury sustained by being run over by a locomotive engine of the defendant, at a crossing of a private way at grade, the plaintiff relies upon the alleged negligence of the engineer of the locomotive, and also upon the want of a flagman, the defendant is not entitled to a ruling that, if the engineer used reasonable care, the plaintiff is not entitled to recover. *O'Connor v. Boston & L. R. Corp.*, 15 Am. & Eng. R. Cas. 362, 135 Mass. 352.

356. Excessive speed.*—There was no error in charging the jury that they must determine, from all the circumstances, whether the rate of speed of the train at the crossing was dangerous or unreasonably high; that a rate of speed which would be allowable in a thinly settled part of the country might be dangerous, so as to constitute negligence, through a city or village. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 Am. & Eng. R. Cas. 200, 134 Ind. 380, 33 N. E. Rep. 280.

An instruction that the fact that the train "was, at the time, running twenty, thirty, or forty miles an hour, constitutes no element of negligence, or under the other facts proven shows the defendant or its

servants to have been wilfully careless of the consequences of such running," may be properly refused, because confused and misleading, and because it was not a question as to whether the company's servants were guilty of wilful conduct. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863.

It was not error to instruct the jury that the employes of the train were required to approach the crossing where the injury occurred at a moderate rate of speed, and to give timely warning to those lawfully passing along the street; and that if, by neglect or omission, that duty was not fulfilled, the defendants were liable, unless it was affirmatively shown that ordinary care was not taken by the deceased to avoid the accident. *Philadelphia & T. R. Co. v. Hagan*, 47 Pa. St. 244.

It was not a reversible error to instruct the jury that "the running by defendant of trains upon its track was authorized by law, and that the law did not impose any rule as to the rate of speed of such trains," the evident purpose of the instruction being that it was not negligence *per se* to run a train at any particular rate of speed, where there was no statute regulating the rate of speed. It is not incorrect nor, in the proper case, misleading, to instruct a jury that an act which is not forbidden by law is not an act of negligence in itself, provided they be left to determine whether the circumstances are such as to make it negligent in fact. *McDonald v. International & G. N. R. Co.*, 55 Am. & Eng. R. Cas. 280, 86 Tex. 1, 20 S. W. Rep. 847.

An instruction that tells the jury that if the train was running at a rate of speed greater than that limited by an ordinance of the city, and in excess of what an ordinarily skilful and prudent man engaged in the business would employ, in view of the probable danger of the crossing, and if, in consequence of this speed, the train came so close to plaintiff's horse that she was thrown from the buggy in consequence of the horse becoming frightened, the defendant is liable, if plaintiff did not contribute directly to her injury, is correct. *Gulf, C. & S. F. R. Co. v. Breittling*, (Tex.) 12 S. W. Rep. 1121.

357. Defective crossings.*—Where the suit is to recover for injuries at a cross-

* See also *ante*, 168-189.

* See also *ante*, 20-44.

ing, and the complaint contains no allegation that the road was not properly constructed, it is error to instruct the jury that a failure of the company to put in crossings might be negligence. *O'Connor v. St. Louis, K. C. & N. R. Co.*, 5 Am. & Eng. R. Cas. 324, 56 Iowa 735, 10 N. W. Rep. 263.

An instruction that "it is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel by persons exercising ordinary care," correctly states the law and is not argumentative. *Brown v. Hannibal & St. J. R. Co.*, 42 Am. & Eng. R. Cas. 87, 99 Mo. 310, 12 S. W. Rep. 655.

The difference between the expression "reasonably safe and convenient" in such instruction, which was given at plaintiff's request, and "reasonably safe" in an instruction given at the request of the defendant, that the latter's duty was "to so construct the crossing and approaches as to make the crossing reasonably safe for persons using ordinary care," does not make the instructions inconsistent. *Brown v. Hannibal & St. J. R. Co.*, 42 Am. & Eng. R. Cas. 87, 99 Mo. 310, 12 S. W. Rep. 655.

In an action for an injury at a crossing, the mere statement of the trial court in charging the jury that the crossing was a dangerous one does not amount to a misdirection, where all essential facts were left to the jury. At most it was but the expression of the court's opinion. *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313, 32 N. Y. S. R. 612, 11 N. Y. Supp. 80; affirmed in 126 N. Y. 629, mem., 36 N. Y. S. R. 1012.

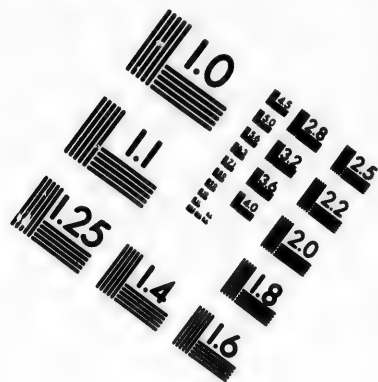
358. Sudden movement of train.—Plaintiff's intestate was killed in attempting to cross a street by a sudden starting or increasing of the speed of a train. The evidence showed that the train had stopped, or so nearly stopped that one in the rear could perceive no motion. The court charged that if defendant's employes gave the train a sudden and undue impetus, it was evidence of negligence. Held, that the instruction must be construed with reference to the circumstances of the case; i.e., if the impetus was given without sufficient lights, signals, or warning, it was evidence of negligence, and was therefore correct. *Maginnis v. New York C. & H. R. R. Co.*, 52 N. Y. 215.

359. Contributory negligence, generally.*—In an action to recover for injuries at a crossing, the court instructed the jury that if they "believed, from the evidence, that the persons in charge of the engine in question saw the top of plaintiff's wagon as it approached the crossing, and continued to see the same until the wagon reached such crossing, and that persons approaching such crossing from the east could not see a train until they were within about thirty feet of such crossing, then it was the duty of such persons in charge of said train to have slackened the speed of said engine and to have warned the plaintiff of its approach by sounding its whistle or ringing a bell, and a failure to do so would be negligence on the part of the defendant." Held, that the instruction was calculated to confuse, and ought not to have been given. *Illinois C. R. Co. v. Maffit*, 67 Ill. 431.

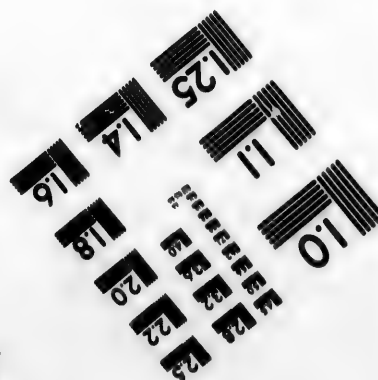
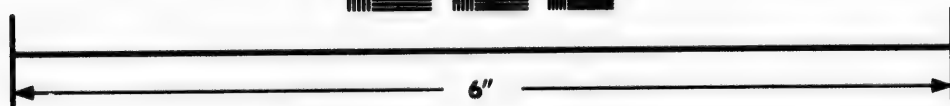
In an action for a personal injury on the ground of negligence, alleged to consist in not ringing a bell or sounding a whistle, in not having a flagman at the street crossing, and in running the train at a greater speed than six miles an hour, the company asked an instruction, based on evidence, as follows: "The jury are instructed, as a matter of law, that if, from the evidence, they believe that the injury to the plaintiff was caused by his attempting to climb upon the train in question while the same was in motion, then he is not entitled to recover." The court refused to give the instruction as asked, but modified it by inserting after the word "motion" the words "and that he was injured in consequence of his own negligence," and gave it as modified. Held, that the court erred in refusing to give the instruction as asked and in modifying the same. *Chicago, R. I. & P. R. Co. v. Eisinger*, 114 Ill. 79, 29 N. E. Rep. 196.

A request for an instruction that "if from the whole evidence in the case the jury cannot determine whether or not plaintiff was free from such negligence, then it would be your duty to find for the defendant," was sufficiently covered by the charge that plaintiff could not recover unless it appeared from a fair preponderance of evidence not only that the injuries complained of were caused by the negligent acts, or some of the negligent acts, of the agents,

* See also *ante*, 190.



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 4.0.



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servants, and employés of the defendants, but that she was herself free from all negligence contributing directly to said injuries. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

In an action for an injury to plaintiff and to his team, which were run into by a passing train, the plaintiff testified that before attempting to cross defendant's track he had stopped, looked, and listened. The defendant adduced evidence to the contrary. The court instructed the jury that the plaintiff could not recover unless he established that he was using due care, that he did no act that contributed to the injury, nor omitted to take any precaution that would have prevented the *Held*, proper. *Shaw v. Jewett*, 6 *Am. & Eng. R. Cas.* 111, 86 *N. Y.* 616.

In an action against a company for an injury at a crossing where the defense of contributory negligence of the plaintiff's driver is set up, after instructing the jury as to the law of contributory negligence it is error to further instruct that if the jury find contributory negligence they must find for the defendant, unless they find that the company's employés saw the carriage and, having it within their power to stop the train, failed to do so, where there is no evidence tending to show that such employés did see the carriage in time to stop the train and prevent a collision. *Missouri Pac. R. Co. v. Peay*, (Tex.) 20 *S. W. Rep.* 57.

Where a court has already instructed the jury, in an action for an injury at a crossing, that "they should take into consideration the location of the tracks and all other facts in evidence," as affecting both the questions of negligence and contributory negligence, it is not error to refuse to further instruct that there could not be a recovery "for any injury resulting from conditions of the place of the accident known to the plaintiff or from the ordinary nature of the business carried on by the defendant." *Leak v. Rio Grande Western R. Co.*, 9 *Utah* 246, 33 *Pac. Rep.* 1045.

360. — In failing to stop, look, and listen.—An instruction to the effect that if plaintiff had no notice in any way of the approach of the train, and yet heedlessly drove upon the track without first apprising herself that she could cross in perfect

safety, then she could not recover unless the injuries complained of were purposely inflicted by defendant, sufficiently apprised the jury of the rights of the parties, stated under the general rule "that the company has the right of way, and the traveler must wait until the train, the coming of which he knows or ought to know, has passed." *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

The defendant cannot successfully complain of an instruction that "if safety under the circumstances required that plaintiff should stop his horse to ascertain whether it was safe to cross the track or not, it was his duty to stop and look and listen, and if, failing in this, he was caught by the engine and injured, he cannot recover." *Pennsylvania Co. v. Horton*, 132 *Ind.* 189, 31 *N. E. Rep.* 45.

An instruction that it was the plaintiff's duty before going on the track of the defendant to look and listen for an approaching train, and if looking and listening he might have heard or seen the approaching train, but failed to look or listen, and went on the track of defendant and was injured by either of the cars he cannot recover, was on the facts of this case properly refused, as the well-devised and well-understood custom and regulation of defendant in operating its trains was that no train from the east was allowed to approach the junction until the east-bound train should clear Main street, on which regulation plaintiff had a right to rely and which relieved him of the ordinary duty of looking and listening before crossing said north track to the sidewalk. *Burbridge v. Kansas City Cable R. Co.*, 36 *Mo. App.* 669.

At the trial the company asked the court to charge that plaintiff could not recover if the intestate, "after reaching the crossing, attempted to cross without looking in the direction of the approaching train." *Held*, that such instruction correctly stated the law, and it was error to add thereto "that if the deceased acted with ordinary prudence and due care, there being but four seconds of time required to cross, the jury might find for plaintiff." *Hewett v. Central R. Co.*, 3 *Lans. (N. Y.)* 83.—FOLLOWING *Grippen v. New York C. R. Co.*, 40 *N. Y.* 51.

Where the action is to recover for injuries received at a street crossing it is error to refuse to charge that if plaintiff by looking

* See also *ante*, 231-285.

could have seen the train approaching the crossing in time to have avoided the collision and did not look he cannot recover. *McGrill v. Lake Shore & M. S. R. Co.*, 1 T. & C. (N. Y.) *Add.* 18.

4. Damages.

361. Generally.*—(1) *Personal injuries*.—The court instructed the jury that if they found defendant guilty they should assess plaintiff's damages, and the instruction then proceeded to state the elements that might be considered in fixing the amount of damages and closed by the words, "as shown by the evidence." *Held*, that the instruction was not open to the objection that it allowed the jury to assess any amount without limiting it to any belief as to what the evidence showed. The finding of the defendant guilty as specified in the instruction presupposed a belief, from the evidence, in the truth of the facts referred to in its previous instructions. *Pennsylvania Co. v. Sloan*, 35 *Am. & Eng. R. Cas.* 440, 125 *Ill.* 72, 17 *N. E. Rep.* 37; *affirming* 24 *Ill. App.* 48.

The amended petition stated several items of damage. The jury returned a verdict for a specific sum, no request having been made for specific findings. *Held*, that it would be presumed that there was no finding on one item for more than the item claimed, and defendant could not complain. *Clampit v. Chicago, St. P. & K. C. R. Co.*, 49 *Am. & Eng. R. Cas.* 468, 84 *Iowa* 71, 50 *N. W. Rep.* 673.

It is error to permit a witness to testify, in an action for personal injuries at a crossing, that plaintiff had dysentery after the accident, which affected his health, without other evidence to show that the disease was caused by the accident. *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99.

In an action to recover for an injury by being struck by a train while walking on a street the court instructed the jury as follows: "In cases of this character the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the good sense and unbiased judgment of the jury." *Held*, not erroneous. *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.

(2) *Injuries to personal property*.—In a suit for injury to personal property at a crossing while in charge of plaintiff's agent,

the rule of damages is this: If the injury occurred wholly by the agent's fault there could be no recovery; if by the mixed fault of the agent and the company there could be a recovery, but diminished in proportion to the agent's fault; if wholly by the fault or negligence of the company's agents then there could be recovery of full damages. *Atlanta & W. P. R. Co. v. Wyly*, 8 *Am. & Eng. R. Cas.* 262, 65 *Ga.* 120.

362. Elements of damage.—In an action for a personal injury at a crossing, while the words "injury to pride and manhood" are not strictly accurate, as indicating to the jury results depending upon the character or temperament of plaintiff, yet he is entitled to recover for mental suffering caused by reason of being permanently deformed; and where the jury may so have understood, and the damages are not excessive, the court will not set aside the verdict. *Atlanta & R. A. L. R. Co. v. Wood*, 48 *Ga.* 565, 11 *Am. Ky. Rep.* 406.

It is not competent for the purpose of showing the injuries, or their character or extent, or for the purpose of enhancing the damages which the plaintiff expected to recover, for the plaintiff to prove his pecuniary or social condition, whether he was rich or poor, married or single, or whether he had a family or not. *Kansas Pac. R. Co. v. Pointer*, 9 *Kan.* 620.

An averment that plaintiff was put to "great expense" by reason of the injury will authorize proof of expenses for medicine and nursing; but if no evidence is offered of such expenses, there can be no recovery therefor. And where there is no averment nor proof of loss of time by reason of the accident, it is error to instruct the jury that there may be a recovery therefor. *Gardner v. Burlington, C. R. & N. R. Co.*, 68 *Iowa* 588. — **DISTINGUISHED IN** *Knapp v. Sioux City & P. R. Co.*, 71 *Iowa* 41, 32 *N. W. Rep.* 18.

Where the action is by a woman to recover for personal injuries, evidence that her husband was killed at the same time, and that she has children dependent upon her, is not admissible to increase the damages. *Shaw v. Boston & W. R. Corp.*, 8 *Gray (Mass.)* 45.—**FOLLOWING** *Carey v. Berkshire R. Co.*, 1 *Cush. (Mass.)* 475.

The plaintiff's occupation and means of earning support are not admissible in evidence to increase the damages, if not specially averred in the declaration. *Bald-*

* See also *ante*, 207.

win v. Western R. Corp., 4 Gray (Mass.) 333.

Evidence of the nature and extent of plaintiff's business, and the loss resulting to him from inability to attend to it by reason of the injury, may be admitted; and it is not error to instruct the jury that, "if a man has an ordinary business yielding ordinary receipts, he will be entitled to recover the diminution of those receipts resulting from such injury." *Kinney v. Crocker, 18 Wis. 74.*

A boy between sixteen and seventeen years of age, in running with a fire engine at night, upon an alarm of fire, on the roadbed of a company which they were bound to keep in proper repair, and which was also a public highway, stepped into a hole therein, fell across the track, was run over by the engine, and his leg crushed, requiring amputation. In an action by the father against the company—*held*, that his compensation was for the loss of services, for nursing, and for surgical and medical attendance. *Oakland R. Co. v. Fielding, 48 Pa. St. 320.*—REVIEWED IN *Covington St. R. Co. v. Packer, 9 Bush (Ky.) 455.*

363. Rule for ascertaining amount of damages.—An instruction declaring the measure of damages for an injury to a wagon was the difference in value of the wagon immediately before and after the injury and a reasonable sum for the loss of the use of the wagon for a time reasonably necessary to repair the same—*held*, correct. *Hoffman v. Metropolitan St. R. Co., 51 Mo. App. 273.*

364. Exemplary damages.—In an action for an injury to a person at a village street crossing, proof that the train was on a down grade approaching a flag station, but before reaching the station, after deciding not to stop, that the rate of speed was increased to 17 miles an hour; that the engineer in charge of the train might have seen the person injured but failed to look, is sufficient evidence to establish ordinary negligence on the part of the company, but does not establish wilful negligence, so as to justify the giving of exemplary damages. *Louisville & N. R. Co. v. Roberts, (Ky.) 8 S. W. Rep. 459.*

365. Damages held not excessive.—(1) *Generally.*—Eight thousand dollars damages for personal injuries received at a public railroad crossing—*held*, not excessive. *Ferguson v. Wisconsin C. R. Co., 19 Am. &*

Eng. R. Cas. 285, 63 Wis. 145, 23 N. W. Rep. 123.—FOLLOWING *Berg v. Chicago, M. & St. P. R. Co., 50 Wis. 419.*

A verdict for \$1000 is not excessive in an action for damages as the result of a collision in which the plaintiff was injured and bruised, her wagon destroyed, her horse injured, and her goods and chattels contained in the wagon seriously damaged. *Spurrer v. Front St. Cable R. Co., 3 Wash. 659, 29 Pac. Rep. 346.*

When plaintiff was twenty-nine years old he lost permanently, by the accident, the use of one leg and was confined to the bed for six weeks, after which he could walk only on crutches. Before the injury he earned \$4 a day. At the time of the accident he was driving several yoke of oxen across the track, and three oxen were killed and others injured. *Held*, that a verdict for \$1000 actual damages, and \$8000 for the personal injuries, was not excessive. *International & G. N. R. Co. v. Brett, 61 Tex. 483.*

A father sued for the death of his five children at a public crossing, ranging in age from five up to sixteen. In assessing the damages the jury were not limited to the actual pecuniary injury sustained by the father by reason of the loss of the services of his children. *Held*, that a verdict for \$10,500 should not be set aside. *Nehrbas v. Central Pac. R. Co., 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.*

(2) *Permanent injuries.*—Plaintiff, a middle-aged man, of good constitution, was so injured at a crossing that he would probably continue to suffer during the remainder of his life, and so crippled as to greatly interfere with his work. *Held*, that a verdict of \$5000 was not excessive. *Bitner v. Utah C. R. Co., 4 Utah 502, 11 Pac. Rep. 620.*

Plaintiff had his leg broken, thigh and ankle injured, and was confined, from injuries, eleven months in a hospital; crutches were necessary for a year longer and permanent lameness remained. *Held*, a verdict for \$7250 is not excessive. *Gahveston, H. & S. A. R. Co. v. Porfert, 1 Tex. Civ. App. 716, 20 S. W. Rep. 870.*

At the time of an accident plaintiff was a farmer and about fifty years of age with a life expectancy of nearly twenty years. By the accident he was confined to his bed for nine weeks, having a leg broken near the hip and being greatly bruised. The fracture failed to unite and a false joint was

formed which shortened his limb about two and a half inches, and he continued to suffer great pain. *Held*, that \$8000 was not excessive. *Funston v. Chicago, R. I. & P. R. Co.*, 14 *Am. & Eng. R. Cas.* 640, 61 *Iowa* 452, 16 *N. W. Rep.* 518.

Plaintiff was a dressmaker and contributed largely to the support of her family. In the accident her left shoulder was broken and her arm practically paralyzed, and often very painful, which necessarily impaired her ability to follow her business. *Held*, that a verdict for \$4500 was not excessive. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 *Fed. Rep.* 316.

A verdict of \$10,175 to a physician sixty years of age, who earned \$2500 a year from his profession, for injuries which made him a physical wreck and which disabled him from practising his profession to some extent, is not excessive. *Gratiot v. Missouri Pac. R. Co.*, (Mo.) 49 *Am. & Eng. R. Cas.* 398, 16 *S. W. Rep.* 384.

(3) — *loss of limbs*.—A verdict of ten thousand dollars for an injury which necessitates the amputation of an arm, where the defendant was guilty of gross negligence, is not a case of excessive damages. *Robinson v. Western Pac. R. Co.*, 48 *Cal.* 409, 7 *Am. Ry. Rep.* 244.—QUOTED IN *Patnode v. Harter*, 20 *Nev.* 303, 21 *Pac. Rep.* 679.

The evidence showed that plaintiff, a woman, was injured so that she lost one arm and the use of the other and was otherwise much injured, and her health and memory much impaired, and continued to suffer constant pain. At three different trials she obtained verdicts for \$15,000, \$18,000, and \$22,250, respectively, the first and second verdicts being set aside for errors of the court in instructing the jury. *Held*, that the third verdict should not be set aside as excessive. *Shaw v. Boston & W. R. Corp.*, 8 *Gray (Mass.)* 45.—REVIEWED IN *Towle v. Blake*, 48 *N. H.* 92; *Louisville & N. R. Co. v. Fox*, 11 *Bush (Ky.)* 495.

A judgment for \$30,000, as compensation for the pain and suffering endured by the plaintiff, and the loss to him for the remainder of his life of both feet, will not be reversed upon the ground that the damages awarded are excessive. *Retan v. Lake Shore & M. S. R. Co.*, 94 *Mich.* 146, 53 *N. W. Rep.* 1094.

Plaintiff, a miner by trade, without means of support except his labor, was injured
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when thirty-four years old. He lost one leg, had his right arm disabled and his right shoulder and several ribs broken, and was confined to his bed several weeks. *Held*, that a verdict for \$15,000 was not so excessive as to indicate prejudice or passion on the part of the jury. *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.

366. Inadequate damages.—Plaintiff sued for a personal injury at a crossing. There was nothing to show that the injuries were severe, while there was some evidence tending to show that they were very slight. *Held*, that a verdict in his favor of six cents was not so palpably inadequate as to justify a reversal. *O'Neill v. Brooklyn Heights R. Co.*, 71 *Hun (N. Y.)* 114.

Plaintiff's horse was injured at the same time that he was injured as above, and in a separate action for an injury to the horse he testified injuries which, if believed, would call for a verdict for a considerable amount; but there was other evidence that he called a veterinary surgeon a few days after the accident, who failed to discover any injuries. *Held*, that a verdict of six cents should not be set aside as inadequate. *O'Neill v. Brooklyn Heights R. Co.*, 71 *Hun (N. Y.)* 114.

CROWDS.

Unusually large, providing for, at stations, see CARRIAGE OF PASSENGERS, 117; STATIONS AND DEPOTS, 59.

CRUELTY TO ANIMALS.

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CULTIVATION.

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Duty to fence where road passes through fields under, see ANIMALS, INJURIES TO, 100.

CULVERTS.

Construction lien upon, see LIENS, 24.

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I. DUTIES OF THE COMPANY.

1. Statutes construed.—A company is not liable for insufficient culverts, under Ill. Rev. St. ch. 114, § 20, unless it appear that the road was constructed after that act went into effect. *Wabash R. Co. v. Sanders*, 47 Ill. App. 436.

Article 4171, Texas Rev. St., prescribes that "in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof." This rule should be applied to cases under it and enforced by the courts. *Austin & N. W. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484. See also *Gulf, C. & S. F. R. Co. v. Pomeroy*, 30 Am. & Eng. R. Cas. 200, 67 Tex. 498, 3 S. W. Rep. 722.

2. Right to construct and maintain.—The right to have and maintain a culvert, so constructed as to cause plaintiff's land to be overflowed, can be acquired by a railroad company by proof of twenty years' user. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow has, at regular or irregular intervals during the twenty years, covered the very land in controversy. *Emery v. Raleigh & G. R. Co.*, 37 Am. & Eng. R. Cas. 253, 102 N. Car. 209, 9 S. E. Rep. 139.

A. granted to the Western R. corporation a license to locate, construct, repair, and maintain a railroad upon his land, and to take land therefor. The land was so situated that the embankment of the road would cause water to accumulate on the upper side, and it became necessary to provide culverts for its discharge. The corporation made the culvert, but the situation of the land was such that it was necessary to connect ditches with the culvert and extend ditches beyond the location of the road into the land of A., to prevent the water from materially injuring the road or damaging the land. Held, that the corporation was authorized by such license to make such cul-

verts and ditches, under the maxim that the grant of a thing includes the means necessary to attain it. Held also, that the corporation was authorized to deepen and widen the bed of a mountain stream over which the road was laid and constructed, to facilitate the discharge of the waters when such widening and deepening was necessary to prevent damage to the road and adjacent land. *Babcock v. Western R. Corp.*, 9 Metc. (Mass.) 553.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504. REVIEWED IN *Rathke v. Gardner*, 14 Am. & Eng. R. Cas. 281, 134 Mass. 14.

3. Duty to construct, generally.*—Where a company constructs its road under legislative authority over private land, it must construct suitable culverts, bridges, etc., for carrying off the waters of water-courses crossed by the track, and must see that they are kept in suitable repair for that purpose whenever practicable. *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

The company is bound to use reasonable care in constructing and maintaining its track and roadbed in such condition as to make the same reasonably secure for the use of passengers and employes, and it is bound to use like care in providing sufficient culverts for the escape of water collected and accumulated by its embankments and excavations. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 Am. & Eng. R. Cas. 229, 91 Mo. 509, 10 West. Rep. 54, 4 S. W. Rep. 389.

4. —to provide for the natural flow of water.†—Railroad corporations must provide suitable bridges and culverts for the natural flow of water crossed by their roads. *March v. Portsmouth & C. R. Co.*, 19 N. H. 372.—QUOTED IN *Taylor v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 259, 33 W. Va. 39, 10 S. E. Rep. 29.

Except when they cannot be made, or where the expense of making them is greatly disproportioned to the interests to be preserved by them. *Gilbert v. Savannah, G. & N. A. R. Co.*, 69 Ga. 396.

Where it is practicable in the building of a railroad to construct a culvert which will allow the passage of the water of a stream in its natural channel, it is negligence not to do so, and a landowner injured by such fail-

* Obligation of company as to culverts, see note, 14 AM. & ENG. R. CAS. 271.

Company must construct necessary culverts, see note, 20 AM. & ENG. R. CAS. 92.

† See also *post*, 12.

ure may recover damages. *Van Orsdol v. Burlington, C. R. & N. R. Co.*, 56 Iowa 470, 9 N. W. Rep. 379.

It is expressly provided by statute that "in no case shall any railroad construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof." (Tex. Rev. Stat. art. 4171.) The duty thus required is imperative, and should damage occur from its non-performance, the railroad company would unquestionably be liable therefor to the extent of the injury; but the remedy afforded the injured party is a legal one of a suit for damages, which the law regards as adequate; and there can be no further resort to equity to compel the company to construct the necessary culverts and sluices of a kind, and at such places on its road, as the party injured may demand or a court may order. *International & G. N. R. Co. v. Malone*, 1 Tex. App. (Civ. Cas.) 92.

5. — to prevent flooding lands.—If for the purpose of constructing a railroad, or for any other purpose, it becomes necessary to erect an embankment, a proper outlet or culvert must be provided of ample capacity to carry off the flow of surface water, so that it may not be obstructed, and thus accumulate on the upper and adjacent lands of other persons. *Philadelphia, W. & B. R. Co. v. Davis*, 34 Am. & Eng. R. Cas. 143, 68 Md. 281, 11 Atl. Rep. 822, 10 Cent. Rep. 551.—QUOTING *Harrison v. Great Northern R. Co.*, 3 H. & C. 236.

And the company will be liable in damages for injuries to adjacent lands by overflow or back-water caused by a failure or neglect to perform this duty. *Carriger v. East Tenn., V. & G. R. Co.*, 7 Lea (Tenn.) 388.

If there is no difficulty in constructing a culvert under a railroad, to carry off the water from a meadow over which the railroad passes, the railroad company will be liable for flowing the meadow, if it does not make a culvert, with ditches to and from it sufficiently low to drain off the water. *Johnson v. Atlantic & St. L. R. Co.*, 35 N. H. 569.—QUOTING *Dearborn v. Boston, C. & M. R. Co.*, 24 N. H. 185.—DISTINGUISHED IN *O'Connor v. Fond du Lac, A. & P. R. Co.*, 5 Am. & Eng. R. Cas. 82, 52 Wis. 526, 38 Am. Rep. 753.

6. Where need not be constructed.—Where a railroad has been constructed

across a watercourse, the want of a culvert for the passage of the water in its natural channel is an imperfection; but mere proof that it is built across a cranberry marsh, without a culvert, and that in consequence of its construction the marsh on one side has become dry, has no tendency to show that the road is improperly constructed. *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538, 15 Am. Ry. Rep. 91.—DISTINGUISHED IN *O'Connor v. Fond du Lac, A. & P. R. Co.*, 5 Am. & Eng. R. Cas. 82, 52 Wis. 526, 38 Am. Rep. 753.

7. The duty to construct is continuing.—The duty of the railroad to so construct its road that a sufficient space should be left for the discharge of the water through its accustomed channel, whether artificial or natural, is a continuing one. *Knight v. Albemarle & R. R. Co.*, 111 N. Car. 80, 15 S. E. Rep. 929.

8. Excuse for not constructing.—Where a party agrees to construct and maintain a culvert at a designated place he must make it reasonably effective for the purpose it is intended to accomplish, notwithstanding accident or natural causes may make the work more difficult and expensive than it was supposed it would be. *Indiana, B. & W. R. Co. v. Adamson*, 34 Am. & Eng. R. Cas. 127, 114 Ind. 282, 12 West. Rep. 706, 15 N. E. Rep. 5.

9. Negligence in failing to construct, a question of fact.—Whether a company has been negligent in the construction or maintenance of its culvert in a particular locality is a question to be determined under the circumstances of the case by a jury upon the evidence with reference to the construction of the road itself and the formation of the land in the vicinity. *Union Pac. R. Co. v. O'Brien*, 49 Fed. Rep. 538, 4 U. S. App. 221, 1 C. C. A. 354.

The sufficiency of the culvert is a question for the jury. *Fick v. Pennsylvania R. Co.*, 157 Pa. St. 622, 27 Atl. Rep. 783.

It is a question for the jury to determine as a matter of fact whether, under the facts of a particular case, it was the duty of a company, in the exercise of due care with respect to the protection of its employes, to cover a certain culvert within its yard. *Franklin v. Winnebago & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 5 Am. St. Rep. 856, 34 N. W. Rep. 898.

10. Degree of care required in construction.—A company acting in pursu-

ance or legislative authority need only exercise reasonable diligence and precaution in constructing passageways for water through its culverts and embankments, and may select a safe and massive structure in preference to a lighter one which would offer less obstruction to the water. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 *Am. & Eng. R. Cas.* 642, 57 *Fed. Rep.* 441.

The measure of diligence required in the maintaining of bridges and culverts is that the character and size of the stream, the extent and situation of the agricultural land about it, and the nature of the rainfalls and floods affecting it shall be ascertained and provided for so far as the exercise of ordinary foresight, care, and skill can accomplish them; but there is no requirement that the occurrence of cyclones, cloudbursts, or the like shall be foreseen or guarded against, though it is known that they have many times happened and therefore will certainly recur. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 *Am. & Eng. R. Cas.* 642, 57 *Fed. Rep.* 441.

What is deemed reasonable precaution with respect to suitable bridges, culverts, or other provision for carrying off water, effectually absolving the party constructing the road from all just imputation of negligence, carelessness, or wanton disregard of the rights of individuals, is that a company bring to the construction all the engineering knowledge, skill, and care ordinarily applied to works of like kind, taking into consideration the size and habits of the stream, the character of its channel, and the declivity of the circumjacent territory forming the watershed; and what are deemed suitable works are such as are sufficient to avoid all danger from such stream in connection with such works in all ordinary floods and freshets. *Illinois C. R. Co. v. Bethel*, 11 *Ill. App.* 17.—QUOTED IN *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127.

11. Sufficiency, generally.*—The jury are justified in finding that a culvert was manifestly insufficient, where the facts show that the culvert was about thirty feet wide and had been constructed in lieu of the natural flow of the stream, which was one hundred feet wide, and that at times of high water the stream would overflow its banks and a portion thereof run across low

lands, and backing up higher and higher would reach back to and cover nearly all of the lands of a neighboring proprietor. *Union Trust Co. v. Cuppy*, 11 *Am. & Eng. R. Cas.* 562, 26 *Kan.* 754. Compare *Wabash R. Co. v. Sanders*, 47 *Ill. App.* 436.

12. Must provide outlet for surface water.*—In constructing its road a company should construct culverts to provide outlets for surface waters. *Illinois C. R. Co. v. Bethel*, 11 *Ill. App.* 17. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 *Am. & Eng. R. Cas.* 229, 91 *Mo.* 509, 10 *West. Rep.* 54, 4 *S. W. Rep.* 389. *Philadelphia, W. & B. R. Co. v. Davis*, 34 *Am. & Eng. R. Cas.* 143, 68 *Md.* 281, 11 *Atl. Rep.* 822, 10 *Cent. Rep.* 551. *Carriger v. East Tenn., V. & G. R. Co.*, 7 *Lea (Tenn.)* 388. *Johnson v. Atlantic & St. L. R. Co.*, 35 *N. H.* 569.

In constructing its road across a stream a railroad company should provide an outlet, not merely for the water falling within the banks of the stream, but also for all water which had been accustomed to flow into the stream from the surface of the adjacent country. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 58 *Am. & Eng. R. Cas.* 654, 57 *Ark.* 387, 21 *S. W. Rep.* 1066.

13. Must provide for ordinary rains and floods.†—The company must provide proper and sufficient openings or culverts for the escape of the water of all streams crossing its roadbed, so as not to flood the land of upper riparian owners, whether at an ordinary stage of water or during floods which could reasonably have been foreseen and guarded against; and if it fails to provide such openings, it is liable to any person damaged thereby. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 58 *Am. & Eng. R. Cas.* 654, 57 *Ark.* 387, 21 *S. W. Rep.* 1066. *Emery v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 253, 102 *N. Car.* 209, 9 *S. E. Rep.* 139.

A company is required to use ordinary care in the construction of a culvert under an embankment made in constructing its road, to provide against ordinary rains. *Houston & G. N. R. Co. v. Parker*, 50 *Tex.* 330.

A company must so construct its road as to avoid those dangers which it could be reasonably foreseen by competent and skillful engineers might result from the ordinary

* Proof as to sufficiency of culverts, see 44 *AM. & ENG. R. CAS.* 504, *abstr.*

* See also *ante*, 4.

† See also *CARRIAGE OF PASSENGERS*, 175.

rainfall and freshets peculiar to the particular section of country in which it is constructed. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

By "ordinary floods" are understood all usual and expected freshets occurring in the stream, such freshets as are usual and always to be expected in certain seasons in each and every year. *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

14. Need not provide against extraordinary floods and freshets.*

Railroads are only required to construct culverts large enough to carry the ordinary high water of streams, and not that of extraordinary floods. *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 57 Am. Rep. 120. FOLLOWED IN *Baltimore & O. R. Co. v. Sulphur Spring I. S. Dist.*, 2 Am. & Eng. R. Cas. 166, 96 Pa. St. 65, 42 Am. Rep. 529. QUOTED IN *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448; *O'Connell v. East Tenn., V. & G. R. Co.*, 87 Ga. 246. REVIEWED IN *Denver City I. & W. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. Rep. 565.—*McPherson v. St. Louis, I. M. & S. R. Co.*, 97 Mo. 253, 10 S. W. Rep. 846. *Ellet v. St. Louis, K. C. & N. R. Co.*, 12 Am. & Eng. R. Cas. 183, 76 Mo. 518. *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 Mo. App. 554. *Emery v. Raleigh & G. R. Co.*, 37 Am. & Eng. R. Cas. 253, 102 N. Car. 209, 9 S. E. Rep. 139; rehearing denied in 105 N. Car. 45. *Fick v. Pennsylvania R. Co.*, 157 Pa. St. 622, 27 Atl. Rep. 783. *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.

By "extraordinary floods" are meant freshets not occurring annually. *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17.

It is not culpable negligence on the part of a company in the construction of its roadbed, track, and culverts if it has failed to provide against such extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad. *Libby v. Maine C. R. Co.*, 58 Am. & Eng.

R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 943. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

A railroad company which fails to construct a culvert or bridge sufficient to pass extraordinary floods is not liable for damages sustained thereby, if it has used ordinary, reasonable foresight, care, and skill in constructing and maintaining such culvert or bridge, and will not be liable for such injuries as could not be anticipated or guarded against. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441.

The statute requiring railway companies in constructing their embankments to provide such culverts and sluices as may be demanded by the natural lay of the land for its necessary drainage, must be construed to mean that provision need not be made for such extraordinary floods as could not have reasonably been foreseen, but that such as may have been reasonably anticipated must be guarded against without reference to the frequency of their recurrence. The fact that the floods not provided for occur at the place at long intervals affords no defense. *Gulf, C. & S. F. R. Co. v. Pomeroy*, 30 Am. & Eng. R. Cas. 200, 67 Tex. 498, 3 S. W. Rep. 722.—REVIEWED IN *Missouri Pac. R. Co. v. Johnson*, 37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325.

Three floods in quick succession, with notice to the company to enlarge a culvert, did not necessarily make it the duty of the company to make such enlargement. *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445.

15. Duty to keep unobstructed and in good condition.—Where a company

builds a culvert or other passageway under its roadbed, it must keep the same open for the free transit of water. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 112 Mo. 6, 20 S. W. Rep. 322.

A company is liable for damages resulting from a failure to keep a culvert unobstructed. The entrances to the culvert in this case were subject to the company's control as part of its roadbed. The right of the corporation to enjoy the use of its roadbed as an easement carried with it a continuing correlative obligation to use reasonable diligence to keep the culvert unobstructed, so that detriment to the owners

* See also BRIDGES, ETC., 23; CARRIAGE OF PASSENGERS, 170; FLOODING LANDS I., 3.

of the land might be avoided so far as practicable, considering the size and structure of the culvert. *West v. Louisville, C. & L. R. Co.*, 8 *Bush (Ky.)* 404.

The breaking of a culvert under the embankment of a road during the time of a freshet having caused an accumulation of water which, the embankment being open, overflowed plaintiff's land to his damage, the court charged the jury that if the servants of the defendant let the water off, defendant is liable for actual damages therefrom ensuing, no matter how much care and caution they exercised. *Held*, that the instruction was erroneous, as defendant was not liable unless guilty of negligence in setting free the accumulated water. *Mills v. Greenville & C. R. Co.*, 5 *Am. & Eng. R. Cas.* 55, 13 *So. Car.* 97.

A town is liable for damages for the overflow of land caused by a culvert which, though amply sufficient for the passage of water of a natural stream, becomes filled at its mouth by reason of the raising of the grade of a street some time after its construction—the raising having been done by the highway surveyor. *Haynes v. Burlington*, 38 *Vt.* 350.

But the town would not be liable for the obstruction of the flow of water through a culvert causing damage to adjoining land by flooding, if such obstruction was due to the acts of a railroad company which owns lands adjacent to the highway, and who filled up a ravine on such lands, which was a natural channel for the outlet of the water flowing from the culvert. *Haynes v. Burlington*, 38 *Vt.* 350.

II. LIABILITIES OF THE COMPANY.

10. Generally.—A company, in consideration of the grant of a right of way for its road through the lands of the plaintiff and of two other adjoining proprietors, agreed to make such culverts and crossings as might be necessary to enable the parties "to reasonably occupy their lands, to carry off surplus water, etc.;" and that upon the hillside of said road a sufficient drain should be made and kept open "for the discharge of the drainage." The company built a culvert across its road south of and below said lands, with which the drain on the hillside of the road was connected, and through which the drainage from the lands of the plaintiff was discharged. *Held*, that the culverts and the drain form necessary

parts of the plan or means agreed on for draining the lands of the plaintiff on the hillside of the railroad, and that for damages caused to such lands by the obstruction of the drain, the company is liable, although the obstruction may not have been on the lands of either of the parties granting the right of way. *Madden v. Cincinnati & M. V. R. Co.*, 3 *Am. & Eng. R. Cas.* 232, 36 *Ohio St.* 46.

17. Nuisance.—A defective construction of a culvert where the road crosses a watercourse, whereby the stream is dammed, or partially so, is in the nature of a nuisance. *Union Trust Co. v. Cuffy*, 11 *Am. & Eng. R. Cas.* 562, 26 *Kan.* 754.

Where a company is charged with a nuisance in maintaining an insufficient culvert, which grows out of the construction of the road and not its use, in order to render the company liable it must appear either that the company constructed the culvert, or that it has been notified to abate it. *Wabash R. Co. v. Sanders*, 47 *Ill. App.* 436. —DISTINGUISHING *Chicago, B. & Q. R. Co. v. Schaffer*, 124 *Ill.* 121; *Ohio & M. R. Co. v. Wachter*, 123 *Ill.* 445.

18. Personal injuries, generally.—A company constructed its road across the main street of a village, about a foot and a half above the level of the street. The street was 12 rods wide, with two traveled paths, one on each side of the street, and an open common between. The company was required by its charter to restore any highway intersected, so as not to impair its usefulness. The company put the two traveled tracks in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths they constructed a culvert under the timbers of the track to let the water accumulating from rains pass through, which was left uncovered. A person walking across the street upon the railroad track, at a time when the culvert was filled with snow and could not be seen, fell into it and was injured. *Held*, that the company was liable for the injury. *Judson v. New York & N. H. R. Co.*, 29 *Conn.* 434.—QUOTED IN *Ellis v. Wabash, St. L. & P. R. Co.*, 17 *Mo. App.* 126.

In an action to recover damages for an injury alleged to have been caused by the leaving of certain planks over a culvert unfastened, which it was the duty of the company to keep secure, plaintiff testified that

one Hines, a section hand, told him that he warned the section boss of the dangerous condition of the planks on the night immediately preceding the day of the accident. *Held*, that the defendant could prove by the section boss in question that Hines gave no such warning. *Pennsylvania Co. v. Boylan*, 10 *Am. & Eng. R. Cas.* 734, 104 *Ill.* 595.

In the above case, it appearing that Hines had charge of the culvert, and that it had been securely fixed shortly before the accident—*held*, proper for the defendant to ask said Hines how long the culvert would stay fixed, and for what purpose or in what case the planking would be removed. *Pennsylvania Co. v. Boylan*, 10 *Am. & Eng. R. Cas.* 734, 104 *Ill.* 595.

In the above case, said Hines having testified that none of the planks over the culvert were loose at the time of the accident, as far as he knew—*held*, admissible for the defendant to ask said Hines whether he would have known that said planks were loose had they actually been so. *Pennsylvania Co. v. Boylan*, 10 *Am. & Eng. R. Cas.* 734, 104 *Ill.* 595.

19. — injuries to passengers.—In an action for injuries to a passenger occasioned by a washout at a culvert, the fact that the culvert would not have given way but for the breaking of a dam on adjoining property over which the company had no control, will not prevent recovery if the negligent manner in which the culvert was constructed contributed to the accident. *Bonner v. Wingate*, 78 *Tex.* 333, 14 *S. W. Rep.* 790.—FOLLOWED IN *Bonner v. Mayfield*, 82 *Tex.* 234.

20. — injuries to employees.*—It is the duty of a company to cover its bridges and culverts within its yards and within a reasonable distance from its switches, wherever, in the performance of their duties, it would naturally be anticipated that brakemen would be apt to go for the purpose of making couplings. *Franklin v. Winona & St. P. R. Co.*, 31 *Am. & Eng. R. Cas.* 211, 37 *Minn.* 409, 34 *N. W. Rep.* 898, 5 *Am. St. Rep.* 856.

21. Flooding lands†—Injuries to crops.—If a company, under a grant of a right of way, constructs its road with prudence and care it will not be liable to the

grantor for injuries incident to such construction; but if it acts without care and skill, and by reason of a failure to apply necessary and proper culverts surface water is turned out of its usual and natural channel and emptied upon the lands of the grantor, it will be liable to him, or those holding under him, for the damages resulting therefrom. *Gilbert v. Savannah, G. & N. A. R. Co.*, 69 *Ga.* 396.

Where the defendant built an embankment across a wide creek bottom and a culvert over the creek, thus causing all the surface water of the bottom to flow into the channel of the creek, but the culvert was not of sufficient capacity to carry the waters of the creek when thus augmented, and the result was that the land above the embankment was flooded, the landowner may recover damages of the company. *Sullens v. Chicago, R. I. & P. R. Co.*, 74 *Iowa* 659, 7 *Am. St. Rep.* 501, 38 *N. W. Rep.* 545.—REVIEWING *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 *Mo.* 271.—FOLLOWED IN *Moore v. Chicago, B. & Q. R. Co.*, 75 *Iowa* 263, 39 *N. W. Rep.* 399; *Noe v. Chicago, B. & Q. R. Co.*, 76 *Iowa* 360, 41 *N. W. Rep.* 42.

The rule that a landowner may improve his land for the purpose for which similar land is ordinarily used and may do what is necessary for that purpose, such as to build upon it, or raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from coming upon it, or to draw from adjoining land surface water that would otherwise remain there, or to shed surface water over land on which it would not otherwise go—applied to a railroad company constructing its road across a prairie country. *Jordan v. St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 1, 42 *Minn.* 172, 6 *L. R. A.* 573, 43 *N. W. Rep.* 849.—FOLLOWING *Kobs v. Minneapolis*, 22 *Minn.* 159; *Hogenson v. St. Paul, M. & M. R. Co.*, 31 *Minn.* 224, 17 *N. W. Rep.* 374; *Blakely Tp. v. Devine*, 36 *Minn.* 53, 29 *N. W. Rep.* 342; *Pye v. Mankato*, 36 *Minn.* 373, 31 *N. W. Rep.* 863; *Olson v. St. Paul, M. & M. R. Co.*, 38 *Minn.* 419, 37 *N. W. Rep.* 953.

A landowner may maintain an action against a company for the flooding of his lands caused by a failure to provide a culvert suitable for carrying off the water of a stream that once every few years so swelled its current as to make such a culvert necessary to prevent flooding of the land; for the

* Injuries to employees from failure to construct culvert. When question of negligence for the jury, see 53 *AM. & ENG. R. CAS.* 106, *abstr.*

† See also FLOODING LANDS.

company is presumed to have notice of the habits of the stream during extraordinary, as well as ordinary, floods. *Carriger v. East Tenn., V. & G. R. Co.*, 7 *Lea (Tenn.)* 388.—EXPLAINING *Colcough v. Nashville & N. W. R. Co.*, 2 *Head (Tenn.)* 173.

Each overflow caused by such negligence, carelessness, or want of skill of the defendants or its agents, is an independent wrong, for which an action may be maintained for damages resulting to the crops or other property of the possessor of the land overflowed. *Carriger v. East Tenn., V. & G. R. Co.*, 7 *Lea (Tenn.)* 388.

And in such a case it is immaterial that the owner of the land, at the time of the injury, was not the owner thereof at the time of the building and laying out of the road. *Carriger v. East Tenn., V. & G. R. Co.*, 7 *Lea (Tenn.)* 388.

22. — defenses — Estoppel.—Proceedings for the condemnation of land for the right of way of a railroad company will not operate as an estoppel in an action brought by a party to such proceedings to recover damages to his lands from overflows resulting from the negligent construction of a culvert by the company. *Emery v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 253, 102 *N. Car.* 209, 9 *S. E. Rep.* 139.

23. — contributory negligence.—Where the owner of a tract of land had his brickyard on the premises, and his crops submerged with water by reason of the negligent construction of a railroad culvert, he is not guilty of contributory negligence when he afterwards constructs a brickyard in the same place and plants a crop on the same land, both of which are again submerged from the same cause. Because a culvert was negligently constructed by a company, and plaintiff knew it, is no reason why plaintiff should have abandoned his land and ceased all effort to utilize it. *Emery v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 253, 102 *N. Car.* 209, 9 *S. E. Rep.* 139.—QUOTING *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99.

24. — evidence—Experts.—In an action for negligence in not providing sufficient culverts for the escape of water collected and accumulated by its embankments and excavations, by reason of which a portion of its roadbed suddenly gave way, evidence of a non-expert witness who had lived in the neighborhood all his life was

competent as to the capacity of the culvert to carry away accumulated water in time of freshets. *McPherson v. St. Louis, I. M. & S. R. Co.*, 97 *Mo.* 253, 10 *S. W. Rep.* 846.—APPLIED IN *Stoher v. St. Louis, I. M. & S. R. Co.*, 105 *Mo.* 192.

Where the issue was as to whether a culvert was of proper size, and the defendant examined as its witness an expert who stated that he built the culvert, and that it was the largest one he had ever built—*held*, that it was proper to permit the plaintiff to show that another corporation had built a larger culvert over the same stream a short distance below the culvert in controversy. *Emery v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 253, 102 *N. Car.* 209, 9 *S. E. Rep.* 139.

The reputation for intelligence and skill of a civil engineer under whose direction a culvert was built, cannot be shown in evidence on the trial of an issue as to whether the culvert was in fact so constructed as to carry off the water except in cases of excessive rainfalls. *Emery v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 253, 102 *N. Car.* 209, 9 *S. E. Rep.* 139.

In an action for injury done to land by the breaking of a culvert, testimony as to the price for which adjacent land sold four years afterwards, by a witness who had but slight, after-acquired knowledge of the land, was competent. *Gentry v. Richmond & D. R. Co.*, 38 *So. Car.* 284, 16 *S. E. Rep.* 893.

25. — measure of damages.—In an action for injury done to land by the breaking of a culvert, plaintiff claiming damages only for injury done to the land, the measure of damages is the value of the land before and after the injury. While the value of the crops made might aid in estimating the value of the land, the loss of crops cannot be considered in fixing the amount of damages. *Gentry v. Richmond & D. R. Co.*, 38 *So. Car.* 284, 16 *S. E. Rep.* 893.—DISTINGUISHING *Hammond v. Port Royal & A. R. Co.*, 15 *So. Car.* 10; *Devereux v. Champion Cotton Press Co.*, 17 *So. Car.* 66.

CUMBERLAND AND PENNSYLVANIA R. CO.

1. Reduction of rates of toll.—In the original charter of the Cumberland and Pennsylvania railroad company the legislature expressly reserved the power to alter, repeal, or annul the charter at pleasure.

By the Act of 1876, ch. 80, the rates of toll authorized to be charged by said company were reduced. *Held*, that the Act of 1876, ch. 64, was constitutional and valid law, and that the railroad company could not lawfully exact or receive higher rates for transportation than the act provides; and that the Act of 1876, ch. 80, was also free from constitutional objections. *American Coal Co. v. Consolidated Coal Co.*, 46 Md. 15. See also *State v. Consolidated Coal Co.*, 46 Md. 1.

CUMULATIVE.

Evidence, new trial not granted for, see NEW TRIAL, 94.

Remedies for enforcement of mortgages, see MORTGAGES, 163.

CURATIVE ACTS.

Effect of, on irregular proceedings for municipal aid to railways, see MUNICIPAL AND LOCAL AID, 135.

CURVES.

Duty of trainmen when approaching, see TRESPASSERS, INJURIES TO, 37.

— to sound signals at, see CROSSINGS, INJURIES, ETC., AT, 151.

Power of company to fix, see ELEVATED RAILWAYS, 27.

Speed allowable at, see CROSSINGS, INJURIES, ETC., AT, 179.

View of track obstructed by, see CROSSINGS, INJURIES, ETC., AT, 300.

CUSTODIANS.

Of child, contributory negligence of, see CHILDREN, INJURIES TO, 144.

Traveling on cattle trains, see CARRIAGE OF LIVE STOCK, 118-133.

CUSTODY.

Of baggage by agent of carrier, see BAGGAGE, 63, 71.

— — passenger, effect of, see BAGGAGE, 79-87.

— cattle by shipper while en route, see CARRIAGE OF LIVE STOCK, 118-133.

— property attached by officer, see ATTACHMENT, 48.

CUSTOM ; USAGE.

As proof of disputed facts, see EVIDENCE, 37.

— to places at which to stop train, see CARRIAGE OF PASSENGERS, 256, 257.

As to safety of turntables, evidence of, see CHILDREN, INJURIES TO, 31.

Competency of evidence of, in actions for causing death, see DEATH BY WRONGFUL ACT, 226.

Duty to give notice of arrival, as affected by, see CARRIAGE OF MERCHANDISE, 223.

Effect of, as to delivery by carrier, see EXPRESS COMPANIES, 42.

— — on liability of connecting carriers, see BAGGAGE, 27.

— — stop-over privileges, see TICKETS AND FARES, 47.

— — to limit liability, see EXPRESS COMPANIES, 64; LIMITATION OF LIABILITY, 16.

Evidence of, generally, see CARRIAGE OF MERCHANDISE, 750; CONTRIBUTORY NEGLIGENCE, 97; EVIDENCE, 54.

— — customary occurrences, see CARRIAGE OF PASSENGERS, 566.

— — general, as throwing light on disputed fact, see EVIDENCE, 11.

— — to show negligence or its absence, see NEGLIGENCE, 95.

— — — — — vary terms of written instrument, see EVIDENCE, 185.

Examination of witness as to extent of, see WITNESSES, 60.

Liability of initial carrier as affected by, see CARRIAGE OF MERCHANDISE, 561.

Not valid unless consistent with charter, see CARRIAGE OF MERCHANDISE, 426.

Of agent, to examine freight, evidence of, see EVIDENCE, 17.

Positive and negative evidence of, see EVIDENCE, 296.

Sufficiency of evidence to show, see CARRIAGE OF PASSENGERS, 580.

That owner shall feed and water stock, see CARRIAGE OF LIVE STOCK, 51.

To allow animals to run at large, evidence of, see ANIMALS, INJURIES TO, 411.

— give signals, when imposes a duty, see CROSSINGS, INJURIES, ETC., AT, 96, 117.

1. Interpretation and effect.*—The generality of the custom of railroads in the country in reference to the management of their business in a certain manner, cannot in any degree excuse injuries occasioned by acting in conformity to the custom when it is unreasonable, dangerous, and productive of injury. *Hill v. Portland & R. R. Co.*, 55 Me. 438.

The custom of companies to allow their contractors the free use of their own roads,

* Usage to furnish express facilities to express companies, see note, 23 AM. & ENG. R. CAS. 577.

cannot be extended so as to bind a company to pay the expenses of its contractors on the road belonging to a distinct corporation. *Colcock v. Louisville, C. & C. R. Co.*, 1 *Strobh. (So. Car.)* 329.—REVIEWING *Nesbitt v. Louisville, C. & C. R. Co.*, 2 *Spears* 698.

2. Validity.*—A custom that an intermediate consignee has power to deduct from the back-freight charge earned any deficiency in the shipment as shown by a comparison of the bill of lading with the measurement of the receiving carrier, is not a valid custom which the courts will recognize as binding, where the custom was not shown to have been certain, reasonable, or of undisputed generality and uniformity. *Strong v. Grand Trunk R. Co.*, 15 *Mich.* 206.

A custom of railroads not to receive for transportation any live stock unless under certain conditions modifying their common-law liability would be contrary to law and public policy. *Missouri Pac. R. Co. v. Fagan*, 72 *Tex.* 127, 2 *L. R. A.* 75, 9 *S. W. Rep.* 749.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.

A custom cannot require that a shipper should expressly agree as a condition precedent to his right to damages for injury to stock during transportation, that he would give notice before removing the stock. *Missouri Pac. R. Co. v. Fagan*, 72 *Tex.* 127, 2 *L. R. A.* 75, 9 *S. W. Rep.* 749.

A custom requiring a shipper to agree, as a condition of shipment, that his measure of damages should not be more than the cash value of the stock shipped at the place of shipment, is illegal. *Missouri Pac. R. Co. v. Fagan*, 72 *Tex.* 127, 2 *L. R. A.* 75, 9 *S. W. Rep.* 749.

3. Notice to person sought to be bound.—That a railroad company had been for about a month in the habit of storing cotton consigned to their agent, at the warehouse of A. without any proof that this was generally known, or any other evidence that the shipper had notice of it, is not sufficient to bind him. *Alabama & T. R. Co. v. Kidd*, 35 *Ala.* 209.

In a suit against a company for loss of freight in a car loaded by plaintiff, but the keys thereof retained by agents of the company, it is not error to exclude from the

jury evidence that it was the custom of the company not to be responsible for the conduct of its agents who held the keys, particularly if there was no notice of such custom brought home to the plaintiff. *Central R. & B. Co. v. Anderson*, 58 *Ga.* 393, 16 *Am. Ry. Rep.* 85.

Where, in a suit against a railroad company for the loss of poultry shipped, the defense was a usage of railroads to carry such freight only when accompanied by the owner, and at his risk, and that the loss had occurred through the fault of the owner in not keeping the coops properly righted on the cars—held, that evidence from the plaintiff, and others who had been accustomed to ship on railroads, that they had never heard of such usage, was admissible. *Evansville & C. R. Co. v. Young*, 28 *Ind.* 516.

The testimony of freight conductors on a railroad, that they had, contrary to rule, themselves ridden on freight trains without a pass, and had permitted former employes of the railroad company so to ride, is, in the absence of knowledge thereof on the part of the officers of the company, insufficient to establish a custom which will render it liable to such an employe so riding as to a passenger. *Powers v. Boston & M. R. Co.*, 153 *Mass.* 188, 26 *N. E. Rep.* 446.

A custom which is restricted to a certain locality or business, though shown to have become general and uniform, is not conclusive on the party, so that he may not give evidence that it was unknown to him. *Pennell v. Delta Transp. Co.*, 94 *Mich.* 247, 53 *N. W. Rep.* 1049.

4. Proof of.*—A general custom, as to the number of passengers conveyed, may be proved, but not the practice established on the route. *Maury v. Talmadge*, 2 *McLean (U. S.)* 157.

Evidence to the effect that passenger conductors were in the habit of receiving coupons similar to those held by plaintiff under similar circumstances, is admissible to prove a custom to that effect. *Marshall v. Boston & A. R. Co.*, 31 *Am. & Eng. R. Cas.* 18, 145 *Mass.* 164, 5 *N. Eng. Rep.* 172, 13 *N. E. Rep.* 384.

* Evidence of custom, inadmissible as bearing on negligence, see note, 23 *AM. & ENG. R. CAS.* 346.

Evidence of usage varying common carriers' liability, see note, 42 *AM. DEC.* 498.

* Customs and their validity. How far common carriers are affected thereby, see note, 50 *AM. DEC.* 99.

A valid custom may exist, binding on the railroad company, to give notice of the arrival of goods to consignees residing in a village twenty miles or more from the town in which the depot is situated, although the custom does not prevail in that town; and such custom may be established by the practice of the agent, without instructions from his principal; but it is not established by proof that the agent gave notice occasionally, or "about as often as not," nor by the fact that he gave notice to consignees when goods accumulated in unusual quantities. *Columbus & W. R. Co. v. Ludden*, 42 *Am. & Eng. R. Cas.* 404, 89 *Ala.* 612, 7 *So. Rep.* 471.

5. Question of fact.—A particular custom or usage of trade is a question of fact for the jury. They having passed upon this question, under instructions of the court below, and found against the usage, this court will presume the fact in favor of such finding. *Steamboat Sultana v. Chapman*, 5 *Wis.* 454.

6. When will control a contract.—Where it appeared that it was the custom of the company to make monthly payments partly in stock to its contractors for work done on its road upon estimates made by the engineer at the end of each month—held, that this must be considered the rule of payment under a contract established by mutual consent, and binding upon the parties so as to make a special request for the customary payments in stock unnecessary. *Boody v. Rutland & B. R. Co.*, 3 *Blatchf. (U. S.)* 25.

Evidence of a custom in respect to the delivery, inspection, and acceptance of cross-ties, delivered on the line of a railroad by persons desiring to sell, such custom being known to the parties, is admissible, from which the intention and understanding of the parties may be inferred, in the absence of a special contract; or, if there be one, to supply a stipulation as to which the contract is silent. *Kinney v. South & N. Ala. R. Co.*, 82 *Ala.* 368, 3 *So. Rep.* 113.

The rule observe^d by shippers in their general transactions with the depot agent of a railroad company touching the delivery of freight for shipment, if continuous or general, though not universal, may grow into a usage, authorizing others to treat it as the proper rule and as an element of the contract of shipment, although the usage may be in conflict with the regulations es-

tablished and promulgated by the company's superintendent, known to the shippers, and no notice of it is traced to the superintendent. *Montgomery & E. R. Co. v. Kolb*, 18 *Am. & Eng. R. Cas.* 512, 73 *Ala.* 396, 49 *Am. Rep.* 54.

A charter of a railroad company prescribed the maximum rate charged for the transportation of heavy articles by the hundred pounds, and of articles of measurement by the cubic foot, without further definition in the act itself. Whether cotton in bales should be charged as a heavy article or as an article of measurement, depends upon the meaning of this term as used in the charter, to be ascertained by proof of the custom prevailing in reference to these matters at the passage of the act granting the charter. *Bonham v. Charlotte, C. & A. R. Co.*, 3 *Am. & Eng. R. Cas.* 302, 13 *So. Car.* 267.

7. — and when not.—The general custom or rules of a railroad company, or of various companies, cannot affect a special contract or modify the same, where such contract contains no ambiguity of terms. *Martin v. Union Pac. R. Co.*, 1 *Wyom.* 143.

Neither is proof of such general custom or usage permissible, unless it is also shown that such has been so in the dealings of such companies with outside parties, they understanding and assenting thereto. *Martin v. Union Pac. R. Co.*, 1 *Wyom.* 143.

The custom must be a general usage between the company and those who contract with it. *Martin v. Union Pac. R. Co.*, 1 *Wyom.* 143.

In Michigan a custom cannot change a definite contract, and no custom is binding which is not certain, definite, uniform. *Pennell v. Delta Transp. Co.*, 94 *Mich.* 247, 53 *N. W. Rep.* 1049.—QUOTING *Walls v. Bailey*, 49 *N. Y.* 476.

A local custom to deliver goods to any person who holds the bill of lading, but which is not a general custom, does not bind a shipper who takes a bill of lading, naming himself as consignee, at least if the shipper has no knowledge of it. *Weyand v. Atchison, T. & S. F. R. Co.*, 75 *Iowa* 573, 1 *L. R. A.* 650, 39 *N. W. Rep.* 899; reversing 30 *Am. & Eng. R. Cas.* 102, 33 *N. W. Rep.* 133.

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I. GENERAL PRINCIPLES.

1. *Right to Damages, Generally.*

1. The right to damages, and liability therefor, generally.—The rightful and *bona fide* exercise of a lawful power or authority cannot afford a basis for an action. If the power or right is exercised carelessly, negligently, wrongfully, improperly, and may be maliciously, the party so exercising it may be liable to respond in damages for an injury, direct or consequential, resulting to another from thus exercising the right or power; but such liability can only arise upon and for the manner of doing the act, and not for the act itself. *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 148. *Mexican National Constr. Co. v. Meddlege*, 75 Tex. 634, 13 S. W. Rep. 257.

The damages for which compensation can be allowed are settled by jurisprudence. Unless such damages are proved they cannot be allowed. *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 La. Ann. 824, 8 So. Rep. 586.

The award of damages must be founded upon a fair and reasonable construction of the evidence, in view of all the facts and circumstances disclosed, and the probabilities deducible therefrom according to common experience. *Siefke v. Manhattan R. Co.*, 27 J. & S. (N. Y.) 444, 14 N. Y. Supp. 763, 39 N. Y. S. R. 355; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306 — QUOTED IN

Balch v. Grand Rapids & I. R. Co., 67 Mich. 394, 11 West. Rep. 476, 34 N. W. Rep. 884.

The liability of a corporation for damages does not depend upon whether it is a public or private corporation, but whether the franchise is created for private emolument or exclusively for the public good. *Tinsman v. Belvidere Del. R. Co.*, 26 N. J. L. 148.

The maxim "*De minimis non curat lex*" is never applied to a positive and wrongful invasion of another's property. *Adler v. Metropolitan El. R. Co.*, 46 N. Y. S. R. 253, 18 N. Y. Supp. 858.

One who is not deprived of any absolute right for which damages could be given cannot maintain an action for an injury to his feelings alone, which results solely from a breach of a contract to which he was not privy, made with and for the benefit of another, or which results from a tort committed against another, resulting in injury to such other person, except when the right of action is expressly given by statute. *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563.

2. Right to damages for torts.*—

While in actions for breach of contract such damages are recoverable only as the parties may reasonably be supposed to have contemplated as likely to result in actions for torts, the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen or contemplated by him as the probable result of the act done. *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 11 N. W. Rep. 356, 911, 41 Am. Rep. 41.—DISTINGUISHING *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 23. REVIEWING *Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111.—DISTINGUISHED IN *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.*, 62 Wis. 642, 51 Am. Rep. 725.—*Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. Rep. 559.

3. No recovery in cases of pure accident.†—When the injuries complained of are the result of inevitable accident, no compensation can be allowed. *Tucker v. Duncan*, 6 Am. & Eng. R. Cas. 268, 4 Woods (U. S.) 652, 9 Fed. Rep. 867. *Lewis v. Flint*

& P. M. R. Co., 18 Am. & Eng. R. Cas. 263, 54 Mich. 55, 19 N. W. Rep. 744, 52 Am. Rep. 790.

4. Duty to keep damages down.*—

(1) Generally.—Where one is injured from another's breach of contract or tort, he is bound to use ordinary care and reasonable exertions and expense to render the injury as light as possible. *Austin & N. W. R. Co. v. Anderson*, 85 Tex. 88, 19 S. W. Rep. 1025.

And where by the use of such means he may prevent loss, he can only recover for such loss as could not thus be prevented. *Texas & St. L. R. Co. v. Young*, 13 Am. & Eng. R. Cas. 544, 60 Tex. 201.

But he is not required to do work, in keeping down damages, which the defendant by his contract is bound to perform. *Indiana, B. & W. R. Co. v. Adamson*, 34 Am. & Eng. R. Cas. 127, 114 Ind. 282, 12 West. Rep. 708, 15 N. E. Rep. 5.

And if while suffering with pain caused by his injuries, plaintiff neglects to do that which is most prudent for his recovery, he will not be held negligent if constrained to such neglect to alleviate his suffering. *Gulf, C. & S. F. R. Co. v. McMannewitz*, 34 Am. & Eng. R. Cas. 428, 70 Tex. 73, 8 S. W. Rep. 66.

For special injury to his use and occupation of premises injured, a party is entitled to recover only the damages accruing for such length of time as will afford him a reasonable opportunity to put a stop to the same. *Karst v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 118.

One who contracted for the construction and maintenance of a water-tank to which the company refused to pay, was not entitled to recover damages so far as the property was injured through depreciation by abandonment or exposure. He should have protected and preserved the property, or have sold it to the best advantage possible. *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264.—FOLLOWING *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

But where, to carry out a contract to furnish water to a company, a party purchases articles which, under the contract, are to remain his own, if the company abandons the contract, leaving the property uninjured, except by depreciation from change of locality, he is not bound to sell, but may retain the property, and recover damages

* See also *post*, 64-74.

† See also ANIMALS, ETC., 52; BAGGAGE, 12; CARRIAGE OF LIVE STOCK, 13, 22, 26; CARRIAGE OF MAILS, 8; CARRIAGE OF MERCHANDISE, 12-20, 104, 289; CARRIAGE OF PASSENGERS, 158, 177.

* See also ANIMALS, ETC., 590.

for the breach; the measure of damages in such case being the difference between the cost of the articles and their present market, or actual, value. *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264.

(2) *Duty to procure medical aid*.—Plaintiff, after the injury is received, must act as a prudent man would under the circumstances, and use due diligence to know whether medical aid is required, and to have himself cured. *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138.

And he forfeits his rights to recover damages that might have been saved, and which resulted from his own negligence in failing to adopt means of cure. *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. Rep. 492. *Gulf, C. & S. F. R. Co. v. McMannewitz*, 34 Am. & Eng. R. Cas. 428, 70 Tex. 73, 8 S. W. Rep. 66.

But he is only bound to use ordinary diligence to procure medical aid. *Louisville, N. A. & C. R. Co. v. Fakvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908.

A person injured by the negligent conduct of another is not unqualifiedly bound to engage medical aid and attendance for such length of time as his injuries make necessary. Whether neglect to do all in this regard that a man of ordinary prudence would under like circumstances have done can be taken into consideration, and no compensation allowed for any damages that might have been averted by engaging medical aid more promptly than the plaintiff did, not decided. *Vallo v. United States Exp. Co.*, 147 Pa. St. 404, 23 Atl. Rep. 594.

5. Unskilful medical treatment.*

—If the negligence of the defendant be the immediate cause of the death, the fact that the injured person was unskilfully treated and that this contributed to his death will be no defense to an action by the next of kin. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

If the negligence of the plaintiff contributed not to the cause but to the aggravation of the injury, it should not bar a recovery,

* Persons injured not prejudiced by aggravating injury or retarding cure caused by unskilfulness of physicians or nurses, see note, 50 AM. REP. 603.

Company that has negligently inflicted injury not relieved of liability by lack of skill on part of attending physician, see note, 17 L. R. A. 34.

but there should be an apportionment of the damages, the defendant being held liable only for such damages as its negligence actually produced. *So held*, where plaintiff aggravated the injury to her limb by poor and negligent medical treatment. *Goshen v. England*, 119 Ind. 368, 21 N. E. Rep. 977.

6. Constitutionality of statutes relative to damages.—The double-damage act (Mo. Rev. St. § 809) is constitutional, both as regards the state and federal constitutions. *Hamilton v. Missouri Pac. R. Co.*, 87 Mo. 85.*

The Pennsylvania Act of April 4, 1868, limiting the amount of damages for personal injuries through negligence, is unconstitutional in so far as it attempts to regulate damages where the right of action accrued before its passage. *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269.

The Pennsylvania Act of April 4, 1868, § 2, limiting a recovery to \$3000 in case of personal injury is unconstitutional. *Thirteenth & F. St. Pass. R. Co. v. Boudroun*, 2 Am. & Eng. R. Cas. 30, 92 Pa. St. 475, 37 Am. Rep. 707.—FOLLOWING Central R. Co. v. Cook, 1 W. N. C. 319.

2. Proximate and Remote, or Consequential Damages.

7. Proximate and remote damages, generally.†—The law refuses to take into consideration damages remotely resulting

* See also ANIMALS, ETC., 10.

Treble, when recoverable, see EMINENT DOMAIN, 672.

† Various illustrations of the doctrine of "proximate and remote cause" as applied to causes of injury and damages in case of negligence, see note, 52 AM. REP. 157.

Proximate and remote cause of damage, see notes, 13 L. R. A. 733; 6 Id. 194.

"Proximate and remote cause" as applied to personal injuries, see note, 47 AM. REP. 381.

Proximate and remote cause in cases involving wrongful acts, see note, 36 AM. ST. REP. 808.

Liability of company determined by whether injury is proximate cause of the damage, see note, 41 AM. REP. 53.

Liability for injuries determined by whether they were the "direct and natural" result of the act or whether there was "intervening cause," see note, 42 AM. REP. 390.

Disease as proximate or remote result of company's negligence, see note, 18 AM. & ENG. R. CAS. 233.

See also CARRIAGE OF LIVE STOCK, 157; CARRIAGE OF PASSENGERS, 612, 613; CHILDREN, INJURIES TO, 186; CROSSING OF RAILROADS, 48; EMINENT DOMAIN, 671, 1244.

from a breach of a carrier's contract or neglect of its duty. The maxim is, *Causa proxima, non remota spectatur*. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344.—QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475.—DISAPPROVED IN *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 41 Am. Rep. 41. OVERRULED IN *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168.

Damages traceable to the act of negligence, but not to its legal or natural consequence, are too remote and contingent. *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 382.

A party guilty of a negligence by which a loss is sustained shall only be liable for the proximate consequences of his wrongful act, not for remote, speculative, and contingent consequences which plaintiff might easily have avoided. *Perry v. Central R. Co.*, 66 Ga. 746. *Kankakee & S. W. R. Co. v. Fitzgerald*, 17 Ill. App. 525. *Corrister v. Kansas City, St. J. & C. B. R. Co.*, 25 Mo. App. 619.

And "proximate," as here used, means closeness of causal connection, and not nearness in time or distance, and is intended to qualify the generality of the idea expressed by the word "natural." *Kuhn v. Jewett*, 32 N. J. Eq. 647.

Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages. But it will not make such allowance upon a calculation of speculative profits; nor will it indemnify for remote or indirect losses. The loss must be the natural and proximate consequence of the act; and when this can be ascertained without uncertainty the principle of compensation will be adopted. *Medbury v. New York & E. R. Co.*, 26 Barb. (N. Y.) 564.

"Damages" is the indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights through the act or default of another. To recover, the loss must be the natural and proximate consequence of the wrong. *Collins v. East Tenn., V. & G. R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46.

Damage to be recovered must be both the natural and proximate consequence arising from the wrong complained of, and not from the wrongful act of a third party remotely induced thereby. The interven-

tion of the independent act of a third person between the wrong complained of and the injury sustained, which act was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery. *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; affirmed in 35 N. J. L. 574.

8. What damages are proximate.—Proximate damages are the ordinary and natural results of the particular negligence, and therefore such as might have been expected. *Louisville, N. & G. S. R. Co. v. Fleming*, 18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128.—FOLLOWING *Jackson v. Nashville, C. & St. L. R. Co.*, 13 Lea 491.—*Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.—QUOTING *Henry v. Southern Pac. R. Co.*, 50 Cal. 176.

The direct or proximate consequences of a wrongful act are those which occur without any intervening cause, and where an efficient, adequate cause for the injuries has been found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened. *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. Rep. 559.

9. — resultant disease.*—If an injury is the direct cause of a diseased condition which results in paralysis the latter may be ascribed to the injury as a proximate cause. *Bishop v. St. Paul City R. Co.*, 48 Minn. 26, 50 N. W. Rep. 927.

And whether the plaintiff's aggravated sickness was a proximate consequence of the defendant's wrongful act is a question of fact for the determination of the jury. *East Tenn., V. & G. R. Co. v. Lockhart*, 79 Ala. 315.

If the injury received by plaintiff superinduced and contributed to the production or development of a cancer the defendant is responsible therefor; and the cancer is not to be treated as an independent cause of injury or suffering. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134.—DISTINGUISHING *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84. REVIEWING *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163.

If a disease causing suffering or permanent injury results proximately from per-

* See also *post*, 22.

Personal injury aggravated by predisposition to disease, see notes, 23 AM. & ENG. R. CAS. 536; 18 *Id.* 19.

sonal injuries inflicted by the negligence of a railway company, the suffering caused by that disease constitutes an element in estimating damages; nor is this rule affected by the fact that such a disease would not ordinarily result from the original personal injury inflicted. *Houston & T. C. R. Co. v. Leslie*, 9 Am. & Eng. R. Cas. 407, 57 Tex. 83.

10. What damages are too remote.

—Damages done by a crowd assembled around an engine which fell from the track into a private garden are too remote and cannot be recovered in an action for the negligence of the company. *Scholes v. North London R. Co.*, 21 L. T. 835.

A street lay between plaintiff's property and the river, and contiguous to the latter. The defendant filled up a portion of the river, increasing the distance of plaintiff's property therefrom, and laid its tracks thereon. Plaintiff's house having accidentally taken fire, the fire department were unable to obtain access to the river by reason of the use of the street and embankment by the defendant. Plaintiff thereupon sued the latter for damages for the destruction of his building. *Held*, that the damages were too remote. *Bosch v. Burlington & M. R. Co.*, 44 Iowa 402.—REVIEWING Metallic Comp. Casting Co. v. Fitchburg R. Co., 109 Mass. 277.—APPLIED IN *Brown v. Washash, St. L. & P. R. Co.*, 20 Mo. App. 222.

11. — profits lost and expenses incurred by non-delivery of goods.

—Hotel expenses of a commercial traveler while unemployed and waiting for samples, the delivery of which was negligently delayed, are too remote. *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318, 36 L. J. C. P. 177, 15 W. R. 383, 15 L. T. 579.

Nor can such traveler recover special damages for loss of profits that he might have made on sales during several days that he was kept idle by reason of the company failing to deliver his samples, unless notice was given to the company at the time of shipment of the purposes for which the samples were to be used. *Texas Mex. R. Co. v. Willis*, 3 Tex. App. (Civ. Cas.) 94.

In an action for failure to carry plaintiff's theatre troupe to their destination on time plaintiffs are entitled to recover the damages suffered on account of the engagements actually missed by the delay; but damages accruing on account of other engagements, which they might have kept but for the

breaking up of the troupe through failure to pay the performers, which failure was due to the loss of the box receipts of the engagements missed, are too remote to have been in the contemplation of the parties, and cannot be recovered. *Foster v. Cleveland, C., C. & St. L. R. Co.*, 56 Fed. Rep. 434. See also *Georgia R. Co. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274. *Missouri Pac. R. Co. v. Curtis*, 3 Tex. App. (Civ. Cas.) 379.

Plaintiff shipped a photograph outfit to a certain point and he claimed, for a delay in carrying it, damages for large profits that he might have made if he had received it as he expected and in the time that it should have been carried. He was to take the photographs of soldiers who were stationed at the point during pay-days, but which he lost by reason of the outfit not being received until after pay-days were over. *Held*, that such damages were special and were too remote to be recovered, in the absence of anything to show that the company had notice of the purpose of the shipment of the goods, or that any advantage would result to the owner by having them at the place of destination at a certain date; the true measure of damages being the compensation for the inconvenience that the owner was put to during the time of the delay. *Galveston, H. & S. A. R. Co. v. Jessee*, 2 Tex. App. (Civ. Cas.) 351.

Plaintiff ordered a cotton-gin and it was delivered to him, without his knowledge, with a missing sill. He notified the company, but after waiting a reasonable time ordered another and brought suit against the company to recover \$35, the value of the lost sill, and \$600 for delay in failing to deliver the same within a reasonable time, being the profits that he claimed he could have made on ginning cotton during the time of the delay. *Held*, that as to the \$600 damages the same were uncertain, remote, and speculative, and could not be recovered in the absence of anything to show notice to the company, or facts showing that such damages might reasonably have been anticipated by the parties at the time of the shipment. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

12. Consequential damages.*—The

* Consequential damages, see note, 17 AM. & ENG. R. CAS. 194.

Consequential damages in Illinois and Ne-

responsibility of a wrong-doer for consequential damages resulting from his act, is the same in cases of actionable negligence as in cases of wilful or malicious torts. *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 *Am. & Eng. R. Cas.* 313, 109 *Ind.* 179, 58 *Am. Rep.* 387, 6 *N. E. Rep.* 310, 10 *N. E. Rep.* 70.

In an action on the case to recover for consequential damages resulting from an estray, the plaintiff, to entitle himself to consequential damages, must allege and prove that the injury was the result of the defendant's negligence. If, however, the animal escaped from his inclosure without the knowledge and without any fault of the defendant, he would not be liable in such action for consequential damages. *Annapolis & E. R. Co. v. Baldwin*, 11 *Am. & Eng. R. Cas.* 486, 60 *Md.* 88, 45 *Am. Rep.* 711.

There can be no reason for extending the rigorous rule of the common law, which holds the owner liable in an action of trespass, whether his cattle escape through negligence or not, to an action on the case by a railroad company seeking to recover consequential damages. *Annapolis & E. R. Co. v. Baldwin*, 11 *Am. & Eng. R. Cas.* 486, 60 *Md.* 88, 45 *Am. Rep.* 711.

13. — construction and operation of railroad.*—(1) *Recoverable*.—A company which lawfully occupies a portion of a street for its track is liable for consequential damages to an adjoining owner, only in case it has not exercised its right with due care and skill or has been guilty of some misconduct or negligence. *Carson v. Central R. Co.*, 35 *Cal.* 325.

Damages from the non-thriving of cattle, owing to the construction of a railroad through the pasture on which they were feeding, are not remote, contingent, or speculative, but are recoverable in an action of trespass, *quare clausum frogit*. *Baltimore & O. R. Co. v. Thompson*, 10 *Md.* 76.

The court allowed the jury to consider the noise created by defendant's trains as an element of damage. *Held*, no error; that any consequential injury to plaintiff's property from the acts of defendant, while

engaged in an unauthorized occupation and use of the street, might be considered.* *Kane v. New York El. R. Co.*, 46 *Am. & Eng. R. Cas.* 137, 125 *N. Y.* 164, 26 *N. E. Rep.* 278, 34 *N. Y. S. R.* 876.—DISTINGUISHED IN *American Bank Note Co. v. New York El. R. Co.*, 129 *N. Y.* 252. QUOTED IN *Sperb v. Metropolitan El. R. Co.*, 41 *N. Y. S. R.* 155, 61 *Hun* 539, 16 *N. Y. Supp.* 392.

(2) *Not recoverable*.—For damages indirectly resulting from the lawful acts of a chartered railroad company in the construction of its road, the law affords no remedy. *Rogers v. Kennebec & P. R. Co.*, 35 *Me.* 319.

A plaintiff owning property on a street 350 feet from a railway crossing cannot recover for damages to said property caused by the subsequent depression of the tracks of the company about four feet, by authority of the city, this being a common public injury for which damages cannot be recovered by an individual citizen, although the inconvenience to him and to the public may depreciate the value of his property. *Fairchild v. St. Louis*, 97 *Mo.* 85, 11 *S. W. Rep.* 60.—FOLLOWED IN *Canman v. St. Louis*, 97 *Mo.* 92.

Damages to real estate arising from the construction and lawful operation of an elevated railroad, erected entirely on property of the company separated from that of the plaintiff by a city street fifty-one feet wide, disclose no injury actionable under § 8, article 16 of the Pa. constitution. *Dooner v. Pennsylvania R. Co.*, 142 *Pa. St.* 36, 21 *Atl. Rep.* 755.—FOLLOWING *Pennsylvania R. Co. v. Lippincott*, 116 *Pa. St.* 472; *Pennsylvania R. Co. v. Marchant*, 119 *Pa. St.* 541.

In a suit against a company for injury resulting from going through an inclosed field with its roadway, and exposing to destruction growing crops, evidence of what the value of the crops would have been if they had matured was of too speculative a character to form a proper basis for damages. *International & G. N. R. Co. v. Benitos*, 10 *Am. & Eng. R. Cas.* 122, 59 *Tex.* 326.

Defendant constructed its railroad in such a manner as to divert a watercourse from its accustomed channel into an abandoned quarry of V. From this quarry the water

braska, see note, 14 *AM. & ENG. R. CAS.* 168. As to remoteness of consequential damages, see note, 36 *AM. REP.* 382.

See also ELEVATED RAILWAYS, 160-162; EMINENT DOMAIN, 665-669.

* Liability for consequential damage resulting from construction and operation of road, see note, 7 *AM. REP.* 179.

* Noise as an element of, see ELEVATED RAILWAYS, 143.

burst through the dividing wall into the quarry of the plaintiff. It appeared that the ancestors of the plaintiff had worked over onto the premises of V. before the construction of the defendant's railroad, and that this encroachment had so weakened the dividing wall that the water broke through, doing the damage complained of by the plaintiff. *Held*, that the weakening of the wall was not the proximate cause of the injury. *Gilson v. Delaware & H. Canal Co.*, 65 Vt. 213, 26 Atl. Rep. 70.—APPLYING *Stevens v. Dudley*, 56 Vt. 158; *Smith v. London & S. W. R. Co.*, L. R. 6 C. P. 14.

14. —nervous shock.*—Mere fright, occasioned by a collision, producing permanent injury to the nervous system, is a result too remote to be actionable. No well-considered case has held that fright alone, not resulting from or accompanied by some physical injury to the person, will sustain an action for negligence. *Ewing v. Pittsburgh, C., C. & St. L. R. Co.*, 48 Am. & Eng. R. Cas. 506, 147 Pa. St. 40, 23 Atl. Rep. 340.

Damages in case of negligent collision must be the natural and reasonable result of the defendant's act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. *Victorian Railway Com'rs v. Coultas*, 13 App. Cas. 222.—APPROVING *The Notting Hill*, 9 P. D. 105.—Compare also *Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N.W. Rep. 675.

Where the gate-keeper had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by the fright—*held*, that the verdict could not be sustained, and that judgment must be entered for the defendants. *Victorian Railway Com'rs v. Coultas*, 13 App. Cas. 222, 6 Ry. & C. T. Cas. lxviii.—DISAPPROVED IN *Mitchell v. Rochester R. Co.*, 4 Misc. (N. Y.) 575. RECONCILED IN *Grand Trunk R. Co. v. Sibbald*, 20 Can. Sup. Ct. 259. REVIEWED IN *New Brunswick R. Co. v. Vanwart*, 17 Can. Sup. Ct. 35.

3. Substantial and Nominal Damages.

15. Substantial damages.—It is sufficient, in order to the recovery of substan-

tial damages, if the plaintiff introduce proof of the nature, extent, and probable duration of the injury, without other proof tending to show the amount of the damage. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 99.

A landowner whose premises have been subjected to the unauthorized beneficial use and occupation of another, though under color of right, is entitled to substantial damages, to be measured by the fair rental value of the land during the time and for the purpose it was occupied, though no special damage is proven. *Baltimore & O. R. Co. v. Boyd*, 30 Am. & Eng. R. Cas. 372, 67 Md. 32, 7 Cent. Rep. 435, 10 Atl. Rep. 315.

Taking an elderly man into custody and marching him through a crowded thoroughfare in charge of an officer, depriving him of his liberty, away from friends and facilities for bail, putting him on trial, causing fear and suspense, are acts sufficient to call for substantial rather than mere nominal damages. *Toomey v. Delaware, L. & W. R. Co.*, 2 Misc. (N. Y.) 82, 49 N. Y. S. R. 623, 21 N. Y. Supp. 448; *affirmed in 4 Misc. 392*.

16. Nominal damages.*—(1) *Generally*.—The law fixes the burden upon him who claims damages from another as a compensation for pecuniary loss, to furnish the facts necessary to ascertain the extent of his loss with reasonable certainty, and failing in this, he is entitled only to nominal damages. The allowance of punitive damages, resting upon a different consideration, does not fall within this requirement. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. Rep. 733. *Kansas City, M. & B. R. Co. v. File*, 67 Miss. 373, 7 So. Rep. 223.

In an action to recover damages for personal injuries sustained by plaintiff from the defendant's negligence, where loss of time is claimed as an item of damages, if plaintiff fails to prove value of the time lost or facts on which an estimate of such value can be founded, only nominal damages for that item can be given. *Staal v. Grand St. & N. R. Co.*, 31 Am. & Eng. R. Cas. 21, 107 N. Y. 625, 1 Silv. App. 516, 13 N. E.

* See also CARRIAGE OF MERCHANDISE, 764, 789; CARRIAGE OF PASSENGERS, 615; CHILDREN, INJURIES TO, 187; DEATH BY WRONGFUL ACT, 424-426; ELEVATED RAILWAYS, 135; EJECTION OF PASSENGERS, 104.

* See also *post*, 46, 63, 71, 89.

Rep. 624, 11 *N. Y. S. R.* 352; reversing 36 *Hun* 208.

In the exercise of the court's equity powers, nominal damages were properly allowed where plaintiff had not shown himself entitled to compensatory damages. The father had cause to seek judicial investigation into the accident which resulted in the death of his child. *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 *La. Ann.* 824, 8 *So. Rep.* 586.

Plaintiff is entitled to recover nominal damages only where it appeared that she had been unable to attend to her school duties as music teacher for several weeks, during which time she lost her salary, but the amount of her salary was not proved by the evidence. *Baker v. Manhattan R. Co.*, 118 *N. Y.* 533, 23 *N. E. Rep.* 885, 29 *N. Y. S. R.* 936; affirming 22 *J. & S.* 394, 7 *N. Y. S. R.* 68.

Nominal damages at least should be awarded for medical services which are shown by the evidence to have been rendered to the plaintiff where he sues to recover for personal injuries. *Feeney v. Long Island R. Co.*, 39 *Am. & Eng. R. Cas.* 639, 116 *N. Y.* 375, 22 *N. E. Rep.* 402, 26 *N. Y. S. R.* 729, 5 *L. R. A.* 544; affirming 42 *Hun* 657, 5 *N. Y. S. R.* 63.

In an action by a city, on a bond given by a city railroad company, to keep in repair the streets used by the company, proof of neglect to repair entitles plaintiffs to nominal damages, and the objection that actual damages were not proved cannot be heard for the first time on appeal, in support of a judgment dismissing the complaint. *Brooklyn v. Brooklyn City R. Co.*, 8 *Abb. Pr. N. S. (N. Y.)* 356.

(2) *More than nominal damages.*—Where the evidence shows that, before the injury, plaintiff earned \$100 per month, and that he has been unable to do any work since, an instruction that only nominal damages for the difference in such earning capacity can be allowed is properly refused. *Kansas City, M. & B. R. Co. v. Phillips*, 98 *Ala.* 159, 13 *So. Rep.* 65.

In a case where the value of the time lost by the injured person is not specifically proved by way of special damages, it is not error to decline to charge that nominal damages therefor are only recoverable. *Looram v. Second Ave. R. Co.*, 11 *N. Y. S. R.* 652.—QUOTING *Lincoln v. Saratoga & S. R. Co.*, 23 *Wend.* 425.

(3) *Not even nominal damages.*—In an action of tort under a count alleging injuries to plaintiff's tenement house from the flow of water from melting ice and snow, deposited by defendant upon a lot of land and private way opposite plaintiff's premises, no recovery can be had of nominal damages if the injury to the land was distinct from the injury to the house, no injury having been done to the building. *McDonnell v. Cambridge R. Co.*, 151 *Mass.* 159, 23 *N. E. Rep.* 841.

4. *Compensatory and Exemplary Damages.*

a. *Compensatory Damages.**

17. When compensatory damages only are allowable.—The damages to one who has been injured by the negligence of a railroad must be restricted to those that are actual. *Troy v. Cape Fear & Y. V. R. Co.*, 34 *Am. & Eng. R. Cas.* 13, 99 *N. Car.* 298, 6 *S. E. Rep.* 77, 6 *Am. St. Rep.* 521.

For actual compensation is the measure of damages in all instances in which the nature of the case admits of the rule. *Louisville, N. & G. S. R. Co. v. Guinan*, 13 *Am. & Eng. R. Cas.* 37, 11 *Lea (Tenn.)* 98, 47 *Am. Rep.* 279.—APPROVING *Nashville & C. R. Co. v. Smith*, 6 *Heisk. (Tenn.)* 174.

A party who receives a physical injury through the negligence of another, should be allowed sufficient damages to compensate him for the amount of his expenditures and losses in consequence of the injury, taking also into consideration the extent of his injuries, his sufferings, and the effect of the accident on his general health. *Keep v. Indianapolis & St. L. R. Co.*, 3 *McCrary (U. S.)* 208, 9 *Fed. Rep.* 625.

Where the plaintiff sustained actual damages and expended considerable sums for necessary medical attention, etc., a verdict for only nominal damages should be set aside. The jury, having by its verdict fixed plaintiff's right to a recovery, should have awarded at least compensation for actual damages proved to have been sustained. *Moseley v. Jamison*, 68 *Miss.* 336, 8 *So. Rep.* 744.

18. Absence of malice or oppression.—(1) *The rule.*—Where there is no testimony showing that the negligence is so gross as to amount to wantonness, and no

* See also *CARRIAGE OF PASSENGERS*, 617; *EJECTION OF PASSENGERS*, 105-111.

wilful or malicious acts are proven, actual or compensatory damages, merely, is the rule. *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. Rep. 453.—FOLLOWING Kansas City, Ft. S. & G. R. Co. v. Kier, 41 Kan. 671.—*Morse v. Duncan*, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671, 21 Pac. Rep. 770. *Belknap v. Boston & M. R. Co.*, 49 N. H. 358.

Therefore, to leave the question of punitive or exemplary damages to the jury, when there is no testimony which would warrant a verdict for such damages, is improper. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671, 21 Pac. Rep. 770.—DISTINGUISHING *Kansas Pac. R. Co. v. Little*, 19 Kan. 269.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109.—*Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1.

In such a case it is error to instruct the jury that "they are at liberty to award what are termed exemplary or punitive damages; that is, damages which are given, not on account of any special merit in plaintiff's case justifying the same, but as a warning and lesson to the defendant, to teach it greater respect and care for the rights and safety of others." *Chicago, K. & W. R. Co. v. O'Connell*, 46 Kan. 581, 26 Pac. Rep. 947.

(2) *Illustrations* — *Instructions*. — Where there was no malice or ill-will shown, but it appeared that a detective had made an arrest on suspicion in good faith, and deemed himself warranted to do so under the circumstances of the case, exemplary damages cannot be recovered against the company employing him to make the arrest. *Newman v. New York, L. E. & W. R. Co.*, 54 Hun (N. Y.) 335, 27 N. Y. S. R. 135, 7 N. Y. Supp. 560.

In an action by an employé against the company for negligent injury the damages could not properly exceed the measure of strict compensation, and an instruction to the jury that they might consider the "mortification" which the injured person endured was misleading. *Batterson v. Chicago & G. T. R. Co.*, 8 Am. & Eng. R. Cas. 123, 49 Mich. 184, 13 N. W. Rep. 508.

Where it appeared that a newsboy was engaged in selling papers on street-cars; that when on the point of leaving the car he stopped to allow a wagon to pass; that the conductor pushed him on the arm and

he fell upon the street and was run over, there being no evidence that the act was wilful or wanton or that the conductor was moved by feelings of violence, outrage, or reckless indifference to consequences—held, that plaintiff was not entitled to recover exemplary damages. *Philadelphia Traction Co. v. Orbann*, 34 Am. & Eng. R. Cas. 432, 119 Pa. St. 37, 11 Cent. Rep. 628, 12 Atl. Rep. 816, 21 W. N. C. 76.

19. Simple negligence.—(1) *The rule*. —In an action for personal injuries alleged to have been caused by negligence on the part of the defendant, exemplary or vindictive damages cannot be allowed for any want of care less than gross negligence. *Patterson v. South & N. Ala. R. Co.*, 89 Ala. 318, 7 So. Rep. 437.

Where there is no evidence of wanton and malicious or gross and outrageous conduct on the part of the company or its agents, actual damage is all a plaintiff, injured by the negligence of the company, can recover for, and the allowance of exemplary damages would be improper. *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277. *Columbus & W. R. Co. v. Bridges*, 38 Am. & Eng. R. Cas. 136, 86 Ala. 448, 5 So. Rep. 864.

And where the neglect is clearly unattended with any circumstances of insult, of aggravation of feelings, of injury to the person or his property, or bodily or mental suffering, the jury will not be justified in finding exemplary damages. *Southern R. Co. v. Kendrick*, 40 Miss. 374.—REVIEWED IN *Nunn v. Georgia R. Co.*, 71 Ga. 710, 51 Am. Rep. 284.

For punitive damages cannot be given for mere negligence. *Louisville, N. A. & C. R. Co. v. Shanks*, 19 Am. & Eng. R. Cas. 28, 94 Ind. 598. *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. Rep. 574. *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94. *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414, 12 S. E. Rep. 954.

(2) *Its illustrations*. —The simple neglect to sufficiently light depot grounds is not such wilful, wanton, or reckless negligence on the part of the railroad company as to entitle a party injured to exemplary or punitive damages. *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

Under a contract with a party whose land

it had purchased a company bound itself to ditch and drain an old river bed. *Held*, in a suit for damages resulting from negligence and delay in providing such drainage, that exemplary damages could not be recovered where it appeared that the company drained the river bed without delay indicating a wilful disregard of the rights of the plaintiff. *Oursler v. Baltimore & O. R. Co.*, 14 *Am. & Eng. R. Cas.* 298, 60 *Md.* 358.

20. Negligence of servants.*—A company is not to be punished by punitive damages for the mere negligence of the servant if the company itself be entirely free from blame. *Louisville, N. & G. S. R. Co. v. Fleming*, 18 *Am. & Eng. R. Cas.* 347, 14 *Lea (Tenn.)* 128.—FOLLOWING *Cleghorn v. New York C. & H. R. R. Co.*, 56 *N. Y.* 44; *Illinois C. R. Co. v. Hammer*, 72 *Ill.* 353.

And compensatory damages only can be allowed in such a case. *Potts v. Chicago City R. Co.*, 33 *Fed. Rep.* 610.

In an action against a street-railroad company for personal injuries to a passenger—*held*, error to instruct the jury that "if the negligence of the driver was gross, the jury should find exemplary damages in their discretion beyond the actual injury sustained, for the sake of example and punishment for such gross negligence." *McKeon v. Citizens' R. Co.*, 42 *Mo.* 79.—CRITICISED IN *Perkins v. Missouri, K. & T. R. Co.*, 55 *Mo.* 201.

21. Unintentional injury.—As there was no intentional injury nor such gross neglect as to manifest recklessness and bad faith, according to the evidence, even if a recovery could be had in this case, the amount of damages would have to be limited strictly to compensation, and not given by way of punishment. *Louisville & N. R. Co. v. Sickings*, 5 *Bush (Ky.)* 1.—QUOTED IN *Louisville & N. R. Co. v. Fox*, 11 *Bush (Ky.)* 495.—*Griffith v. Baltimore & O. R. Co.*, 44 *Fed. Rep.* 574. *Green v. Pennsylvania R. Co.*, 36 *Fed. Rep.* 66.

Exemplary damages are not to be given for mere error of judgment not accompanied with negligence evidencing an indifference to consequences. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

Where an injury results from any act or

omission of another which is free from any taint of fraud, malice, or wilful wrong—that is to say, if a tort is committed through mistake, ignorance, or mere negligence—the party injured thereby is only entitled to recover compensation for the injury, which includes "loss of time during the cure, and expenses incurred in respect of it, the pain and suffering undergone by the plaintiff, and any permanent injury, especially when it causes a disability for further exertion." *Consolidated Coal Co. v. Haenni*, 146 *Ill.* 614, 35 *N. E. Rep.* 162.

22. Aggravation of disease.*—Where a disease caused by an injury supervenes, as well as where the disease exists at the time of the injury and is aggravated by it, the injured person is entitled to full compensatory damages. *Louisville, N. A. & C. R. Co. v. Miller*, (*Ind.*) 58 *Am. & Eng. R. Cas.* 304, 37 *N. E. Rep.* 343. *Ohio & M. R. Co. v. Hecht*, 34 *Am. & Eng. R. Cas.* 447, 115 *Ind.* 443, 15 *West. Rep.* 122, 17 *N. E. Rep.* 297. *Louisville, N. A. & C. R. Co. v. Jones*, 28 *Am. & Eng. R. Cas.* 170, 108 *Ind.* 551, 9 *N. E. Rep.* 476.

Although the plaintiff, at the time of the injury, was afflicted with Bright's disease, which had a tendency to aggravate the injury, he is entitled to recover compensatory damages. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434.

The fact that the injury to plaintiff was caused in part by plaintiff's predisposition to disease, does not prevent a recovery provided the injuries received excited or developed said predisposition. The measure of damages is based upon plaintiff's condition without any regard to his predisposition to disease. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.—APPROVING *McNamara v. Clintonville*, 62 *Wis.* 207, 51 *Am. Rep.* 722. *OVER-RULING Pullman Palace Car Co. v. Barker*, 4 *Colo.* 344, 34 *Am. Rep.* 89.

23. Trespass on lands.†—Where a trespass to lands had been wilfully committed and persisted in after earnest remonstrance, with circumstances of aggravation, it is not error to instruct the jury that they are at liberty to give exemplary dam-

* See also *ante*, 9; and CARRIAGE OF PASSENGERS, 623.

† See also TRESPASS, 16-20.

* See also AGENCY, 83-80.

ages. *Newman v. St. Louis & I. M. R. Co.*, 2 Mo. App. 402.—REVIEWING *Milwaukee & St. P. R. Co. v. Arms*, 3 Cent. L. J. 220.

The plaintiffs were not entitled to recover exemplary damages, there being no element of fraud or malice, or evil intent or oppression in the acts of the defendant in entering upon and building the tracks for its road over the plaintiff's lot, and in the continued use of them down to the bringing of the action. *Baltimore & O. R. Co. v. Boyd*, 63 Md. 325.—QUOTING *Philadelphia, W. & B. R. Co. v. Hoeflich*, 62 Md. 300.

A company instituted condemnation proceedings, entered upon the land, constructed its tracks, and used the same. The proceedings were held under certain city ordinances, and afterwards proved to be defective and insufficient. *Held*, that such entry being without fraud, malice, or evil intent, plaintiffs were not entitled to recover exemplary damages. *Baltimore & O. R. Co. v. Boyd*, 30 Am. & Eng. R. Cas. 372, 67 Md. 32, 7 Cent. Rep. 435, 10 Atl. Rep. 315.

Plaintiff sued to recover damages to his land and growing crops by reason of the company failing to erect stock-guards, and for throwing rocks and dirt from the company's right of way upon his tillable lands, and for damages by tramping his land, and for trouble and vexation of mind. At the trial he was permitted to testify that he was damaged from trouble and vexation of mind in the sum of \$50. *Held*, that in the absence of anything to show that his fence was wantonly and maliciously pulled down, or that the defendant had been guilty of gross negligence, insult, outrage or oppression, he was not entitled to recover for the vexation of mind, as it was not a case where exemplary damages were allowable. *Missouri Pac. R. Co. v. Cox*, 2 Tex. App. (Civ. Cas.) 217.

24. Elements of compensation.*—

No fixed rule exists for estimating the amount of damages from permanent injuries to the person. The amount should be reasonable and just to both parties, and should compensate the injured one for the loss of money which he would probably earn had not the injuries occurred. *Richmond & D. R. Co. v. Allison*, 48 Am. & Eng. R. Cas. 101, 86 Ga. 145, 12 S. E. Rep. 352.—

QUOTING *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554.

Evidence should be admitted as to the age of the deceased, probable duration of life, habits of industry, business, earnings, health, skill, reasonable expectations, and possibly other facts; but when the evidence only shows his age, and the fact of the killing, a verdict for more than nominal damages would be purely conjectural. *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. Rep. 360.

Compensatory damages should include reasonable compensation for the bodily pain and suffering necessarily attending the injury complained of. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317.—DISTINGUISHING *Kentucky C. R. Co. v. Dills*, 4 Bush (Ky.) 593; *Seymour v. Chicago, B. & Q. R. Co.*, 3 Biss. (U. S.) 43; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Stonesifer v. Sheble*, 31 Mo. 243; *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

Mental anguish arising from the nature and character of an assault committed by a railroad employé, is a proper element of compensatory damages, and the outrage and indignity which accompany the injury are to be estimated as well as its physical effect, even in cases where exemplary damages do not lie. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314.—APPROVING *Smith v. Pittsburg, Ft. W. & C. R. Co.*, 23 Ohio St. 10; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 365. DISTINGUISHING *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. St. 290.—DISTINGUISHED IN *Paine v. Chicago, R. I. & P. R. Co.*, 45 Iowa 569. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Gants*, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608; *Randolph v. Hannibal & St. J. R. Co.*, 18 Mo. App. 609.

Compensatory damages for personal injuries when death does not ensue, are confined to the expense of cure, value of time lost, and a fair compensation for the physical and mental sufferings caused by the injury, and for any permanent reduction of the power to earn money. *Kentucky C. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480, 8 S. W. Rep. 691, 10 Ky. L. Rep. 170.

In assessing compensatory damages mental suffering is to be taken into consideration—first, when it is connected with bodily pain, caused by defendant's negligence;

* See also *post*, 50-74.

What the term "pecuniary loss" includes, see note, 13 L. R. A. 859.

second, when it is accompanied by circumstances of malice, insult, inhumanity, or oppression on the part of defendant. *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 *Am. & Eng. R. Cas.* 134.

25. Instructions as to.—(1) *Good.*—An instruction that in estimating damages the jury may consider past and future suffering, the value of time lost, or likely to be lost, whether the injury is likely to be permanent or not, and its probable effect upon the future health of the party, and upon all the facts ascertain the extent of the injury and award such damages as in their judgment "will compensate, so far as money can," for such injury, is not erroneous as invading the province of the jury. *Cleveland, C., C. & I. R. Co. v. Newell*, 23 *Am. & Eng. R. Cas.* 492, 104 *Ind.* 264, 54 *Am. Rep.* 312, 3 *N. E. Rep.* 836.—FOLLOWED IN Ohio & M. R. Co. *v. Cosby*, 27 *Am. & Eng. R. Cas.* 339, 107 *Ind.* 32.

It was proper to inform the jury that damages should be ascertained on the basis of compensation, and that in making such estimate the jury should take into consideration the plaintiff's physical and mental suffering, the character of the injury, whether temporary or permanent, and the reduction, if any, in plaintiff's ability to earn money, caused by the injury. *Wabash & W. R. Co. v. Morgan*, 132 *Ind.* 430, 31 *N. E. Rep.* 661, 32 *N. E. Rep.* 85.

The jury were instructed that in their determination of the amount of compensatory damages to be recovered by the plaintiff, they should allow such damages as would "fairly compensate" the plaintiff "for what he paid out or incurred for medical attendance." *Held*, that the instruction being in the alternative as to the allowance of such expenses either paid or incurred, the instruction was not erroneous, though the evidence failed to show the actual payment of any sum; and that the jury must have understood from such instruction that only reasonable and necessary expenditures were to be allowed. *Flanagan v. Baltimore & O. R. Co.*, 83 *Iowa* 639, 50 *N. W. Rep.* 60.—*DISTINGUISHING Reed v. Chicago, R. I. & P. R. Co.*, 57 *Iowa* 23; *Stafford v. Oskaloosa*, 57 *Iowa* 748.

The court in one part of the charge said: "Give this man, if he is entitled to compensation, all that you believe will compensate him for the injury, if he is entitled to recover." In another part of the charge the

court said: "If you find for the plaintiff he is entitled to recover such an amount as will compensate him for his pain and suffering, for any amount of money that he has expended by reason of the injury, for any loss of wages that he has been deprived of or has been unable to earn by reason of the accident, and, if you believe it is a permanent injury, for loss of earning power for the balance of the time that the injury will prevent his working." *Held*, that there was no error in the first portion of the charge as qualified and explained by the latter portion. *Owens v. People's Pass. R. Co.*, 155 *Pa. St.* 334, 26 *Atl. Rep.* 748.

A charge that the jury might assess the amount shown by the evidence to be due plaintiff, and that they were the sole judges as to the amount of damages and the extent of the injuries, taken with an instruction that in estimating damages they were to consider physical and mental pain, character of injury, effect upon health, capacity for labor, etc., was sufficiently specific to indicate that only compensatory damages were to be awarded. *Texas C. R. Co. v. Rowland*, 3 *Tex. Civ. App.* 158, 22 *S. W. Rep.* 134.

(2) *Bad.*—An instruction in a personal-injury case that compensatory damages in favor of the plaintiff include only "the fair and reasonable expenses of his cure, and the value of his time lost," is erroneous, and should be refused. *Ohio & M. R. Co. v. Dickerson*, 59 *Ind.* 317.—REVIEWED IN *Cunningham v. Evansville & T. H. R. Co.*, 23 *Am. & Eng. R. Cas.* 347, 102 *Ind.* 478, 52 *Am. Rep.* 683.

The judge properly refused a request to charge "that, no evidence of wilful misconduct having been offered by plaintiff, the jury cannot find exemplary damages; for exemplary damages may be recovered where there is no wilful misconduct; and besides, it was a charge invading the province of the jury. *Quinn v. South Carolina R. Co.*, 37 *Am. & Eng. R. Cas.* 166, 29 *So. Car.* 381, 7 *S. E. Rep.* 614, 1 *L. R. A.* 682.—QUOTING *Bridger v. Asheville & S. R. Co.*, 25 *So. Car.* 30.

*b. Exemplary or Punitive Damages.**

26. When exemplary damages will

* See also CARRIAGE OF PASSENGERS, 634; 630, 651; CHILDREN, INJURIES TO, 101; CROSSINGS, INJURIES TO PERSONS, ETC., AT, 364; DEATH BY WRONGFUL ACT, 418-423;

be awarded, generally.*—(1) *Awarded.*

—The injured party is entitled to a measure of damages that will compensate somewhat for his wounded feelings, as well as secure the public against a repetition of the wrong. *McGinnis v. Missouri Pac. R. Co.*, 21 *Mo. App.* 399.

Corporations, like natural persons, are liable in exemplary damages when the facts of a case are of a character to warrant them. *Malecek v. Tower Grove & L. R. Co.*, 57 *Mo.* 17, 9 *Am. Ry. Rep.* 1. *Jeffersonville R. Co. v. Rogers*, 28 *Ind.* 1. *Spellman v. Richmond & D. R. Co.*, 35 *So. Car.* 475, 14 *S. E. Rep.* 947. *Texas & P. R. Co. v. Woodall*, 2 *Tex. App. (Civ. Cas.)* 413. — QUOTING *Hays v. Houston & G. N. R. Co.*, 46 *Tex.* 272; *Nashville & C. R. Co. v. Starnes*, 9 *Heisk. (Tenn.)* 52; *Terre Haute & I. R. Co. v. Graham*, 46 *Ind.* 239; *Gasway v. Atlanta & W. P. R. Co.*, 58 *Ga.* 216.

To justify exemplary damages for personal injuries the negligence of defendant must have been such as to have amounted to wantonness, wilfulness, or malice. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 *Kan.* 671, 21 *Pac. Rep.* 770.

Exemplary damages are given both as a compensation to the plaintiff for the wrong done him and as a punishment to the tortfeasor, when torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. *Consolidated Coal Co. v. Haenni*, 146 *Ill.* 614, 35 *N. E. Rep.* 162. *Samuels v. Richmond & D. R. Co.*, 52 *Am. & Eng. R. Cas.* 315, 35 *So. Car.* 493, 14 *S. E. Rep.* 943. — LIMITING *Palmer v. Charlotte, C. & A. R. Co.*, 3 *So. Car.* 597; *Hall v. South Caro-*

lina R. Co., 28 *So. Car.* 263; *Quinn v. South Carolina R. Co.*, 29 *So. Car.* 386.

If the tort was wilful, or committed under such circumstances as show gross negligence, punitive damages may be given. *Purcell v. Richmond & D. R. Co.*, 108 *N. Car.* 414, 12 *S. E. Rep.* 954, 956. — APPLYING *Heirn v. M'Caughan*, 32 *Miss.* 1. QUOTING *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 *Miss.* 660.

Practically there is a human intelligence and volition which control the affairs of a corporation just like those of an individual, and which may act wilfully and maliciously, or recklessly, thus laying the basis for exemplary damages; and therefore whatever rule of damages would apply in a suit against a natural person ought to apply in a suit against a corporation. *Jeffersonville R. Co. v. Rogers*, 28 *Ind.* 1.

(2) *Not awarded.**—The doctrine of exemplary or punitive damages, as applicable to common carriers, is not sanctioned in Louisiana. *Rutherford v. Shreveport & H. R. Co.*, 41 *Am. & Eng. R. Cas.* 129, 41 *La. Ann.* 793, 6 *So. Rep.* 644.

Where the accident was not occasioned by recklessness and wrong intention, arising in malice and evil disregard of the rights of others, punitive damages cannot be recovered. The injury which will justify the allowing of punitive damages is a personal right which does not survive to the parent of the child injured. *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 *La. Ann.* 824, 8 *So. Rep.* 586.

Exemplary or punitive damages cannot be recovered in an action on the case for consequential damages. *McCoy v. Philadelphia, W. & B. R. Co.*, 5 *Houst. (Del.)* 599.

At common law, except in an action for breach of promise of marriage, the motives or conduct of the party breaking the contract cannot be made a ground for exemplary damages. *Houston & T. C. R. Co. v. Shirley*, 4 *Am. & Eng. R. Cas.* 443, 54 *Tex.* 125.

If plaintiff's injuries were caused by two co-operating independent causes the existence of one of which was unknown to defendant, and the other, though known, was insufficient of itself to produce the result, a case for exemplary damages is not made out. *Richmond & D. R. Co. v. Vance*, 93 *Ala.* 144, 9 *So. Rep.* 574.

EJECTION OF PASSENGERS, 112-119; EMINENT DOMAIN, 672, 1084.

* Exemplary damages; when awarded, see notes, 41 *AM. & ENG. R. CAS.* 132; 30 *Id.* 579; 11 *AM. ST. REP.* 65; 9 *AM. ST. REP.* 777; 1 *L. R. A.* 682; 30 *AM. & ENG. R. CAS.* 579, *abstr.*

Rule in United States supreme court as to exemplary damages, see 30 *AM. & ENG. R. CAS.* 580, *abstr.*

Injuries to passengers caused by defective track. Evidence of. Exemplary damages for injuries caused thereby, see note, 47 *AM. & ENG. R. CAS.* 512.

Exemplary and punitive damages for personal injuries caused by negligence, see note, 11 *L. R. A.* 43.

Liability of corporations for punitive damages, see note, 21 *AM. & ENG. R. CAS.* 401; 11 *Id.* 676.

* See also *ante*, 17, 18.

The actual damage to which a company must respond, extending as it does to injuries to the feelings and damage for personal suffering, gives to juries sufficient scope, without allowing exemplary damages, except in cases when the corporation has itself been remiss. *Hays v. Houston & G. N. R. Co.*, 46 Tex. 272, 13 Am. Ry. Rep. 281.

A malicious and oppressive trespass upon the rights of a corporation may entitle it to exemplary or punitive damage, when the result of such a trespass is to impair its credit and subject it to the expense of litigation; sense of wrong and insult consequent on the trespass, which, as between natural persons, entitles one to redress by the way of exemplary damages, has no application in a suit by a corporation. *International & G. N. R. Co. v. Telephone & T. Co.*, 69 Tex. 277, 5 S. W. Rep. 517.

Where suits are brought for injuries arising from accidents on railroads, exemplary, punitive, or vindictive damages should not be awarded except in extreme cases. The general rule is that sufficient damages should be given to fully compensate the plaintiff for his loss of time and suffering. *Union Pac. R. Co. v. Hause*, 1 Wyom. 27.

27. Gross negligence.—(1) *Generally.*—The jury may, in their discretion, give exemplary damages where a personal injury has been caused by the gross carelessness of a railroad in the management of their trains. *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9.—CRITICISED IN *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732. QUOTED IN *Atlantic & G. W. R. Co. v. Dunn*, 19 Ohio St. 162. REVIEWED IN *Fay v. Parker*, 53 N. H. 342.—*Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. Rep. 359. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466. *Kennedy v. North Missouri R. Co.*, 36 Mo. 351. *Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498, 1 S. W. Rep. 280. *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802. *Peck v. Neil*, 3 McLean (U. S.) 22. *Wall v. Cameron*, 6 Colo. 275.

Or where the evidence shows a grossly careless disregard of the safety of the public, or, what is of equivalent import, recklessness, wantonness, or wilfulness. *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. Rep. 574. *Jacob v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

Or where there was any aggravating cir-

cumstances, such as gross negligence, in the act whereby the injury was inflicted. *Western & A. R. Co. v. Drysdale*, 51 Ga. 644, 7 Am. Ry. Rep. 343.

Or where defendant's negligence is so gross and culpable as to evince utter recklessness. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.—DISTINGUISHED IN *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y. 295.

But the negligence should be so gross as to amount to wantonness. *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426.—QUOTED IN *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523.

Although intentional misconduct is not necessary. *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523, 15 Am. Ry. Rep. 338.—QUOTING *Sawyer v. Sauer*, 10 Kan. 466; *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426.—QUOTED IN *Kansas Pac. R. Co. v. Whipple*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730.

Exemplary damages can be allowed only where the negligence is of a gross and flagrant character evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects; or where there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness, or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. As "gross negligence" is not confined to this extreme degree of negligence, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.—FOLLOWING *Florida R. & N. Co. v. Webster*, 25 Fla. 394, 5 So. Rep. 714.

(2) *Illustrations—Statutes—Death.*—In an action to recover damages for personal injuries caused by a failure to keep in proper repair a bridge over a highway, the plaintiff may recover exemplary damages if the negligence was gross. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.—CRITICISING *Barbour County v. Horn*, 48 Ala. 577. QUOTING *Day v. Woodworth*, 13 How. (U. S.) 363; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156.

The mere failure to provide a proper

platform or light at a stopping place where a branch road turns off, or to give the necessary signals by blowing the whistle or ringing the bell, is not gross negligence allowing an award of exemplary damages; and if the person injured was a mere trespasser or intruder on the track, being at a place where he had no right to be, gross negligence would be the failure to use reasonable care to avoid injury after his peril was discovered. *Ensley R. Co. v. Chewning*, 50 Am. & Eng. R. Cas. 46, 93 Ala. 24, 9 So. Rep. 458.—FOLLOWED IN *Glass v. Memphis & C. R. Co.*, 94 Ala. 581. QUOTED IN *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137.

An action for an injury not resulting in death is a common law proceeding, and punitive damages are recoverable if the proof shows that the company failed to use such diligence in keeping its railroad bridge in repair as careless and inattentive persons usually exercise in the preservation of the same, or of business of like character. *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.) 122, 17 Am. Ry. Rep. 53.

The Mississippi statute (Rev. Code, p. 299) for the protection of passengers is intended to hold companies responsible for actual, not punitive or exemplary damages. Gross negligence must be shown to authorize the jury to exceed actual damages sustained. *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607. — QUOTED AND DISTINGUISHED IN *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134.

28. Wilful negligence. — (1) *Generally.*—The negligence established must be wanton, wilful, or malicious to justify punitive or exemplary damages. *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. Rep. 453.—FOLLOWING *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671.

Exemplary damages may be given if the injury complained of was caused by the defendant's wilful misconduct or that entire want of care which would raise a presumption of conscious indifference to consequences. *Lake Shore & M. S. R. Co. v. Rosenzweig*, 26 Am. & Eng. R. Cas. 489, 113 Pa. St. 519, 6 Atl. Rep. 545. *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. Rep. 359. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.

In an action for wilful negligence accom-

panied with contempt of the plaintiff's rights, the jury may give exemplary damages. *Emblen v. Myers*, 6 H. & N. 54, 30 L. J. Ex. 71. See *Bell v. Midland R. Co.*, 9 W. R. 612, 10 C. B. N. S. 287, 30 L. J. C. P. 273.

Wilful negligence must be the result of intention. Mere neglect cannot be considered as wilfulness. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235.

If the employes of a company wilfully, recklessly, or capriciously fail to stop a train when signaled at a signal station, exemplary damages are recoverable. *Wilson v. New Orleans & N. E. R. Co.*, 63 Miss. 352.

(2) *Rule in Colorado.*—In Colorado, in the absence of statute, punitive damages cannot be recovered in a civil action, although the tort complained of as causing the injury was wilful, and is not punishable criminally. *Greeley, S. L. & P. R. Co. v. Yeager*, 11 Colo. 345, 18 Pac. Rep. 211. Contra, *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442. See also to the same effect, *Murphy v. Hobbs*, 7 Colo. 541.—OVERRULING *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442.—FOLLOWED IN *Republican Pub. Co. v. Miner*, 12 Colo. 77; *Howlett v. Tuttle*, 15 Colo. 454; *French v. Deane*, 19 Colo. 507, 36 Pac. Rep. 609. But under the Colo. Laws of 1889, p. 64, §1, punitive damages may be recovered in civil actions, where the injuries complained of were attended by circumstances of fraud, malice, or insult, or a wanton or reckless disregard of the injured party's rights and feelings.

29. Question of intent.—Exemplary damages are allowed when the wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. The turpitude of the defendant's conduct is alone considered, and there must be a wrong intent on his part, or the wrongful execution of a *bona-fide* intent. *Louisville, N. & G. S. R. Co. v. Guinan*, 13 Am. & Eng. R. Cas. 37, 11 Lea (Tenn.) 98, 47 Am. Rep. 279. And see *Philadelphia, W. & B. R. Co. v. Hoeflich*, 18 Am. & Eng. R. Cas. 373, 62 Md. 300, 50 Am. Rep. 223.

Punitive damages being imposed as a punishment for the wilful or reckless misconduct of a wrong-doer, cannot be inflicted regardless of his intent, whether good or

bad. *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368, 49 N. Y. S. R. 722, 21 N. Y. Supp. 457.

The motive of defendant must have been bad, and his negligence quasi criminal. *Jacobs v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

30. Malice and oppression.—Exemplary damages may be given when malice and oppression weigh in the controversy, and the act is not punishable as a crime. *Louisville, N. A. & C. R. Co. v. Wolfe*, 47 Am. & Eng. R. Cas. 630, 128 Ind. 347, 27 N. E. Rep. 606.

Punitive damages may be awarded where fraud, malice, oppression, insult, rudeness, caprice, wilfulness, or other cause of aggravation mingle in the controversy, and are proven to the satisfaction of the jury, and in their judgment such damages ought to be awarded. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.—QUOTING *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607. RECONCILING *Southern R. Co. v. Kendrick*, 40 Miss. 374. REVIEWING *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 406.—*Baltimore & O. R. Co. v. Blocher*, 27 Md. 277. *Knowles v. Norfolk Southern R. Co.*, 102 N. Car. 59, 9 S. E. Rep. 7.—QUOTING *Holmes v. Carolina C. R. Co.*, 94 N. Car. 318.—*Philadelphia, W. & B. R. Co. v. Hoeflich*, 18 Am. & Eng. R. Cas. 373, 62 Md. 300, 50 Am. Rep. 223. *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.—DISTINGUISHED IN *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. QUOTED IN *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466; *Spellman v. Richmond & D. R. Co.*, 35 So. Car. 475.—*Kennedy v. North Missouri R. Co.*, 36 Mo. 351. *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802.

The mere fact that an act may have been wrongful and injurious does not justify exemplary damages, in the absence of actual malice, evil intent, oppression, or wanton indifference as to the rights invaded. *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, 47 N. W. Rep. 312. *McFee v. Vicksburg, S. & P. R. Co.*, 42 La. Ann. 790, 7 So. Rep. 720. *Edmunds v. St. Louis R. Co.*, 3 Mo. App. 603. *Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498, 1 S. W. Rep. 280.—FOLLOWING *Haley v. Mobile & O. R. Co.*, 7 Baxt. (Tenn.) 240; *Louisville & N. R. Co. v. Garrett*, 8 Lea 438; *Louisville, N. & G. S. R. Co. v. Guinan*, 11 Lea 98.

Nor will deliberation and force alone justify an award of punitive damages. *Philadelphia, W. & B. R. Co. v. Hoeflich*, 18 Am. & Eng. R. Cas. 373, 62 Md. 300, 50 Am. Rep. 223.—QUOTING *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489.

31. Wrongful acts of servants.*—

(1) *Generally.*—The principal, even when a corporation, is civilly responsible in damages for the acts of his agent done in his employment, to the same extent as if the principal himself was the actual wrong-doer, and therefore may be liable for exemplary damages. *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 395.—QUOTING *Brand v. Schenectady & T. R. Co.*, 8 Barb. (N. Y.) 368; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156.—*Hamilton v. Third-Ave. R. Co.*, 13 Abb. Pr. N. S. (N. Y.) 318.—FOLLOWING *Goddard v. Grand Trunk R. Co.*, 10 Am. Law Reg. 17.—*Haley v. Mobile & O. R. Co.*, 8 Am. & Eng. R. Cas. 541, 7 Baxt. (Tenn.) 239.—QUOTING *Goddard v. Grand Trunk R. Co.*, 2 Am. Rep. 39.

An instruction that a street-car driver must be liable to conviction for criminal negligence in order to authorize punitive damages for his negligence, should be refused. *Augusta & S. R. Co. v. Randall*, 34 Am. & Eng. R. Cas. 439, 79 Ga. 304, 4 S. E. Rep. 674.

The employé of a company may be liable in exemplary damages while the company would only be bound for compensatory damages. *Louisville, N. & G. S. R. Co. v. Fleming*, 18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128.—FOLLOWING *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52.

In an action to recover for injuries from an accident which occurred through the alleged negligence of a bridge tender, whose ignorance was such that he was unable to read or write, but it did not appear that such ignorance in any way contributed to the accident, an instruction was erroneous which submitted the question to the jury, allowing them to infer that from the bridge

* See also AGENCY, 71-105.

Liability for exemplary damages resulting from act of servant, see note, 62 AM. DEC. 379.

See also AGENCY, 92, 93.

Liability in punitive damages for unauthorized and unratified wanton or grossly negligent acts of servants, see note, 21 AM. & ENG. R. CAS. 402.

tender's ignorance the company was so wilfully negligent as to justify an assessment of exemplary damages. *Brooks v. New York & G. L. R. Co.*, 30 *Hun* (N. Y.) 47.—EXPLAINED IN *Fisher v. Metropolitan El. R. Co.*, 34 *Hun* (N. Y.) 433.

(2) *Acts within scope of servant's employment.*—A corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant were the suit against him instead of the company. *Lake Shore & M. S. R. Co. v. Rosenzweig*, 26 *Am. & Eng. R. Cas.* 489, 113 *Pa. St.* 519, 6 *Atl. Rep.* 545. *Atlantic & G. W. R. Co. v. Dunn*, 19 *Ohio St.* 162.—FOLLOWING *Pittsburg, Ft. W. & C. R. Co. v. Slusser*, 19 *Ohio St.* 157. QUOTING *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 *Miss.* 453; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 *How.* (U. S.) 202; *Hopkins v. Atlantic & St. L. R. Co.*, 36 *N. H.* 9.—*Gasway v. Atlanta & W. P. R. Co.*, 58 *Ga.* 216, 16 *Am. Ry. Rep.* 99.

(3) *Acts authorized or ratified by company.*—A company may be liable for exemplary damages for the act of its agent if the master authorized or has ratified the act, and if it is one for which the servant would be liable to exemplary damages if the action were against him. *Bass v. Chicago & N. W. R. Co.*, 42 *Wis.* 654, 15 *Am. Ry. Rep.* 45.—FOLLOWING *Milwaukee & M. R. Co. v. Finney*, 10 *Wis.* 388.

But in an action of trespass on the case against a company for injury resulting from the tortious act of their servants, punitive or vindictive damages cannot be recovered unless it be shown that the company expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed. *Hagan v. Providence & W. R. Co.*, 3 *R. I.* 88.—NOT FOLLOWED IN *Quigley v. Central Pac. R. Co.*, 11 *Nev.* 350.

(4) — *neither authorized nor ratified by company.*—The prompt discharge of an agent by the company upon being advised of his conduct, and the repudiation of his act, would exclude altogether the right of the plaintiff to recover additional damages "to deter the wrong-doer from repeating the trespass," but would not prevent the jury from giving additional damages "as compensation for the wounded feeling of the plaintiff." *Western & A. R. Co. v.*

Turner, 28 *Am. & Eng. R. Cas.* 455, 72 *Ga.* 292, 53 *Am. Rep.* 842.

And it has been held, that the company was liable for exemplary damages for the acts of its servants though the wrong complained of was the act of the servant, not authorized nor ratified by the company. *Fell v. Northern Pac. R. Co.*, 44 *Fed. Rep.* 248.

32. Wanton acts.—(1) *Recoverable.*—A corporation cannot be held liable for punitive damages for the gross negligence of its servants merely. To make it liable for such damages it must knowingly employ incompetent, drunken, or reckless servants; or they should act with a reckless, wanton disregard for the safety of others. *Illinois C. R. Co. v. Hammer*, 72 *Ill.* 347.—FOLLOWED IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 *Lea* (Tenn.) 128.—*Quinn v. South Carolina R. Co.*, 37 *Am. & Eng. R. Cas.* 166, 29 *So. Car.* 381, 7 *S. E. Rep.* 614, 1 *L. R. A.* 682.

A corporation, by the malicious misconduct of its servants acting within the scope of their employment, may render itself liable to exemplary or punitive damages; but this doctrine being capable of great practical abuse, the giving it in charge to the jury in a case clearly not warranting its application tends to mislead them; and where, in such a case, a verdict of damages is obviously exorbitant, it is error in the court to refuse to set it aside and award a new trial. *Pittsburg, Ft. W. & C. R. Co. v. Slusser*, 19 *Ohio St.* 157.—FOLLOWED IN *Atlantic & G. W. R. Co. v. Dunn*, 19 *Ohio St.* 162. REVIEWED IN *Paine v. Chicago, R. I. & P. R. Co.*, 45 *Iowa* 569.—*Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202.

Exemplary damages may be recovered against a company where an injury is wantonly inflicted by its servants, by way of mere punishment to the tortfeasor, regardless of the amount of damages actually sustained. *Lake Erie & W. R. Co. v. Christison*, 39 *Ill. App.* 495.

And it makes no difference that the acts resulting in the injury may not have been previously authorized or subsequently ratified by the company. *Philadelphia Trac-tion Co. v. Orbann*, 34 *Am. & Eng. R. Cas.* 432, 119 *Pa. St.* 37, 11 *Cent. Rep.* 628, 12 *Atl. Rep.* 816, 21 *W. N. C.* 76.

But in such cases the court will interfere when the exemplary damages allowed by the jury are grossly excessive. *Flannery v.*

Baltimore & O. R. Co., 4 Mackey (D. C.) 111.

Juries are authorized to give exemplary damages in case of wanton and reckless negligence, as well as for forcible injuries caused by the company's servants; and it is not error for the court in such cases so to instruct the jury. *Kountz v. Brown*, 16 B. Mon. (Ky.) 577.

But an instruction that the plaintiff may recover exemplary damages provided the defendant was wantonly or wilfully negligent, without also submitting the question of contributory negligence on the plaintiff's part, is erroneous. *Indianapolis & St. L. R. Co. v. Willis*, 8 Ill. App. 242.

A passenger injured by the malicious, oppressive, or reckless negligence of the company's servants may recover exemplary damages. And a charge is properly refused to the effect that the company is not liable in exemplary damages unless the injury was caused by the wilful negligence of the company's servants authorized or approved by the company and showing criminal and reckless misconduct on the part of the company. *Quinn v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682.—REVIEWING *Palmer v. Charlotte, C. & A. R. Co.*, 3 So. Car. 583; *Hall v. South Carolina R. Co.*, 28 So. Car. 261.

The law of exemplary damages as against an individual and a corporation is the same, but the duty due by common carriers to passengers imposes a liability for the wilful wrong of a servant done in the course of his employment, where such liability may not attach in other cases; and the right to such damages may be affected by the contributory negligence of plaintiff. *Spellman v. Richmond & D. R. Co.*, 35 So. Car. 475, 14 S. E. Rep. 947.—QUOTING *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.

(2) *Not recoverable*.—A company cannot be held liable for exemplary damages unless shown by the evidence to have been itself guilty of gross negligence; mere negligence or wilful acts of the company's servants in the course of their employment do not justify such damages. *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433.—EXPLAINING *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y. 295; *Brooks v. New York & G. L. R. Co.*, 30 Hun 47; *Milwaukee & St. P. R. Co. v. Arms*, 91 U.

S. 489. FOLLOWING *Woodruff v. Erie R. Co.*, 25 Hun 246; *Woodruff v. Erie R. Co.*, 93 N. Y. 609. RECONCILING *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445. REVIEWING *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44.—QUOTED IN *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368.

A company is not liable in exemplary or punitive damages except where the acts of its agents which brought about the injuries are wanton or malicious. *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462.

A company cannot be held liable for exemplary damages for injuries caused by the act of a servant, even though wanton and malicious, unless expressly or impliedly authorized or ratified by the company. *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801.—QUOTED IN *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368.

A company cannot be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger. *Lake Shore & M. S. R. Co. v. Prentice*, 58 Am. & Eng. R. Cas. 436, 147 U. S. 101, 13 Sup. Ct. Rep. 261.

Though, under the Texas statute, actual damages may be recovered for death caused by the unfitness, gross negligence, or carelessness of the servants or agents of a railway company, as well as for the negligence or carelessness of the proprietor, owner, charterer, or hirer, yet exemplary damages will be allowed only for the wilful act, omission, or gross negligence of the "defendant" to the suit, for the wilful act, omission, or gross negligence of one representing the corporation in its corporate capacity, not a mere ordinary agent or servant. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

Exemplary damages, or smart-money, are not recoverable unless it appears that the conduct of the company's servant was not only malicious in expelling plaintiffs from the cars, but that his act was authorized or sanctioned by the company. Vindictive damages cannot be recovered against a principal for malicious acts of the agent, where there is no evidence to show any authority for ratification of the particular act alleged to be malicious. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388.—FOL-

LOWED IN *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654.

(3) — *illustrations.*—In the absence of proof that the company knew of the reckless character of its agent and still retained him in its employment, exemplary damages will not be allowed, but actual damages only. For injuries sustained through his conduct against the tortfeasor himself, however, the rule is otherwise. *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 19 Am. Ry. Rep. 280.—FOLLOWED IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea (Tenn.) 128. RECONCILED IN *Louisville & N. R. Co. v. Garrett*, 3 Am. & Eng. R. Cas. 416, 8 Lea 438, 41 Am. Rep. 640.

To render a corporation in Texas liable for exemplary damages it must be shown that the officers by whom it was controlled had been guilty of fraud, malice, gross negligence and oppression, and when the injury is caused by its servants, it is not liable for the malicious acts of such servants, unless ratified or accepted by it. Under this rule, a traveler on the highway who is delayed by a train on the track where the highway and railroad cross, is not entitled to claim exemplary damages, unless the evidence shows that the delay was due to the wilful and intentional act of the company, and that it was aggravated by fraud, malice, gross negligence, or oppression, or that it was authorized, ratified, or approved by the company. *Texas & P. R. Co. v. Self*, 2 Tex. App. (Civ. Cas.) 387.

An employé of a railroad, in peaceable possession, was shot and severely wounded while resisting an armed force, acting by direction of another railroad company, in attempting to take forcible possession of the road. *Held*, that the party wounded had a right of action against the trespassing road, and could recover punitive damages. *Denver & R. G. R. Co. v. Harris*, 31 Am. & Eng. R. Cas. 592, 122 U. S. 597, 7 Sup. Ct. Rep. 1286.—QUOTED IN *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34.

33. Circumstances of aggravation.*—Compensation for wounded feelings, as well as punitive damages, should be adjusted to all the circumstances of the actual case. *Georgia R. & B. Co. v. Eskew*, 47 Am. & Eng.

* See also *post*, 96.

Exemplary damages for humiliation and indignation suffered, see 44 AM. & ENG. R. CAS. 416, *abstr.*

3 D. R. D.—44.

R. Cas. 635, 86 Ga. 641, 12 S. E. Rep. 1061.

The jury may award exemplary damages for circumstances of aggravation, or wilful wrong, although no actual damages are proved. *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 9 So. Rep. 375.—DISAPPROVING *Stacy v. Portland Pub. Co.*, 68 Me. 287.

Where there is no evidence of aggravating circumstances in the act or intention, or of gross negligence, § 3066 of the Ga. Code, giving punitive damages, should not be given in charge, and the *onus* is on the plaintiff to prove aggravating circumstances, in order to entitle him to have this section given in charge. But where there was proof of brutal and inhuman conduct on the part of the agent of a railroad company, and of his employment by the company several days after the transaction, that section was properly given in charge. *Western & A. R. Co. v. Turner*, 28 Am. & Eng. R. Cas. 455, 72 Ga. 292, 53 Am. Rep. 842.

34. Necessity of pleading facts where exemplary damages are claimed.—To entitle the plaintiff to exemplary or punitive damages they must be claimed in the complaint. *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.—DISAPPROVING *Houston & T. C. R. Co. v. Baker*, 57 Tex. 419; *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189. FOLLOWING *Louisville & N. R. Co. v. Jones*, 83 Ala. 376.

A tort that sounds in exemplary damages is where some right of person or property is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations; and to recover such damages, plaintiff must allege the elements of such a tort, and to such allegations the testimony must be restricted. *Samuels v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 315, 35 So. Car. 493, 14 S. E. Rep. 943. *Sullivan v. Oregon R. & N. Co.*, 21 Am. & Eng. R. Cas. 391, 12 Oreg. 392, 7 Pac. Rep. 508.

To entitle a party to a recovery for either the actual damages awarded by statute or exemplary damages given by the constitution he must both allege such facts as entitle him to such damages and sustain such allegations by competent evidence. *Houston & T. C. R. Co. v. Baker*, 11 Am. & Eng. R. Cas. 667, 57 Tex. 419.—QUOTING *Campbell v. Houston & T. C. R. Co.*, Tex. L. J. Feb. 1, 1882, p. 312.—DISAPPROVED IN Ala-

Lama G. S. R. Co. v. Arnold, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

Where actual and exemplary damages are claimed, the better practice is that they should be claimed by proper allegations, in the nature of distinct counts, on different causes of action. The court should instruct the jury according to the facts and as to the law governing them as to the measure of damages; and the jury should, in the verdict, ascertain what is actual and what exemplary. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

When exemplary damages are claimed, the petition should set forth the acts or omissions which constituted such fraud, malice, gross negligence, or oppression. When the defendant is a corporation it should be alleged and proved that the acts of the corporation servant, which constitute the fraud, malice, gross negligence, or oppression were committed by direction of the employer, or that the corporation through its proper agents ratified and adopted such acts as its own. *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802.

In an action for a tort, it is not necessary that exemplary damages shall be claimed *eo nomine* in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment. *Savannah, F. & W. R. Co. v. Holland*, 41 Am. & Eng. R. Cas. 196, 82 Ga. 257, 10 S. E. Rep. 200.

35. Evidence to authorize.—The court instructed the jury that if they found for the plaintiff, then, in fixing the damages, they should take into consideration all the circumstances as disclosed by the evidence, "such as the circumstances attending the injury." There was no evidence given to authorize exemplary damages, and none were claimed by the plaintiff. *Held*, that the instruction was not open to the objection that it authorized the jury to give punitive damages under the circumstances, and could not have misled the jury. *Pennsylvania Co. v. Frana*, 112 Ill. 398.

In cases for exemplary damages, the jury in estimating such may take into consideration the probable expenses of litigation to which a plaintiff has been subjected in order to obtain redress for the wrongful act; and evidence is properly admissible to prove the reasonable and proper charges of his coun-

sel. *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242.

It is error to leave the question of punitive damages to the jury when there is no evidence which would warrant a verdict for other than compensatory damages. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

36. Proof of pecuniary ability.—In an action for damages for personal injuries, the fact that the plaintiff is dependent on his manual labor for a living, cannot be considered in the estimation of his damages. Damages in such cases are not affected by the wealth or poverty of the plaintiff. *Shea v. Potrero & B. V. R. Co.*, 44 Cal. 414, 5 Am. Ry. Rep. 448.

In cases for the recovery of punitive or exemplary damages it is not improper to allow proof of the pecuniary ability of the defendant. *Louisville, C. & L. R. Co. v. Mahony*, 7 Bush (Ky.) 235.

The jury, however, cannot take into consideration the ability of the defendant to pay, for the purpose of increasing the damages, in the absence of bad motive or any fact to entitle the plaintiff to exemplary damages. *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363.

The jury may not consider the wealth of the defendant in estimating the damages to be assessed on account of the plaintiff's mental suffering. *Hayes v. St. Louis R. Co.*, 15 Mo. App. 583.

But when exemplary or punitive damages are to be given, the condition and circumstances of the defendant may be material. What would be sufficient damages by way of example and of punishment for a day laborer without means would be nothing by way of punishment or example to a wealthy corporation. *Belknap v. Boston & M. R. Co.*, 49 N. H. 358.—REVIEWED IN *Fay v. Parker*, 53 N. H. 342.

37. Province of jury.—Where there is evidence tending to show acts of negligence on the part of the servants of the defendant corporation, it is a question for the jury whether they will award punitive damages against the corporation for such negligence, even though they should find that said corporation was otherwise blameless. *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. Rep. 65.

When the complaint claims punitive damages, and there is evidence tending to establish the claim, the court may instruct

the jury "that, if they find from the evidence that vindictive damages should be given, they have a right to give such damages as the evidence authorizes, not beyond the amount claimed in the complaint." *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303.

Where an injury is wantonly and wilfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrong-doer vindictive or punitive damages, by way of punishment for the wrongful act; but the party is not "entitled" to such damages as a matter of right, and it is error to so instruct, in any case. Whether the party may have such damages rests largely in the discretion of the jury, under all the circumstances, and they should be left free to exercise their judgment in this respect. *Wabash, St. L. & P. R. Co. v. Rector*, 9 Am. & Eng. R. Cas. 264, 104 Ill. 296.—DISTINGUISHED IN *Harrison v. Ely*, 120 Ill. 83.

The jury should determine, first, the facts necessary to constitute negligence; secondly, if negligence is found, the facts which should determine the amount of a verdict for compensatory damages; thirdly, the facts authorizing them to go beyond compensatory damages; and fourthly, the amount of damages to be given under either head. *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134.

The discretion left to a jury in assessing damages is not arbitrary and unlimited, but is to be guided by sound legal principles applicable to the case before them; and it is the duty of the judge to give them such directions as will draw their thoughts to the proper points of inquiry, and exclude irrelevant considerations. Therefore the judge should charge, as requested by the defendant's counsel, that if the jury believed, from the evidence, there was no wilful fault on the part of the company or its officers, they could not give damages with the view to punish defendant or to make an example, but must only consider and assess the damage sustained by plaintiff. (Spofford, J., dissenting.) *Varillat v. New Orleans & C. R. Co.*, 10 La. Ann. 88.

Whether the evidence tends to show any facts to warrant exemplary damages is a question for the court to determine by its instructions, but the sufficiency of the evidence to establish such facts is a matter for the consideration of the jury. *Chicago, St. L. & N. O. R. Co. v. Scurr*, 6 Am. & Eng.

R. Cas. 341, 59 Miss. 456, 42 Am. Rep. 373.—FOLLOWED IN *Alabama & V. R. Co. v. Purnell*, 69 Miss. 652.

The awarding of exemplary damages is always discretionary with the jury, and an instruction which informs them that under any state of facts it is their duty to award them is improper. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ky. Rep. 308.

In all actions of tort against common carriers the jury are authorized to find exemplary damages when they consider the personal wrong and injury of such a character as, in their judgment, to call for the imposition of exemplary damages. And the jury are vested exclusively with the power to determine the amount of damages. *Southern R. Co. v. Kendrick*, 40 Miss. 374.

Where the circumstances are such as to have the effect of aggravating the damages, the jury should not be left to determine them for themselves, but such aggravating circumstances should be pointed out by proper instructions. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 12 West. Rep. 615, 6 S. W. Rep. 464.

It is erroneous to leave the question of punitive damages to the jury to give or withhold as they see fit. *Hyatt v. New York C. & H. R. R. Co.*, 6 Hun (N. Y.) 306.

In an action upon a tort sounding in exemplary damages, where there is evidence to support the allegations of the plaintiff, the question whether plaintiff is entitled to exemplary damages may be properly left to the jury. The trial judge will be required to determine whether there is any evidence of issuable facts, but he is not required to decide and announce to the jury that the testimony has established a want of malice or wilfulness which will prevent a recovery of such damages. *Samuels v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 315, 35 So. Car. 493, 14 S. E. Rep. 943.

In an action against a railroad company to recover damages for injuries inflicted by a train of defendant's lessee upon the person and property of plaintiff at a road crossing, the question of recklessness on the part of the trainmen was properly left to the jury with the instruction that they could give exemplary damages if they found that such recklessness existed. *Hart v. Charlotte, C. & A. R. Co.*, 33 So. Car. 427, 12 S. E.

Rep. 9.—DISAPPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 *Fed. Rep.* 165.

38. Instructions as to.*—(1) *Generally*.—It is especially desirable that the jury should be correctly instructed as to the awarding of exemplary damages, as to which their finding will not ordinarily be disturbed by the court; but even where they have been erroneously told that it is their duty to award them, the verdict will not be set aside if the facts are such as fully justified their imposition and the sum awarded is not excessive. In such case the verdict will be attributed to the facts which made it right, rather than to the instructions which would make it wrong. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 *Miss.* 200, 9 *Am. Ry. Rep.* 308.

If the proofs fail to warrant an imputation of wilfulness, recklessness, or rudeness, the court should, when so requested, instruct the jury not to inflict punitive damages; otherwise if there is conflict of evidence as to any fact which, if proved, justifies their imposition. *Chicago, St. L. & N. O. R. Co. v. Scurr*, 6 *Am. & Eng. R. Cas.* 341, 59 *Miss.* 456, 42 *Am. Rep.* 373.—EXPLAINED IN *Vicksburg & M. R. Co. v. Scanlan*, 63 *Miss.* 413.

The jury were told that, in estimating the damages, they might take into consideration the mitigating and aggravating circumstances, without pointing out what circumstances were aggravating and mitigating. *Held*, no error, the evidence disclosing no mitigating circumstances, but only the grossest negligence, on the part of the train dispatcher, through whom the injury occurred. *Smith v. Wabash, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 331, 92 *Mo.* 359, 4 *S. W. Rep.* 129.—DISTINGUISHING *Rains v. St. Louis, I. M. & S. R. Co.*, 71 *Mo.* 169. FOLLOWING *Nagel v. Missouri Pac. R. Co.*, 75 *Mo.* 653.

In damage suits where, if exemplary damages are given, they are in the nature of penalties, the charge of the court is not entitled to the same liberality of construction as in ordinary civil cases. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 *Tex.* 189.

A direction to find such damages as the plaintiff sustained is entirely distinct from the idea of punitive damages. *Kentucky C. R. Co. v. Ackley*, 87 *Ky.* 278, 12 *Am. St.*

Rep. 480, 8 *S. W. Rep.* 691, 10 *Ky. L. Rep.* 170.

Though the proper practice when actual and exemplary damages are claimed is to require the jury to discriminate as to the character of damages found in their verdict, a failure to do this will not of itself authorize the reversal of the judgment when the point is for the first time raised in the supreme court. *Texas & P. R. Co. v. Casey*, 52 *Tex.* 112.

When a petition claims exemplary damages for an alleged wrong, and a question exists as to whether the evidence shows such facts as will sustain the claim, a charge should be given on that subject unless, in consequence of an oral statement made in court, the court by a charge withdraws the consideration of such claim for exemplary damages from the jury. *International & G. N. R. Co. v. Underwood*, 27 *Am. & Eng. R. Cas.* 240, 64 *Tex.* 463.

To withdraw such a claim from the consideration of the jury simply by a verbal declaration by counsel of its abandonment, made after the evidence is closed and during argument, is not sufficient. It should be withdrawn from the consideration of the jury in the charge of the court, distinctly calling their attention to the fact that it is abandoned, and charging them as to the remaining issues. *International & G. N. R. Co. v. Underwood*, 27 *Am. & Eng. R. Cas.* 240, 64 *Tex.* 463.

When exemplary damages are not claimed it is not error for the court to fail to give a charge distinguishing between actual and exemplary damages. *International & G. N. R. Co. v. Smith*, 19 *Am. & Eng. R. Cas.* 21, 62 *Tex.* 252.

(2) *Erroneous charges*.—It is error to charge the jury respecting exemplary damages where it is not shown that the servant was guilty of wilfulness or conscious indifference to consequences from which malice may be inferred. *St. Louis, I. M. & S. R. Co. v. Hall*, 42 *Am. & Eng. R. Cas.* 208, 53 *Ark.* 7, 13 *S. W. Rep.* 138.

When the evidence is conflicting as to whether the signals made for the train to stop were seen, or might by reasonable care have been seen, by the employes of the company, it is error for the court to instruct the jury that there is no proof of wilful wrong and that the plaintiff is not entitled, in any view of the case, to recover more than the actual pecuniary loss sustained by

* See also *ante*, 18, 25; *post*, 103-105. See also *APPEAL AND ERROR*, 49.

him. *Wilson v. New Orleans & N. E. R. Co.*, 63 Miss. 352.

It is error to instruct a jury that in a proper case for exemplary damages they should know that, in case the party recover less than one hundred dollars, he cannot recover his cost in the action. *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457.—REVIEWING *Stimpson v. Railroad Cos.*, 1 Wall. Jr. 164.

It was error to charge the jury that "in awarding damages in this class of cases it will be your duty always to award the plaintiff full compensation for the injuries received; and to that you may add such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," as the language would not unnaturally lead the jury to believe that they were to award exemplary damages. *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44, 6 Am. Ry. Rep. 179.

It is error to instruct the jury in a suit for damages against a corporation in which exemplary damage is claimed, to return a verdict for such damages as they believe from the evidence the plaintiff is entitled to, without furnishing them a rule for their guidance in discriminating between actual and exemplary damages. *Galveston, H. & S. A. R. Co. v. Dunlavy*, 11 Am. & Eng. R. Cas. 673, 56 Tex. 256.

Where the court in instructing the jury with reference to the plaintiff's right to recover exemplary damages declares that what is meant by gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances, the charge is erroneous, as it authorizes the jury to conclude that the railroad company is guilty of gross negligence, and therefore liable for exemplary damages, even though the company had exercised a degree of care but slightly less than persons generally would have exercised, and under the same circumstances. *Missouri Pac. R. Co. v. Shuford*, 37 Am. & Eng. R. Cas. 194, 72 Tex. 165, 10 S. W. Rep. 408.

If the court instructs the jury that exemplary damages are recoverable where there is wilful misconduct or such an entire want of care as would raise the presumption of conscious indifference to the consequences, but fails distinctly to tell the jury that the acts of gross negligence upon which the

recovery of exemplary damages is predicated must have contributed to the accident, the instruction is erroneous. *Missouri Pac. R. Co. v. Johnson*, 37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325.

The court charged as follows: The "killing of a human being by culpable negligence being a criminal offense, it is obvious that the law in civil cases ought to follow the criminal law, and even go beyond it, so that there is a manifest propriety in its punishing civilly a low degree of the same negligence which in a little higher degree it would punish criminally; but do not understand me by this that this is a case for punishment by giving exemplary damages." Held, erroneous, as tending to mislead and prejudice the jury. *Heddes v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.—DISTINGUISHING *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 498.

5. Liquidated Damages and Penalty.*

39. When damages are deemed liquidated.—Forfeitures are regarded by courts with little favor and will seldom be upheld if intended to operate as penalties. But there are cases in which parties will be allowed to agree upon a definite sum as the amount of damages which may result from the violation of their contract. *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56.

Where by the terms of an inquisition to condemn land the party seeking the condemnation is required to pay a fixed sum to the owner of the land in case the former shall fail to perform the conditions specified in said inquisition, such sum is liquidated damages and not a penalty. *Pennsylvania R. Co. v. Reichert*, 10 Am. & Eng. R. Cas. 429, 58 Md. 261.—QUOTING *Geiger v. Western Md. R. Co.*, 41 Md. 4.

The question whether a sum named in a contract as liquidated damages for a failure to perform shall be treated as liquidated damages in fact, or as a penalty, is not concluded by the terms made use of by the parties, but it is to be determined by the court from the consideration of the nature of the agreement and the surrounding circumstances. But where from the nature of the contract the extent of damages which

* See also CONSTRUCTION OF RAILWAYS, 35.

would result from a breach thereof is difficult or impossible of ascertainment, and the parties have deliberately named a sum as liquidated damages, the courts will be disposed to hold them to a literal interpretation of their own words—applied in case of a contract for the construction of the earth-works of a railroad. *Wolf v. Des Moines & Ft. D. R. Co.*, 64 Iowa 380, 20 N. W. Rep. 481.

In a contract with a railroad company to grade certain depot grounds the writing stipulated that monthly estimates of the work done should be made by the engineer and eighty-five per cent. thereof paid and the residue paid when the whole work should be accepted; but if the contractor should fail to comply with the contract or to complete it within the time agreed the engineer might annul it, in which case the unpaid part of the value of the work done should be forfeited to the company in the nature of liquidated damages; the contractor failed to complete the work within the specified time and afterward abandoned the contract, when the engineer annulled it. *Held*, the forfeiture agreed upon as liquidated damages should be enforced as to the fifteen per cent. retained; and the failure to annul the contract because the work was not completed within the time prescribed was no waiver of the right to annul it afterward when abandoned by the contractor. *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56.—DISAPPROVING *Williams v. Androscoggin & K. R. Co.*, 36 Me. 201.

A covenant binding the company to erect, within a reasonable time, a respectable station on the land conveyed, and to keep and maintain the same as a regular daily stopping place for not less than two trains daily in each direction, "under the penalty of \$3500, which is hereby agreed between the parties as the liquidated damages for the substantial non-performance of this covenant"—construed to mean liquidated damages. *Howell v. Long Island R. Co.*, 37 Hun (N. Y.) 381; *affirmed* (P) 107 N. Y. 684, *mem.*, 12 N. Y. S. R. 865, *mem.*

A company made application for right of way through certain streets, which was refused, and afterwards obtained permission to cut through the same streets by agreeing to extend the road a certain distance beyond the town, and executed a bond in the sum of fifty thousand dollars as stipulated damages, conditioned for the faithful perform-

ance of the contract. Under the statute of Texas, in force at the time, the company could have made application to the state engineer and he could have designated a route through the town not to interfere with public convenience and interest. The company failed to perform the contract and the city brought suit on the bond. *Held*, that the amount named in the bond was stipulated damages, and not the penalty; the damages arising from failure to perform a contract being incapable of accurate computation, and the parties having entered into the contract with their eyes open to a full knowledge of all the facts. *Indianola v. Gulf, W. T. & P. R. Co.*, 11 Am. & Eng. R. Cas. 314, 56 Tex. 594.—REVIEWED IN *Nilson v. Jonesboro*, 57 Ark. 168.

There was a dispute between a railroad company and a city as to what streets the company should use in the construction and operation of its road, and instead of leaving the question to the settlement of the state engineer, as provided by statute, the company entered into an agreement for the use of certain streets, and gave bond to the city in the sum of fifty thousand dollars, conditioned that the company would construct and complete the line of road for a certain distance beyond the city within a specified time, being the condition upon which it should have a right to use such streets. *Held*, that the amount of the bond was to be taken as stipulated damages, and the whole amount recoverable upon a failure of the company to construct its road according to contract. *Indianola v. Indianola R. Co.*, 2 Tex. Unrep. Cas. 337.

Where a statute requires a railroad company to give a bond to the state conditioned for the completion of its road in a given time, if the road be not built within the time the company must pay the state for its use the amount of the bond, and the courts cannot interfere to mitigate the forfeiture on the ground that the amount mentioned in the bond is a penalty. *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. Rep. 878.

A bond executed in a penalty equal to the value of certain real estate conveyed by plaintiff on the date of the bond, recited that the same was conveyed to an assignee of defendant as part of a bonus given to secure the construction of a certain railroad and condition for its completion. *Held*, that the whole penalty could be recovered

in an action on the bond, and that the measure of damages for the breach of a contract was the actual value of the realty conveyed. *Blewett v. Front St. Cable R. Co.*, 51 Fed. Rep. 625, 7 U. S. App. 285, 2 C. C. A. 415; affirming 49 Fed. Rep. 126.

A stipulation in a contract to build a bridge to the effect that if by a certain time no crossing for trains should be provided, the sum of one thousand dollars every week should be deducted from the contract price, etc., provided for liquidated damages and not a penalty, and the contractor will not be liable for damages in excess of one thousand dollars resulting from causes beyond his control; still high water, sickness of workmen, or sunken logs would not excuse his performance of the contract. *Texas & St. L. R. Co. v. Rust*, 19 Fed. Rep. 239.

40. When the amount recoverable is considered a penalty.—Where a company, having constructed its roadbed through a city lot instead of proceeding under the statute, entered into a written contract with the owner, thereby acquiring a right of way over the lot, in consideration of a given amount of money, and of an agreement on its part that it would do certain work on specified streets leading to or around the lot, where they were intersected by the railroad, within a time prescribed by the contract—a stipulation in such contract that, for any failure on the part of the company, after the time within which it agreed to do the work, it would pay the owner one dollar per day for each day it was in default, will be construed to have been intended by the parties as a penalty, and not as liquidated damages; and on a breach of the stipulation the owner would be entitled to recover the actual loss or injury sustained by him therefrom, which is the diminution of the value of the lot resulting from the obstruction or interruption by the railroad of the streets on which the work was to be done. *Hooper v. Savannah & M. R. Co.*, 14 Am. & Eng. R. Cas. 256, 69 Ala. 529.—FOLLOWED IN *Hooper v. Columbus & W. R. Co.*, 29 Am. & Eng. R. Cas. 540, 78 Ala. 213.

In an action wherein damages were claimed for the non-delivery of property contracted for, to wit, 60,000 railroad ties, less ten per cent. of the monthly certified estimates of an engineer, which was to be retained as security for the performance

and completion of the contract, final payment to be made within twenty days after the receipt of the engineer's certificate of total performance—*held*, that the ten per cent. must be considered not as liquidated damages but as a penalty. *Jemison v. Gray*, 29 Iowa 537.

The amount must be construed as a penalty and not as liquidated damages where, in a covenant for right of way, the company contracted to construct a lawful fence on each side of the track and crossing and cattle-guards at certain places, and in default thereof to pay one thousand dollars. *St. Louis & S. F. R. Co. v. Shoemaker*, 11 Am. & Eng. R. Cas. 379, 27 Kan. 677.

A bond recited: "Whereas it is of great value to said towns and citizens that such road should be finished and put in operation, and the damages resulting from a failure therein and from the said towns having parted with their said bonds would be very great, and it would be impossible to ascertain the amount of damages resulting from the non-completion of said road, or to accurately estimate and prove the elements thereof, that one hundred thousand dollars be fixed as liquidated damages to be paid to the towns for a breach of the condition of said bond, and this amount not to be considered as a penalty." *Held*, that the sum named must be treated as a penalty and not as liquidated damages, notwithstanding the terms of the bond. *Wheatland v. Taylor*, 29 Hun (N. Y.) 70.

6. Prospective and Future Damages.*

41. Permanent injuries to the person.†—(1) *Generally.*—Compensation for prospective damages on account of the permanency of a personal injury is recoverable. *Gorham v. Kansas City & S. R. Co.*, 113 Mo. 408, 20 S. W. Rep. 1060.

To justify the assessment of damages for future or permanent disability it must appear that continued or permanent disability is reasonably certain to result from the injuries complained of. *Ohio & M. R. Co. v. Cosby*, 27 Am. & Eng. R. Cas. 339, 107 Ind. 32, 7 N. E. Rep. 373.—FOLLOWING *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind.

* See also CARRIAGE OF PASSENGERS, 614; DEATH BY WRONGFUL ACT, 415-417; ELEVATED RAILWAYS, 137; EMINENT DOMAIN, 1198.

† See also *post*, 68.

264.—*White v. Milwaukee City R. Co.*, 18 *Am. & Eng. R. Cas.* 213, 61 *Wis.* 536, 21 *N. W. Rep.* 524, 50 *Am. Rep.* 154.—REVIEWED IN *Bigelow v. Metropolitan St. R. Co.*, 48 *Mo. App.* 367.

In an action for personal injuries which are permanent in their nature, a recovery may be had for the disabling effects of the injury both past and prospective; and in estimating the damages, loss of time and incapacity to do as profitable labor after as before the injury, as well as mental and physical suffering, are pertinent and legitimate factors. *Mobile & O. R. Co. v. George*, 94 *Ala.* 199, 10 *So. Rep.* 145.

Claims for permanent internal injuries should never be allowed by a jury, unless they are clearly established by evidence as necessarily arising from the injuries immediately caused by the negligence of the defendant. *Dunn v. Pennsylvania R. Co.*, 20 *Phila. (Pa.)* 258.

(2) *Instructions*.—A charge that there is no fixed rule for estimating damages from injuries claimed to be permanent was not erroneous. *Georgia Pac. R. Co. v. Freeman*, 83 *Ga.* 583, 10 *S. E. Rep.* 277.—REAFFIRMED IN *Richmond & D. R. Co. v. Allison*, 86 *Ga.* 145.

Where there was no evidence that the injury would be permanent, but that plaintiff would suffer future pain and inconvenience from it, the court instructed the jury if they found for the plaintiff, and that "her injuries were permanent, they should consider such inconvenience in getting about, and pain, as they should find reasonably certain to result therefrom in the future and award her such sum as damages as will reasonably and fairly compensate her therefor." *Held*, that the instruction was not open to the objection that it submitted the question whether the injury was permanent, on which there was no evidence. *Raben v. Central Iowa R. Co.*, 31 *Am. & Eng. R. Cas.* 45, 74 *Iowa* 732, 34 *N. W. Rep.* 621.

It being in issue whether injuries proved were permanent, the court, having charged the jury to give damages for permanent injuries if found to be such, when requested by the defendant should have instructed further, that unless the injuries were shown to be permanent damages should be disallowed to the extent of the claim for permanent injuries. *Texas Trunk R. Co. v. Ayres*, 83 *Tex.* 268, 18 *S. W. Rep.* 684.

42. Reasonably certain conse-

quences of injury.—(1) *Rule stated*.—Damages for injuries arising from negligence must cover present loss and that which may arise from future incapacity; they must also embrace compensation for pain and suffering. *Klein v. Jewett*, 26 *N. J. Eq.* 474; *affirmed in* 27 *N. J. Eq.* 550.

In an action for personal injuries, the plaintiff was entitled to damages down to the time of the trial if they are proved; and whether those that ensue later may be taken into account will depend upon whether they are imminent and sufficiently certain. *Chicago City R. Co. v. Yancey*, 33 *Ill. App.* 94.

In an action for injuries caused by negligence the plaintiff is entitled to recover not only indemnity for the injury sustained to the time of the trial, but for such as would probably afterward follow as a necessary consequence of the accident. *McSwyny v. Broadway & S. A. R. Co.*, 27 *N. Y. S. R.* 363, 54 *Hun* 637, 4 *Silv. Sup. Ct.* 495, 7 *N. Y. Supp.* 456. *Gainard v. Rochester C. & B. R. Co.*, 18 *N. Y. S. R.* 692, 2 *N. Y. Supp.* 470.—DISTINGUISHING *Strohm v. New York, L. E. & W. R. Co.*, 96 *N. Y.* 305. FOLLOWING *Curtis v. Rochester & S. R. Co.*, 18 *N. Y.* 534; *Cook v. New York C. & H. R. R. Co.*, 17 *N. Y. S. R.* 353.—*Washington & G. R. Co. v. Harmon*, 58 *Am. & Eng. R. Cas.* 380, 147 *U. S.* 571, 13 *Sup. Ct. Rep.* 557.

Such as damages for probable future effects of the injury upon health. *Davidson v. Southern Pac. Co.*, 44 *Fed. Rep.* 476.

And damages for losses which are satisfactorily proven to be likely to continue. *Totten v. Pennsylvania R. Co.*, 11 *Fed. Rep.* 564.

But the jury should not allow damages for future effects of injuries where the testimony simply shows that the injuries were likely to be permanent, and not a reasonable certainty that they would be so. *Meeteer v. Manhattan R. Co.*, 63 *Hun (N. Y.)* 533, 45 *N. Y. S. R.* 704, 18 *N. Y. Supp.* 561.

(2) *Its extent and limits—Instructions*.—Damages to be recovered for the probable results of personal injuries must depend upon the reasonable certainty and probability of the future results of such injury; otherwise such damages would be considered speculative. *Gregory v. New York, L. E. & W. R. Co.*, 8 *N. Y. Supp.* 525, 28 *N. Y. S. R.* 726.

Where the plaintiff has been injured by

the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's wrongful and negligent acts; and these may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental or physical labor, or of capacity to earn money, and for actual suffering of body and mind, which are the immediate and necessary consequences of the injuries. *Wallace v. Western N. Car. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.—FOLLOWED IN *Bay Shore R. Co. v. Harris*, 67 Ala. 6.

In estimating damages for personal injury resulting from a wrongful act, evidence tending to show the character and extent of the injury, and its probable result, as well as the probability of a return of the disease induced by the injury in the ordinary course of nature, is admissible to show what future damages may reasonably be expected to result of necessity from the injury. *Filer v. New York C. R. Co.*, 49 N. Y. 42, 3 Am. Ry. Rep. 460.—APPLIED IN *Feeney v. Long Island R. Co.*, 39 Am. & Eng. R. Cas. 639, 116 N. Y. 375, 22 N. E. Rep. 402, 26 N. Y. S. R. 729, 5 L. R. A. 544. DISTINGUISHED IN *Van Wagoner v. New York Cement Co.*, 36 Hun (N. Y.) 552. FOLLOWED IN *Sloan v. New York C. & H. R. R. Co.*, 1 Hun (N. Y.) 540, 4 T. & C. 135. REFERRED TO IN *Filer v. New York C. R. Co.*, 59 N. Y. 351. REVIEWED IN *Cook v. New York C. & H. R. R. Co.*, 17 N. Y. S. R. 353.

When successive actions may be brought for a continuous wrong, the damages in each may be justly limited to those sustained by the plaintiff at its commencement. But where for an injury to the person a single action only can be brought, the certain and probable consequences of the injury must of necessity be considered, in order to enable the jury to give the plaintiff a full compensation. *Caldwell v. Murphy*, 1 Duer (N. Y.) 233.

An instruction that the plaintiff was entitled to recover for such injuries as it was reasonably certain that she would suffer from thereafter, was correct; reasonable certainty being all that could be entertained with regard to the future. *Bateman v. New York C. & H. R. R. Co.*, 47 Hun (N. Y.) 429, 14 N. Y. S. R. 454.

Where the court at defendant's request

has charged that "to entitle plaintiff to recover for future damage there must be a reasonable certainty as to such future damage—a mere probability of its future occurrence is not enough," an instruction asked as part of the same, that "future damages can only be awarded when it is rendered reasonably certain from the evidence that such damages will eventually and necessarily result from the original injury," is properly refused. *Missouri Pac. R. Co. v. Mitchell*, 41 Am. & Eng. R. Cas. 224, 75 Tex. 77, 12 S. W. Rep. 810.

43. Speculative or possible consequences of injury.—To entitle a plaintiff to recover damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. It is not enough that the injury may develop into more serious conditions, nor even that they are likely to so develop. *Elsas v. Second Ave. R. Co.*, 30 N. Y. S. R. 414, 56 Hun 161, 9 N. Y. Supp. 210. *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.) 111, 23 N. Y. S. R. 388, 4 N. Y. Supp. 848.—APPLIED IN *De Soucey v. Manhattan R. Co.*, 39 N. Y. S. R. 79, 15 N. Y. Supp. 108. FOLLOWED IN *Atkins v. Manhattan R. Co.*, 32 N. Y. S. R. 214, 10 N. Y. Supp. 432, 57 Hun 102.—*Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. Rep. 357.

And no damages will be allowed for any speculative or merely possible consequences of a wound. *Jewell v. Union Pass. R. Co.*, 16 Phila. (Pa.) 64. See also *Caples v. Central Pac. R. Co.*, 6 Nev. 265. *Gregory v. New York, L. E. & W. R. Co.*, 8 N. Y. Supp. 525, 28 N. Y. S. R. 726.

In answer to a question as to the probable results of an injury a physician testified that a dislocation might take place from time to time; that there might be a degeneration of the cartilage, and if operations were not successful, upon a condition of the bones and cartilages described, an amputation might be necessary. Held, such answer was speculative and hypothetical merely and did not show a reasonable certainty of the probability of such results occurring. *Gregory v. New York, L. E. & W. R. Co.*, 55 Hun (N. Y.) 303, 28 N. Y. S. R. 726, 8 N. Y. Supp. 525.

To charge that plaintiff might recover only for such future consequences as were reasonably certain to ensue from his injury

and not for "merely possible or even probable future effects not now apparent," was properly refused, because the words in the latter part of the instruction qualifying the former part were misleading. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 49 *Fed. Rep.* 209, 4 *U. S. App.* 109, 1 *C. C. A.* 231.

44. Future pain and suffering.—

(1) *The rule stated.*—Pain and suffering that may reasonably be expected in the future may be considered in giving damages for personal injuries if the evidence shows that they will be experienced as a result of the injury. *Feeney v. Long Island R. Co.*, 39 *Am. & Eng. R. Cas.* 639, 116 *N. Y.* 375, 22 *N. E. Rep.* 402, 26 *N. Y. S. R.* 729, 5 *L. R. A.* 544; *affirming* 42 *Hun* 657, 5 *N. Y. S. R.* 63.—*APPLYING* *Filer v. New York C. R. Co.*, 49 *N. Y.* 42; *Turner v. Newburgh*, 109 *N. Y.* 301; *Griswold v. New York C. & H. R. R. Co.*, 44 *Hun* 236, 115 *N. Y.* 61.—*Matteson v. New York C. R. Co.*, 62 *Barb. (N. Y.)* 364.

Suit being brought for a permanent personal injury, future pain and suffering may form an element in estimating damages, provided the evidence renders it reasonably certain that they will necessarily result from the injury. *Atlanta & W. P. R. Co. v. Johnson*, 66 *Ga.* 259.

The damages recoverable for bodily pain and suffering by a person injured by the negligence of another are not limited to that incurred before the trial, but extend to such future suffering as the evidence renders it reasonably certain must necessarily result from the injury. *Curtis v. Rochester & S. R. Co.*, 18 *N. Y.* 534; *affirming* 20 *Barb.* 282.—*DISTINGUISHED* IN *Macer v. Third Ave. R. Co.*, 15 *J. & S. (N. Y.)* 461. *FOLLOWED* IN *Gainard v. Rochester C. & B. R. Co.*, 18 *N. Y. S. R.* 692, 2 *N. Y. Supp.* 470. *QUOTED* IN *Murtaugh v. New York C. & H. R. R. Co.*, 49 *Hun (N. Y.)* 456; *Murtaugh v. New York C. & H. R. R. Co.*, 23 *N. Y. S. R.* 636; *Schuler v. Third Ave. R. Co.*, 44 *N. Y. S. R.* 774, 17 *N. Y. Supp.* 834. *REVIEWED* IN *Bigelow v. Metropolitan St. R. Co.*, 48 *Mo. App.* 367; *Mosher v. Russell*, 44 *Hun* 12.

The bodily pain or suffering which constitutes an element in estimating damages for personal injuries is not confined to that which may have been incurred prior to the trial, but includes such suffering in the future as it is reasonably certain must result from the injury. *Aaron v. Second Ave. R. Co.*, 2 *Daly (N. Y.)* 127.

While future physical suffering is a proper element of damages, yet the damages should be limited to such as would result with reasonable certainty from the injury complained of, and should not be left to mere conjecture. *Fry v. Dubuque & S. W. R. Co.*, 45 *Iowa* 416.—*DISTINGUISHED* IN *Stafford v. Oskaloosa*, 64 *Iowa* 251. *REVIEWED* IN *Bigelow v. Metropolitan St. R. Co.*, 48 *Mo. App.* 367.—*See also* *Waterman v. Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

(2) *Its illustrations.*—Damages for future suffering and pain are properly allowable when based upon evidence showing that the personal injury complained of caused an incurable spinal disease, and that from the time of the accident to the trial plaintiff's suffering had been continuous. *Weiler v. Manhattan R. Co.*, 6 *N. Y. Supp.* 320.

Damages are properly allowed for reasonably certain future sufferings caused by personal injury where the evidence showed that plaintiff was still suffering to some extent at the time of the trial and had been from the time of the accident to that date, even though there was no proof as to the length of time during which such suffering would probably continue. *Union Pac. R. Co. v. Jones*, 49 *Fed. Rep.* 343, 4 *U. S. App.* 115, 1 *C. C. A.* 282.

(3) *Proper instructions.*—Where the proof shows that both feet of the plaintiff were injured so badly that one had to be amputated, and tends to show that the wounds on the other were liable to break out afresh at any time and that the foot could not be used, there is no error in an instruction to the jury that in assessing the damages they might take into consideration the plaintiff's prospective suffering and loss of health. *Lake Shore & M. S. R. Co. v. Johnsen*, 135 *Ill.* 641, 26 *N. E. Rep.* 510; *affirming* 35 *Ill. App.* 430.—*FOLLOWED* IN *Chicago, A. & St. L. R. Co. v. Gomes*, 46 *Ill. App.* 255.

Where the jury examined a broken arm one year after the accident and the attending surgeon gave it as his professional opinion that the plaintiff would never recover the full use of the arm, that evidence is sufficient to justify an instruction telling the jury that they might, in assessing damages, compensate the plaintiff for any permanent injury they might find she had sustained. *Bigelow v. Metropolitan St. R. Co.*, 48 *Mo. App.* 367.

An instruction telling the jury that they might compensate plaintiff for the pain and anguish they may believe from the evidence she would suffer in the future by reason of said injury, does not permit compensation for suffering that might by some possibility or probability attend the plaintiff in the future. *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367.—REVIEWING *Fry v. Dubuque & S. W. R. Co.*, 45 Iowa 416; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *White v. Milwaukee City R. Co.*, 61 Wis. 536.

An instruction to the jury that "You are instructed that, if you find for the plaintiff, in assessing damages you will take into consideration not only the cost of medical treatment and loss of time which the plaintiff has sustained, but also his bodily suffering, and if the injury is permanent, such damages as he may sustain by reason of such suffering, as well as his incapacity for earning money in the future"—held, correct. *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376.

It was proper for the jury to decide whether plaintiff was liable to suffer more from other illnesses than she would otherwise have done, where certain physicians testified that her injuries caused by defendant's negligence were permanent, and that if she were sick from other causes the injuries might cause serious complications. *Crank v. Forty-second St., M. H. & St. N. A. R. Co.*, 6 N. Y. Supp. 229.

The court charged, on the question of damages, that plaintiff was entitled to recover for present pain and what he would endure in the future. Held, no error. *Kane v. New York, N. H. & H. R. Co.*, 132 N. Y. 160, 30 N. E. Rep. 256, 43 N. Y. S. R. 494; affirming 56 Hun 648, 31 N. Y. S. R. 741, 9 N. Y. Supp. 879.

A charge to the jury that plaintiff was entitled to compensation if from the testimony they should find that there was a reasonable certainty that she might suffer in the future from her injuries, was proper when based upon expert testimony to the effect that her injuries were incurable and might cause future suffering. *Koetter v. Manhattan R. Co.*, 13 N. Y. Supp. 458.

The court properly instructed the jury that they might allow damages for future pain on account of personal injury, where the testimony showed that plaintiff had suffered continuously since the accident

from pains in her side and from rheumatism, which she never had previous to the injury, which were attributed to the accident by her physician. *Miller v. Ft. Lee Park & Steamboat Co.*, 25 N. Y. Supp. 924.

Where there is evidence tending to show that the plaintiff had not, at the time of the trial, fully recovered from her injuries, it is not error to instruct the jury that "she is entitled to recover for any further physical suffering which you may find from the evidence is reasonably certain to result from the injury complained of." *Stutz v. Chicago & N. W. R. Co.*, 37 Am. & Eng. R. Cas. 187, 73 Wis. 147, 40 N. W. Rep. 653.

(4) *Improper instructions.*—In the absence of evidence that the injury will cause future pain it is error to charge the jury that if they believe that plaintiff will suffer recurring pain the should award damages therefor. *Bloom v. Manhattan El. R. Co.*, 43 N. Y. S. R. 378, 63 Hun (N. Y.) 629, 17 N. Y. Supp. 812.—QUOTING *Haring v. New York & E. R. Co.*, 13 Barb. 15. REVIEWING *Crawford v. Delaware, L. & W. R. Co.*, 23 J. & S. 255.

Evidence that plaintiff had an incurable disease, resulting from the accident, and that from the time of the accident down to the day of the trial, a period of nineteen months, he had never been free from pain, justified a refusal to charge that "there was no evidence sufficient to warrant the jury in awarding damages for any future pain." *Weiler v. Manhattan R. Co.*, 25 N. Y. S. R. 543.

It was error to submit the question of future pain and suffering, with power to allow damages therefor, to the jury under evidence merely showing that plaintiff's leg was broken, arm fractured, and her scalp torn from her forehead; that she had suffered pain all the time since the accident; that she had not been able to walk without crutches from the time of the accident to the time of the trial, and that she could not perform any work. *Crawford v. Delaware, L. & W. R. Co.*, 23 J. & S. (N. Y.) 255.—FOLLOWING *Mosher v. Russell*, 44 Hun 12.—REVIEWED IN *Bloom v. Manhattan El. R. Co.*, 43 N. Y. S. R. 378.

45. Loss of future earnings.*—Damages may be allowed for future loss or suffering on account of personal injuries, where plaintiff is shown not to have fully

* See also *post*, 67.

recovered at the time of the trial. *Eddy v. Wallace*, 52 *Am. & Eng. R. Cas.* 265, 49 *Fed. Rep.* 801, 4 *U. S. App.* 264, 1 *C. C. A.* 435.

In estimating the damages recoverable for personal injury, the fact that plaintiff was more or less incapacitated to perform labor and follow his business or vocation is a proper element to be considered. *Howard Oil Co. v. Davis*, 76 *Tex.* 630, 13 *S. W. Rep.* 665.—APPLYING *Missouri Pac. R. Co. v. Lyde*, 57 *Tex.* 505; *Waller v. Erie R. Co.*, 63 *Barb.* (N. Y.) 20.

An element of damages based on the future capacity of the injured party to earn money and to acquire greater skill with which to earn it, when it is shown that he was physically disabled by the injuries inflicted, should not be referred to by the court in charging the jury when there is no evidence to enable them to intelligently consider it. *Gulf, C. & S. F. R. Co. v. Gordon*, 70 *Tex.* 80, 7 *S. W. Rep.* 695.—REVIEWING *Stockton v. Frye*, 4 *Gill* (Md.) 412; *Houston & T. C. R. Co. v. Boehm*, 57 *Tex.* 153.

Prospective damage to adults on account of impairment of earning capacity in the future is a proper element of damages in a case of a personal injury; so the jury may take into consideration loss of earnings of an infant four years old, after he shall have attained his majority, though he has never earned anything, and though no one can tell with any certainty what his earning capacity will be. *Rosenkrantz v. Lindell R. Co.*, 108 *Mo.* 9, 18 *S. W. Rep.* 890.

A diminished capacity to earn money is a proper element of damage, although the amount the injured person could earn before the injury and the amount she did earn after it was not shown. Her diminished capacity to do the work she was accustomed to about the hotel was shown, and the charge should have submitted that question to the jury, rather than her diminished capacity to earn money. *Fordyce, Receiver, v. Withers*, 1 *Tex. Civ. App.* 540, 20 *S. W. Rep.* 766.

In an action for injuries caused by alleged negligence, the plaintiff testified, without objection, that she was a custom corset-maker, that she employed two girls, and that her earnings averaged twenty-five to thirty dollars a week the year round. The court charged that if the jury were satisfied that the plaintiff had lost the ability

to earn money in the future by reason of the accident, and found for the plaintiff, they were obliged to include in the award such sum as they believe she will lose in future earnings by reason of the injury. *Held*, no error. *Pill v. Brooklyn Heights R. Co.*, 6 *Misc.* (N. Y.) 267, 27 *N. Y. Supp.* 230, 57 *N. Y. S. R.* 783.—DISTINGUISHING *Marks v. Long Island R. Co.*, 14 *Daly* 61.—See also *Richmond & D. R. Co. v. Norment*, 84 *Va.* 167, 4 *S. E. Rep.* 211.

46. Mortification and mental anguish.*—Mortification and anguish of mind which a person has suffered, and will suffer in the future, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows, may be considered in determining the amount of damages for personal injuries. *Central R. & B. Co. v. Lanier*, 83 *Ga.* 587, 10 *S. E. Rep.* 279.

47. Future expenses of recovery.†—In an action for personal injuries the court charged that the measure of damages was compensation for the injuries, including expenses of recovery as regards the past and future. It appeared that the plaintiff had not fully recovered at the time of the trial, and that, though there was no proof of the value of the medical services required by plaintiff, the defendant asked for no specific instruction limiting the recovery therefore to nominal damages. *Held*, that the charge was not erroneous. *Feeney v. Long Island R. Co.*, 39 *Am. & Eng. R. Cas.* 639, 116 *N. Y.* 375, 22 *N. E. Rep.* 402, 26 *N. Y. S. R.* 729, 5 *L. R. A.* 544; *affirming* 42 *Hun* 657, 5 *N. Y. S. R.* 63.

48. Temporary and permanent injuries to property—Separate actions.—In actions for injury to real property by trespassers the plaintiff can only recover compensation for the injury done up to the commencement of the action, where the injury is not permanent and enduring in its nature; but where it is permanent and continuing a single recovery may be had for the whole injury to result from the acts complained of. *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 *Bush* (Ky.) 382.—QUOTED IN *Chicago & E. I. R. Co. v. McAuley*, 121 *Ill.* 160.

Where the cause of injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to

* See also *ante*, 14; *post*, 63, 71, 89.

† See also *post*, 73.

continue it, the entire damages may be recovered in a single action; but where the cause of injury is in the nature of a nuisance, and not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once entire damages, which it might inflict if permanent, then the entire damages, so as to include future damages, cannot be recovered in a single action, but actions may be maintained from time to time as long as the cause of the injury continues. *Watts v. Norfolk & W. R. Co.*, (W. Va.) 57 Am. & Eng. R. Cas. 694, 19 S. E. Rep. 521.

49. Loss of future profits.*—(1) *The rule stated.*—Prospective profits are generally too remote to furnish a basis for recovery of damages, but in an action for the wrongful deprivation of the use of land the court will allow damages for the deprivation, although gains from the use of land are called profits. *Willer v. Oregon R. & N. Co.*, 15 Oreg. 153, 13 Pac. Rep. 768. *Elisabethtown & P. R. Co. v. Pottinger*, 10 Bush (Ky.) 185.

Thus, damages which are the natural and proximate consequence of the act complained of may undoubtedly be recovered. So with damages that can be readily determined, and are such as may reasonably be inferred to have been contemplated by the parties. *Elisabethtown & P. R. Co. v. Pottinger*, 10 Bush (Ky.) 185.

While it is a general rule that future profits cannot be allowed in estimating damages, whether the action is on contract or tort, yet the exception to it is equally well settled that where labor is to be performed from which profit is to spring as the direct result of work done at a contract price, and one party is prevented from earning such profit by the wrongful act of the other, the law will presume that such loss is the direct and natural result of the breach of the contract and may be estimated in computing damages. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ry. Rep. 233.—*QUOTING Masterton v. Mayor, etc., of Brooklyn*, 7 Hill (N. Y.) 61.

Where the amount of profits of which a party is deprived, as a result of a trespass, is ascertainable with reasonable certainty,

in estimating the damages such profits may be taken into consideration so far as they are traceable, but they must be limited to the natural and necessary consequences of the act. *Illinois & St. L. R. & C. Co. v. Decker*, 3 Ill. App. 135.

No fixed rule can be stated for the estimation of damages for the loss of profits. However, the evidence must show with certainty facts from which the jury can actually determine damages sustained from the loss of profits. *Illinois & St. L. R. & C. Co. v. Decker*, 3 Ill. App. 135.

Probable and speculative profits are not recoverable as damages in an action of tort. *Illinois & St. L. R. & C. Co. v. Decker*, 3 Ill. App. 135.

Speculative and conjectural profits should always be excluded in estimating damages recoverable for the breach of a contract. *Cincinnati, I., St. L. & C. R. Co. v. Lutes*, 112 Ind. 276.

(2) *Illustrations.*—Possible and prospective profits are not ordinarily recoverable as damages. The profits which an injured party lost by reason of defendant's negligence, by being prevented from working and personally superintending his business, which he was unwilling to intrust to his employes, are not elements of this damage in an action to recover for a personal injury. *Phyfe v. Manhattan R. Co.*, 30 Hun (N. Y.) 377.

Where the defendants agreed with the plaintiff to build the proposed railway within a certain time to land which the plaintiff had purchased and divided into building-lots, and to sell tickets to residents and property owners on the said land at a specified rate, it must be presumed that the loss of profits on account of failure to dispose of the lots, which would result from a neglect to construct the proposed railway, was within the contemplation of the parties at the time the contract was made; nor did the fact that the plaintiff surrendered and canceled his contract after the franchises under which the defendants proposed to build the road had been revoked by the city authorities prevent him from maintaining his action. *Blagen v. Thompson*, 56 Am. & Eng. R. Cas. 530, 23 Oreg. 239, 31 Pac. Rep. 647, 18 L. R. A. 315.

Plaintiff was entitled to recover profits which he might have realized on sales of certain tickets actually made and the difference in the expense of transportation of

* See also *ante*, 11.

Profits as an element of damage, see note, 22 AM. & ENG. R. CAS. 99.

those whom he had agreed to take, but nothing for conjectural sales and profits therefrom, in an action on a breach of the contract to the effect that the company would carry excursionists for plaintiff to a certain place on a day of public amusement at a certain rate of fare. *Houston & T. C. R. Co. v. Hill*, 21 *Am. & Eng. R. Cas.* 263, 63 *Tex.* 381.—FOLLOWING *Hadley v. Baxendale*, 9 *Ex.* 341.

II. ELEMENTS AND MEASURE OF DAMAGES.*

1. In Actions for Breach of Contract.

50. In general.†—As a general rule remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the contract, or unless they are capable of exact computation, such as profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract. *Bryan v. Southwestern R. Co.*, 41 *Ga.* 71.

For a breach of contract, all necessary expense which one of the contracting parties incurred in complying with such contract may be recovered as damages. *Bryan v. Southwestern R. Co.*, 41 *Ga.* 71.

An agreement to subscribe for a certain amount of stock is like an agreement to purchase any specific article of property, and if there has been no delivery, or an offer to deliver, the stock, the measure of damages is not the value of the stock, but only such as would result from a loss of the sale. *Thrasher v. Pike County R. Co.*, 25 *Ill.* 393.

In an action for failure to furnish passenger cars, as agreed upon for an excursion at a stipulated price, the measure of damages would be the amount which the plaintiff would have received as passage money if the train had gone as proposed, less the amount agreed to be paid for the use of the cars. *Illinois C. R. Co. v. Demars*, 44 *Ill.* 292.

* See also *ante*, 24; *post*, 74.

See also APPEAL AND ERROR, 48; CONTRACTS, 101; CROSSING OF RAILROADS, 41-46; DEATH BY WRONGFUL ACT, 380; ELEVATED RAILWAYS, 41, 145; EMINENT DOMAIN, 643-726; PATENTS FOR INVENTIONS, 23; TRIAL, 90.

† Damages for breach of executory contract. Loss of profits, etc., see note, 42 *AM. DEC.* 48.

Measure of damages for a delay in carrying a theatrical troupe, see 26 *AM. & ENG. R. CAS.* 262, *abstr.*

The damages to be allowed for the breach of the contract must be such as are foreseen, or might be foreseen, as likely to result from a breach of the contract or obligation, assumed or implied. *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

Where two parties have made a contract, which is broken by one of them, the damage which the other party ought ordinarily to receive for such breach should be such as either arises, in the usual course of things, from the breach itself or such as may be reasonably supposed to have been contemplated by both parties, at the time of contracting, as the probable result of its breach. *Pacific Exp. Co. v. Darnell*, 62 *Tex.* 639.

The party injured by the breach of a contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided such damages may fairly be supposed to have been within the contemplation of the parties when they made the contract, and are certain both in their nature and in respect to the cause from which they proceed. *Hunt v. Oregon Pac. R. Co.*, 13 *Sawy. (U. S.)* 516, 36 *Fed. Rep.* 481.

51. Breach of contract as to place of construction of road.—The damages to which plaintiff is entitled for injuries to his real property are the actual depreciation in value caused by defendant's breach of contract, as such depreciation is established by the evidence, exclusive of all remote, or fanciful, or speculative injuries; though, in order to account for and support their opinion of depreciated value, the witnesses may be permitted to state all causes of injury which they think go to make up the depreciation to which they testify. *Hutchinson v. Chicago & N. W. R. Co.*, 37 *Wis.* 582.—FOLLOWING *Snyder v. Western Union R. Co.*, 25 *Wis.* 60.—QUOTED IN *Neilson v. Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 239, 58 *Wis.* 516.

Statements by witnesses of causes of depreciation do not go to the jury as evidence to assess damages upon, but only as means by which the jury can estimate the value of the evidence as to the depreciated value. *Hutchinson v. Chicago & N. W. R. Co.*, 37 *Wis.* 582.

52. Breach of contracts of sale, generally.—In case of a breach of contract the proper measure of damages is the difference between the price agreed to be paid and the cost of the article to the plain-

tiff. *Allegheny Valley R. Co. v. Steele*, 1 *Pennyp. (Pa.)* 312.

Where a company is sued for failing to receive coal which it had contracted to buy, the measure of damages is the profit which the plaintiff would have made if the contract had been performed. *Baltimore & O. R. Co. v. Brydon*, 25 *Am. & Eng. R. Cas.* 287, 65 *Md.* 198, 7 *Cent. Rep.* 396, 3 *Atl. Rep.* 306, 9 *Atl. Rep.* 126.

The measure of damages in a suit for the breach of an executory contract to purchase railroad stock is the difference between the value of the stock at the agreed price and its actual or market value at the date of the breach of the contract. *Rand v. White Mountains R. Co.*, 40 *N. H.* 79.

When property having a market value has been destroyed, and a recovery in damages is sought, the measure of damages is the market value; but property may have a value for which a recovery may be had if destroyed, though it have no actual market value; and in such case other means of valuation must be resorted to than an investigation of its market value. *Prettyman v. Oregon R. & N. Co.*, 13 *Oreg.* 341, 10 *Pac. Rep.* 634.

A purchaser misled, to his prejudice, by representations of a railway agent, made in the sale of lots at a depot town, as to the future location of the road with reference thereto, cannot, in an action for damages, recover the value of the improvements made on the property bought; such damages would be too remote. The measure of damages would be the difference ordinarily between the contract price and the actual value of the property. *Greenwood v. Pierce*, 58 *Tex.* 130.

Where a company breaks a contract by which it agrees to take a certain number of iron chairs, in assessing the contractor's damages it is proper to consider subcontracts made by him for the supply of such chairs, together with the fact that he had built a foundry for their manufacture. *Cort v. Ambergate, N. & B. & E. J. R. Co.*, 17 *Q. B.* 127, 15 *Jur.* 877, 20 *L. J. Q. B.* 460.

53. Fraud, or breach of warranty in sale.—In an action for deceit in the sale of a railroad eating-house, fixtures, furniture, and the business of keeping it as a whole, and for a single unapportionable consideration, the value of the house, etc., estimated separately from the business, and without reference to it, is not a proper basis

for the computing damages. The value of the business should also be included. *Markel v. Moudy*, 13 *Neb.* 322, 14 *N. W. Rep.* 409.

The measure of damages for a breach of warranty in a sale of mortgage coupons is their purchase price, where there is no evidence of their market value at the time of sale. *South Covington & C. S. R. Co. v. Gest*, 34 *Fed. Rep.* 628; *affirmed in* 36 *Fed. Rep.* 307.

54. Breach of engagements regarding the right of way.—The measure of damages for the breach of a covenant binding a company to stop its trains on plaintiff's land and to permit him to cultivate the right of way, is the difference between the present value of his lands and their increased value if the covenants had been fully performed—that is, the additional value which would have accrued to the lands from such performance; and the plaintiff may, at his election, declare for a total breach and claim in one action the damages running through many years. *Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422, 5 *So. Rep.* 138.

In an action against a railroad company for a breach of contract, where plaintiff has conveyed a right of way over his lands in consideration that the company will build a depot thereon, the measure of damages for failing to build the depot is the value of the right of way conveyed and an amount sufficient to cover the depreciation of the land not conveyed, together with an amount sufficient to cover the increase in the value of his land had the depot been built, disregarding any enhancement of its value caused by the building of the road. *Louisville, St. L. & T. R. Co. v. Neafus*, (Ky.) 18 *S. W. Rep.* 1030.—*REVIEWING Watterson v. Allegheny Valley R. Co.*, 74 *Pa. St.* 208.

Where a party, who has agreed to convey land for a certain sum to a railroad corporation for the site of a road, refuses to perform his agreement, and obtains an assessment, according to law, of his damages caused by the laying out of the road over his land, the measure of the damages to which he is liable for breach of his agreement is the excess of the sum assessed at law over the sum for which he agreed to convey the land. *Western R. Corp. v. Babcock*, 6 *Metc. (Mass.)* 346.

In an action by a railroad corporation on a contract, whereby the defendants agreed

to secure a right of way for the corporation free of expense to it between two given points, it appeared that the defendants failed to perform the contract, and the corporation acquired the right of way in the usual manner. It was agreed that the plaintiff was entitled to recover such sum as the plaintiff had paid or was bound to pay for the right of way. *Held*, that the plaintiff was entitled to recover as damages the following items:

(1) Land taken for the roadbed five rods in width, and also land outside the limit of five rods, if necessary for the proper construction and security of the road. (2) Land damages for land taken for the use of the road, ordered to be paid by the county commissioners to one of the defendants, although the same had not been paid, he having appealed and failed to prosecute his appeal. (3) Money paid for building farm bridges over the road, and for building a bank wall, if the land damages were decreased thereby to an amount equal to their cost. (4) The ordinary legal costs in land-damage cases, and compensation paid to attorneys at law and other agents for their services in relation to the settlement of land damages. *Held* also, that the plaintiff was not entitled to recover: (1) Land damages paid for land, outside the limits of five rods, taken for stations or for procuring gravel to be used in the construction of the road. (2) Money paid to county commissioners for their services in assessing land damages. *New Haven & N. Co. v. Hayden*, 117 Mass. 433, 8 Am. Ry. Rep. 54.

Where a landowner relinquishes a right of way over his land to a railroad on its contracting to locate a depot thereon, which it fails to do, he may recover payment for his land and for all subsequent injuries occasioned by the construction of the road; and in estimating the damages the company is not entitled to any consideration such as would be appropriate in original condemnation proceedings on an exercise of the power of eminent domain, there being an apparent want of good faith in the transaction which presents no claim for indulgence. *Hubbard v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 68, 20 Am. Ry. Rep. 446.

Where a deed for a right of way was obtained from a landowner by fraud on the part of the company, the superior court has jurisdiction to set aside the conveyance, but cannot go further in the same action

and ascertain an enforced payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question, because damages for taking property can only be assessed in the statutory proceeding for that purpose. *Allen v. Wilmington & W. R. Co.*, 102 N. Car. 381, 9 S. E. Rep. 4.

55. Delay in carrying goods.*—

Where a machine is ordered as freight and is not delivered in a reasonable time the measure of damage is the rental value of the machine during the time of the delay; but where the owner mistakes the true measure of damage and sues to recover profits which he claimed he could have made by the use of the machine, there being no averment of the rental value, it is error to admit proof of such rental value. *Gulf, C. & S. F. R. Co. v. Maetse*, 2 Tex. App. (Civ. Cas.) 553.

A commercial traveler suing for damages on account of delay in the transportation of his samples cannot recover his hotel expenses during the time he was awaiting their arrival as an element of the damages. *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318, 36 L. J. C. P. 177, 15 W. R. 383, 15 L. T. 579.

56. Loss or destruction of goods.†—

Plaintiff ordered a cotton-gin, which was delivered to him with one essential piece missing. After waiting a reasonable time he ordered another piece and then sued the company for the cost of the piece lost. The proof showed that the extra piece itself was of no value to plaintiff. *Held*, that his measure of damage was the value of the piece at the time and place it should have been delivered, with interest thereon. *Gulf, C. & S. F. R. Co. v. Maetse*, 2 Tex. App. (Civ. Cas.) 553.

57. Dismissal of employee.‡—

In an action brought to recover damages for the

* See also CARRIAGE OF MERCHANDISE, 146-148, 777-793.

Measure of damages for delay in carrying goods, see note, 11 AM. ST. REP. 366.

† Measure of damages, in case of loss or destruction of goods, see note, 21 AM. & ENG. R. CAS. 125.

Measure of damages for loss of goods or for unreasonable delay, see note, 9 AM. & ENG. R. CAS. 334; 21 *Id.* 142; 30 *Id.* 135.

See also CARRIAGE OF MERCHANDISE, 47, 123, 158, 757-809.

‡ See also EMPLOYEES, 7-9.

breach of contract of employment, full damages for the entire breach may be recovered, for the future as well as for the past, and separate suits cannot be brought for the wages that would have fallen due had the contract continued. *East Tenn., V. & G. R. Co. v. Staub, 7 Lea (Tenn.) 397.*

In an action by an employé for damages for wrongful dismissal, the rule of damages is what would have come to the plaintiff had the contract continued, less whatever he might earn in other employment by reasonable diligence, and may be computed in reference to events to happen after action brought. The difficulty of ascertaining the damages by reason of the uncertain and contingent events upon which they depend, as the duration of the plaintiff's life, is no objection to the action. *East Tenn., V. & G. R. Co. v. Staub, 7 Lea (Tenn.) 397.*

A company brought an action against a discharged employé for money had and received. The employé pleaded a set-off, basing it upon the ground of injuries by reason of the wrongful discharge. The measure of damages to which the employé was entitled by reason of his unlawful discharge was fixed by the contract of employment, and under it was a stipulated salary, to be for one year, less the actual amount paid him, and less the amount of money belonging to the company, which he had actually received and not accounted for. *Held*, that it was competent for the company, in reduction of such damages, to offer in evidence that the employé actually earned, or might by diligence have earned, wages in other employment or vocation subsequent to his dismissal. *Cumberland & P. R. Co. v. Slack, 45 Md. 161.*

58. Preventing performance of work contracted for by plaintiff.—A party who has been wrongfully deprived of the profits of an executory contract may recover the difference between the amount he would have been entitled to on performance and the amount it would have cost him to perform the contract. *Cincinnati, I., St. L. & C. R. Co. v. Lutes, 112 Ind. 276, 11 N. E. Rep. 784, 14 N. E. Rep. 706, 9 West. Rep. 388.*

And in such case the burden is upon the defendant to prove that the plaintiff could have procured other work from which profits would have accrued, thereby preventing, or at least reducing, the damages for which he sues. *Cincinnati, I., St. L. &*

C. R. Co. v. Lutes, 112 Ind. 276, 9 West. Rep. 388, 11 N. E. Rep. 784, 14 N. E. Rep. 706.

Plaintiff delivered to defendant at N. Y. money for a passage ticket from J. to C., to be delivered on that day to R., a museum freak at J., and stated at the time it was essential that it be delivered that day, that R. might proceed to C., where he was to appear four days later to be exhibited pursuant to a contract made by plaintiff. The ticket was not delivered and R. failed to appear at C., whereby plaintiff lost the profits on his contract for exhibition. *Held*, that plaintiff's statement was sufficient to put defendant upon inquiry, and that defendant, not having made such inquiry, must be deemed to have intended to assume the responsibility for such damage as plaintiff would sustain from the breach of the engagement to exhibit the freak, so far as it was occasioned by its own breach of contract. *Liman v. Pennsylvania R. Co., 24 N. Y. Supp. 824, 54 N. Y. S. R. 245, 4 Misc. 539.*

Where one party agrees to do certain work for another, in consideration of certain compensation, but the latter prevents the performance of the contract, though the former is willing and able to carry out his part thereof, the damage recoverable for the breach is only the outlay already incurred and the profits which might be realized had the work been completed; or in place of the outlay recovery may be had for the services already performed, and damages for being prevented completing the performance, provided the compensation is capable of being divided. *Hambly v. Delaware, M. & V. R. Co., 21 Fed. Rep. 541.*

59. Failure to build fences,* crossings,† stations,‡ etc.—A defendant, in consideration of the grant of a right of way through plaintiff's land, agreed to build for the plaintiff a certain wagon road; also to fence both sides of the way. In an action for a breach of this contract—*held*, that the plaintiff was entitled to recover what it would reasonably cost to construct the road and fence. *Taylor v. North Pac. C. R. Co., 56 Cal. 317.*—EXPLAINING *Chamberlain v. Parker, 45 N. Y. 572.*—REVIEWED IN *Cincinnati S. R. Co. v. Hudson, 88 Ky. 480.*

* See also FENCES, 99-101.

† See also CROSSING OF STREETS, ETC., 14, 35, 112.

‡ See also STATIONS, ETC., 43.

Where in a contract granting a right of way the railroad made certain agreements, the plaintiff is entitled to recover for the violation of such promises his past injury, and also the future cost necessary to do for himself what the company failed to do. Where by reason of the company's failure to perform, the plaintiff is prevented from having access to a portion of his land beyond its road, the difference between the value of his land without such portion, and its whole value, with no obstruction to such portion, should be found; and such difference lessened by what such portion would bring by itself, forms an amount beyond which his damages cannot go. *Atlanta & L. R. Co. v. Hodnett*, 29 Ga. 461.

In a suit for a failure to erect a depot building upon the plaintiff's land, and also to erect a sufficient fence on each side of a strip of land conveyed by plaintiff, as it undertook to do in consideration of the conveyance to it, the value of the strip of land, and the damage occasioned to the balance of the farm by the failure to fence it, is the natural and proximate damage which the plaintiff is entitled to recover. Any supposed damage to the farm on account of the failure to build the depot, growing out of anticipated increased value, is too remote. *Rockford, R. I. & St. L. R. Co. v. Beckemeier*, 72 Ill. 267.

Where a deed conveying a right of way for a certain named sum contained an agreement on the part of the company to fence the right of way and build crossings, for a failure on the part of the company to build the fence and put in the crossings as agreed, the measure of damages is the difference in the rental value of the land. *Hull v. Chicago, B. & P. R. Co.*, 20 Am. & Eng. R. Cas. 341, 65 Iowa 713, 22 N. W. Rep. 940.—FOLLOWING *Varner v. St. Louis & C. R. Co.*, 55 Iowa 677.

A company, in consideration of an amicable settlement of his damages by the owner of land taken for their road, agreed with him to fence the land taken, and, failing to do so within a reasonable time, were sued by him for breach of the agreement. *Held*, that a subsequent erection of the fences by them, without the plaintiff's consent or approbation, did not affect his right to recover; and that the measure of his damages was the sum which it would fairly cost to erect the fences according to agreement. *Lawton v. Fitchburg R. Co.*, 8 Cush.

(Mass.) 230. — REVIEWED IN *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480.

A. conveyed to a company a piece of land, the consideration expressed in the deed being \$1; there was also a verbal agreement that the railroad company would erect a freight station upon the land, and give A. an annual pass for himself and wife over the road. The company took possession of and occupied the land, but failed to erect the station, whereupon A. brought an action of assumpsit against the company. *Held*, the measure of damages was the injury A. had sustained by reason of the non-erection of the freight station. *West Chester & P. R. Co. v. Broomall*, (Pa.) 26 Am. & Eng. R. Cas. 591, 3 Atl. Rep. 444.

60. Failure to grade, pave, or gravel street.—Where a covenantor made repairs for which the covenantor bound, but neglected to make, the sum actually expended by the former is, *prima facie*, the amount of damages, and, where no fraud is shown to impeach the reasonableness of the account, is the sum he is entitled to recover—this rule applied in the case of covenants on the part of a street-car company to lay certain pavements which it failed to do. *Mayor, etc., of New York v. Second Ave. R. Co.*, 26 Am. & Eng. R. Cas. 546, 102 N. Y. 572, 7 N. E. Rep. 905, 2 N. Y. S. R. 526, 55 Am. Rep. 839; *affirming* 31 Hun 241.—REVIEWED IN *Binghamton v. Binghamton & P. D. R. Co.*, 41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225.

The measure of damages for the breach of a contract on the part of a company to grade and gravel the streets used by it, is the reasonable cost of doing or completing the work; and upon such breach a right of action accrues for full damages, although the work has not been done or completed by the village. *Cincinnati & S. R. Co. v. Carthage*, 5 Am. & Eng. R. Cas. 306, 36 Ohio St. 631.—DISTINGUISHING *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kan. 490.

61. Failure to issue bonds as agreed.—If an obligation is executed for a sum of money, to be paid in the bonds of a railroad company, and said obligation is not complied with, the measure of damages in an action thereon, or when offered as a set-off, is the nominal value of the bonds, and not the value at which they might be rated in the market. *Memphis & L. R. R. Co. v. Walker*, 2 Head (Tenn.) 467.

Certain individuals subscribed to the

capital stock of a railroad to secure an extension, the consideration expressed being the benefit that would accrue to the subscribers from such extension, and that the company should issue to such subscribers its first-mortgage bonds to an amount equal to such subscriptions. In an action against the company for failure to deliver such bonds, the measure of damages is the highest market value of the bonds between the time they should have been delivered and the time of trial, together with interest. *San Antonio & A. P. R. Co. v. Busch*, (Tex. Civ. App.) 21 S. W. Rep. 164.

The purchaser of first-mortgage railroad bonds canceled them under a contract entered into by the company to issue second-mortgage bonds to be subject to certain first-mortgage bonds to be issued to third parties for the purpose of enabling the company to complete its road. In an action for a failure to issue the second-mortgage bonds the measure of damages is the amount of bonds called for by the agreement; but this amount is subject to said first-mortgage bonds issued as above stated to complete the road. *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.*, 43 Am. & Eng. R. Cas. 356, 33 W. Va. 761, 11 S. E. Rep. 58.

62. Failure to maintain cattle-passes, side tracks, etc.—A railroad company had agreed to keep in repair certain cattle-passes under the track of its road for the benefit of the owner of the land. Held, that in an action for damages for neglecting to keep the same in repair, the plaintiff could recover only damages up to the time of bringing the suit, and not prospective damages. *Phelps v. Hew Haven & N. Co.*, 43 Conn. 453.

A railroad company used the surface of certain land in consideration of the building and maintaining perpetually a side track in front of certain lots, and covenanted to that effect. Defendant company succeeded to the rights of the first company and assumed its indebtedness incurred in the construction of the road, and subsequently took up the side track and abandoned it. In an action by the landowner for damages resulting from a breach of the covenant entered into by the first company—held, recovery might be against the second company, and that the proper measure of damages was the difference between the value of plaintiff's lots with the side track oper-

ating and their value without it, and not the difference between the annual rental value of the lots with the side track and without it. *Amsden v. Dubuque & S. C. R. Co.*, 28 Iowa 542.—REVIEWED IN *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604.

63. Mental suffering.*—A widow may recover damages for mental suffering caused by the negligence of a company in failing to deliver promptly the body of her deceased husband, which it had undertaken to transport. *Hale v. Bonner*, 49 Am. & Eng. R. Cas. 135, 82 Tex. 33, 17 S. W. Rep. 605.—APPLYING *Western Union Tel. Co. v. Simpson*, 73 Tex. 422.

Plaintiff contracted for a special train to take him to the bedside of a sick parent. Damages could not properly be recovered in an action for breach of such contract, for disappointment and mental suffering merely resulting from delay in a departure of the special train. *Wilcox v. Richmond & D. R. Co.*, 52 Fed. Rep. 264, 8 U. S. App. 118, 3 C. C. A. 73.—QUOTING *Griffin v. Colver*, 16 N. Y. 489; *Lynch v. Knight*, 9 H. L. Cas. 598.

A party not privy to a contract cannot recover damages for injury to his feelings from a breach of the same, unless such a right of action is given in express terms by statute. *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563.

Where a married woman, just recovered from a spell of sickness, and desirous of returning to her home and family, applied to the ticket agent of a railroad for a ticket and transportation over said road, and offered to pay said agent the price of said ticket, this occurring about ten o'clock at night, and a few minutes before the train passed the station; but owing to the carelessness and inattention of the ticket agent she failed to get her ticket, and the agent also failing to signal the train to stop at said station, it passed on without her, and afterwards she was compelled to walk a distance of about two miles over a tiresome road, in the night, to get a place to stay the balance of the night; and that by reason of all this she became sick, and remained sick a long time, and suffered mentally and physically—held, that the correct conclusions of law were found by the trial court as follows: "1. Plaintiff was entitled to judgment for

* See also *ante*, 14, 46; *post*, 71, 89.

damages which resulted, and might reasonably be expected to result, from being left under the circumstances. 2. Mental suffering may be estimated as a basis for damages. 3. The negligence of the agent is the negligence of the railroad company, and the defendant is liable therefor." *Houston & T. C. R. Co. v. Rand*, 1 *Tex. App. (Civ. Cas.)* 100.

2. In Actions for Torts or Wrongs.*

64. General rules.—No fixed rule exists for estimating the damages to one injured by the negligence of a railroad company. *Central R. & B. Co. v. Passmore*, 90 *Ga.* 203, 15 *S. E. Rep.* 760.

The rules and principles of law applicable to the relation of master and servant apply equally to corporations and their agents, and damages resulting from the negligence of both classes of persons are measured by the same rule. *Denver, S. P. & P. R. Co. v. Conway*, 8 *Colo.* 1, 54 *Am. Rep.* 537, 5 *Pac. Rep.* 142.

A party will be entitled to as much damages for any wrong or injury quietly endured as if he violently resisted. *Southern Kan. R. Co. v. Hinsdale*, 34 *Am. & Eng. R. Cas.* 256, 38 *Kan.* 507, 16 *Pac. Rep.* 937.

The fact that there is no certainty in the measurement of damages can afford no reason for refusal to award compensation for a wrong or injury done to plaintiff—applied in the case of an injunction seeking to enjoin the construction of a street railway alleged to be an infringement of the exclusive franchise of another street railway. *Omaha Horse R. Co. v. Cable Tram-Way Co.*, 32 *Fed. Rep.* 727.

One guilty of an act of negligence will be held to have foreseen and to be responsible for whatever consequences resulted from his negligence, without the intervention of some other independent agency disconnected from the primary fault and self-operating, although, in advance, the actual result may have seemed improbable. *Quigley v. Delaware & H. Canal Co.*, 142 *Pa. St.* 388, 21 *Atl. Rep.* 827. *Bunting v. Hogsett*, 48 *Am. & Eng. R. Cas.* 87, 139 *Pa. St.* 363, 21 *Atl. Rep.* 31. Compare also *Holyoke v. Grand Trunk R. Co.*, 48 *N. H.* 541.

65. Injuries to property, gener-

ally.*—The measure of damages for obstructing plaintiff's right of way is the difference between the fair rental value with the crossing obstructed and the same with it unobstructed. *Brakken v. Minneapolis & St. L. R. Co.*, 31 *Minn.* 45, 16 *N. W. Rep.* 459.—FOLLOWING *Brakken v. Minneapolis & St. L. R. Co.*, 29 *Minn.* 41.

In estimating the damages to real property occasioned by the negligence of an adjoining owner in failing to keep his water-pipes in proper repair, plaintiff was entitled to recover the actual damages sustained by him by the wrongful omission of the defendant's duty, as well as such expenses as are reasonably necessary to protect a wall from further injury from the flow of water. *Comstock v. New York C. & H. R. R. Co.*, 48 *Hun (N. Y.)* 225, 17 *N. Y. S. R.* 937.

In an action to enjoin a company from maintaining a switch on plaintiff's land in a highway, where the equitable relief is granted, the loss of the use of the premises up to the time of the trial may be included in the damages allowed. *Burditt v. New York C. & H. R. R. Co.*, 55 *N. Y. S. R.* 18, 71 *Hun* 361, 24 *N. Y. Supp.* 1137.—FOLLOWING *Roberts v. New York El. R. Co.*, 128 *N. Y.* 455, 40 *N. Y. S. R.* 454.

The market value of property destroyed or injured is the proper measure of damages, and a charge to the jury should so state it. *Ft. Worth & D. C. R. Co. v. Scott*, 2 *Tex. App. (Civ. Cas.)* 137.

The measure of damages for a team killed and a wagon destroyed by a passing train on a crossing, is their reasonable cash value at the time of their loss, with interest thereon until the time of trial. *Galveston, H. & S. A. R. Co. v. Matula*, (*Tex.*) 19 *S. W. Rep.* 376.

In actions for personal injuries, plaintiff is entitled to recover for any loss or damage sustained by the railroad's negligence, including expense of medical attendance, a reasonable sum for pain and suffering, and for what he otherwise would have earned. *Vicksburg & M. R. Co. v. Putnam*, 27 *Am. & Eng. R. Cas.* 291, 118 *U. S.* 545, 7 *Sup. Ct. Rep.* 1.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Needham*, 54 *Am. & Eng. R. Cas.* 88, 52 *Fed. Rep.* 371, 10 *U. S. App.* 339.

* See also *ante* 23, 48.

Cost of restoration as measure of damages for injuries to real property, as in cases of throwing dirt on, digging ditches, etc., see note, 17 *L. R. A.* 426.

* See also *ante*, 2.

3 C. C. A. 129. QUOTED IN *Richmond & D. R. Co. v. Allison*, 86 Ga. 145.

Where a vessel is injured by collision, the proper measure of damages is the loss necessarily incurred in repairing the injury, and, also, compensation for the use of the boat during the time necessary to repair and fit her for future use. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 1 *McCrary* (U. S.) 281, 2 *Fed. Rep.* 285.

The plaintiff came to the depot of the defendants' railroad at S., with his wagon, to haul to the town of R. a load of dry goods, and was directed by the defendants' agent who had charge of the depot, where to back his wagon and receive the load. While he was engaged in loading the wagon, at the place designated, through the defendants' negligence it was run into by the defendants' cars and seriously damaged, so as to be unable to convey its load. In an action on the case the court, upon these facts appearing, instructed the jury that the measure of damages was the damage done to the wagon, the loss of the trip in which the plaintiff was engaged, and the loss of the use of the wagon until, by proper diligence, the plaintiff could get it repaired. *Held*, that the instruction was correct. *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 *Ind.* 471.—APPROVED IN *Keyes v. Minneapolis & St. L. R. Co.*, 36 *Minn.* 290, 30 *N. W. Rep.* 888. FOLLOWED IN *Shelbyville Lateral Branch R. Co. v. Lynch*, 4 *Ind.* 494.

66. Injury to or destruction of crops, fruit trees, etc.*—Where a company is sued for destroying growing fruit trees the measure of damage is the depreciation in the value of the land by reason of their destruction, and not the value of the trees in themselves. *Haskell v. Northern Adirondack R. Co.*, 74 *Hun* 380, 26 *N. Y. Supp.* 595, 36 *N. Y. S. R.* 303.—FOLLOWING *Dwight v. Elmira, C. & N. R. Co.*, 132 *N. Y.* 199. NOT FOLLOWING *Whitbeck v. New York C. R. Co.*, 36 *Barb.* 644.

In a suit for the recovery of damages for injury to land and to crops growing thereon, the general rule for the measure of damage is the difference between the market value of the land immediately before the injury is done and its market value immediately after such injury. Growing crops upon the

land are a part of the land, and in estimating damages to the land the damage done to the crops should be considered. *Missouri Pac. R. Co. v. Cox*, 2 *Tex. App. (Civ. Cas.)* 217.

When a crop is injured or destroyed the measure of damage is the actual value of so much thereof as was injured or destroyed at the time of such injury or destruction, with legal interest from that date. *Missouri Pac. R. Co. v. Cox*, 2 *Tex. App. (Civ. Cas.)* 217. *Texas & St. L. R. Co. v. Reid*, 1 *Tex. App. (Civ. Cas.)* 120.

Where immature cotton is destroyed by the negligence of a railroad company, the measure of damage is the value of the cotton at the time of its destruction, with legal interest thereon till the time of trial; and it is error to permit proof of what the cotton would have yielded when mature, if it had not been destroyed. *Missouri Pac. R. Co. v. Wise*, 3 *Tex. App. (Civ. Cas.)* 461.

67. Personal injuries, generally.*

—(1) *Rules of assessment.*—No precise or fixed rule can be given to measure the extent of the recovery in an action for personal injuries. *Walker v. Erie R. Co.*, 63 *Barb. (N. Y.)* 260. *Central R. & B. Co. v. Passmore*, 90 *Ga.* 203, 15 *S. E. Rep.* 760. *Caples v. Central Pac. R. Co.*, 6 *Nev.* 265. *Dunn v. Pennsylvania R. Co.*, 20 *Phila. (Pa.)* 258.

The measure of damages must, to a great extent, depend upon the pains and suffering of the plaintiff, and these cannot be accurately measured by amounts. *Walker v. Erie R. Co.*, 63 *Barb. (N. Y.)* 260.

The law does not contemplate absolute, but only a qualified or relative, compensation in damages for the loss of a limb, there being no money equivalent for such injuries. *Western & A. R. Co. v. Young*, 42

* Measure of damages for personal injuries, see notes, 9 *AM. & ENG. R. CAS.* 371; 75 *AM. DEC.* 268.

Elements of damages for personal injuries, see note, 52 *AM. & ENG. R. CAS.* 614.

Rules of damages for personal injuries through negligence, see note, 9 *AM. ST. REP.* 344.

Various elements of damage for personal injuries, including value of time lost, expense of nursing and medical attendance, probable future damages and impaired capacity to work, see note, 11 *L. R. A.* 45.

See also CARRIAGE OF PASSENGERS 610-633; CHILDREN, INJURIES TO, 190; DEATH BY WRONGFUL ACT, 373-440; EJECTION OF PASSENGERS, 100.

* See also CATTLE-GUARDS, 22, 33; CULVERTS, 23; FENCES, 100, 110.

Am. & Eng. R. Cas. 135, 83 *Ga.* 512, 10 *S. E. Rep.* 197.

The injured party is entitled to receive one compensation for all damages, past and prospective, including expenses incurred, loss of time, and for actual suffering of body and mind as the consequences thereof. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 *Atl. Rep.* 818. *Holyoke v. Grand Trunk R. Co.*, 48 *N. H.* 541.

Damages for injuries may be divided into two classes: 1. Those arising from pain, suffering, distress, anxiety of mind, and the immediate medical and other expenses growing out of the sickness and confinement of the party injured. 2. The permanent pecuniary loss or injury growing out of the total or partial personal disability to attend or engage in business. *Murray v. Hudson River R. Co.*, 47 *Barb.* (N. Y.) 196; *affirmed*, see 6 *Alb. L. J.* 198.—QUOTED IN *Koetter v. Manhattan El. R. Co.*, 36 *N. Y. S. R.* 611, 59 *Hun* 623, 13 *N. Y. Supp.* 458. REVIEWED IN *Potter v. Chicago & N. W. R. Co.*, 22 *Wis.* 615.—*Totten v. Pennsylvania R. Co.*, 11 *Fed. Rep.* 564. *Whelan v. New York, L. E. & W. R. Co.*, 38 *Fed. Rep.* 15. *Peoria Bridge Assoc. v. Loomis*, 20 *Ill.* 235.

The damages should include compensation for loss of wages if a laboring man; loss of business if engaged in business; and in considering these the jury may include not only past losses but continuing losses, where the evidence satisfies them that the injuries will continue. *Totten v. Pennsylvania R. Co.*, 11 *Fed. Rep.* 564.

But the damages should be limited to compensation for the pain suffered, time lost, and permanent injuries occasioned by the negligence, including expenses, if any, of being cured. *Stephens v. Hannibal & St. J. R. Co.*, 38 *Am. & Eng. R. Cas.* 110, 96 *Mo.* 207, 9 *S. W. Rep.* 589.—CRITICISING *Winters v. Hannibal & St. J. R. Co.*, 39 *Mo.* 475.

And plaintiff cannot recover special damages on account of his particular calling or profession. *Holyoke v. Grand Trunk R. Co.*, 48 *N. H.* 541.—QUOTED IN *Fay v. Parker*, 53 *N. H.* 342.

In estimating the damages to which plaintiff is entitled for personal injuries inflicted through the negligence of a railroad company, the jury may take into consideration the following facts and circumstances:

The character, nature, and extent of the

injury. *Baltimore & O. R. Co. v. Kean*, 28 *Am. & Eng. R. Cas.* 580, 65 *Md.* 394, 5 *Atl. Rep.* 325. *Sherwood v. Chicago & W. M. R. Co.*, 44 *Am. & Eng. R. Cas.* 337, 46 *N. W. Rep.* 773. *Blair v. Chicago & A. R. Co.*, 89 *Mo.* 383, 1 *S. W. Rep.* 350. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 *Mo. App.* 99. *Caples v. Central Pac. R. Co.*, 6 *Nev.* 265. *Baker v. Pennsylvania Co.*, 142 *Pa. St.* 503, 21 *Atl. Rep.* 979. *Harris v. Union Pac. R. Co.*, 4 *McCrary* (U. S.) 454, 13 *Fed. Rep.* 591. *Robertson v. Cornelson*, 34 *Fed. Rep.* 716.

The plaintiff's age, his habits, his strength, sex, his ability to earn wages, the rate of wages earned in the past, his prospect of obtaining steady employment in the future, his pain and suffering, together with the contingencies of human life. *Central R. & B. Co. v. Passmore*, 90 *Ga.* 203, 15 *S. E. Rep.* 760. *Grant v. Union Pac. R. Co.*, 45 *Fed. Rep.* 673. *Robertson v. Cornelson*, 34 *Fed. Rep.* 716.

The occupation, vocation, and business of plaintiff. *Ohio & M. R. Co. v. Hecht*, 34 *Am. & Eng. R. Cas.* 447, 115 *Ind.* 443, 15 *West. Rep.* 122, 17 *N. E. Rep.* 297. *Central R. & B. Co. v. Passmore*, 90 *Ga.* 203, 15 *S. E. Rep.* 760. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908. *Clifford v. Dam*, 12 *J. & S.* (N. Y.) 391.

Plaintiff's ability to earn money. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908. *Indiana Car Co. v. Parker*, 100 *Ind.* 181. *Geveke v. Grand Rapids & I. R. Co.*, 22 *Am. & Eng. R. Cas.* 551, 57 *Mich.* 589, 24 *N. W. Rep.* 675.

The permanent effect of the injury and its effect upon the ability of the injured person to earn money, or to pursue his trade or profession. *Indiana Car Co. v. Parker*, 100 *Ind.* 181. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908. *McMahon v. Northern C. R. Co.*, 39 *Md.* 438.

Or the loss of earnings caused by permanent disability. *Whelan v. New York, L. E. & W. R. Co.*, 38 *Fed. Rep.* 15.

The loss of wages which has resulted from plaintiff's injuries. *Harris v. Union Pac. R. Co.*, 4 *McCrary* (U. S.) 454, 13 *Fed. Rep.* 591. *Richmond & D. R. Co. v. Norment*, 84 *Va.* 167, 4 *S. E. Rep.* 211.

The pecuniary loss occasioned, taking into account not only the personal loss but

the incapacity to earn a future improved income, also the injury sustained by the plaintiff in his person. *Fair v. London & N. W. R. Co.*, 21 L. T. 326, 18 W. R. 66.

Permanent pecuniary loss to plaintiff growing out of total or partial disability to engage in work. *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196; *affirmed*, see 6 Alb. L. J. 198.

The injury to the plaintiff's health. *Beckwith v. New York C. R. Co.*, 64 Barb. (N. Y.) 299; *reversed* (?) 9 Alb. L. J. 45.

The health and condition of the plaintiff before the injury as compared with his health and condition consequent upon the injury. *McMahon v. Northern C. R. Co.*, 39 Md. 438.

The probable effect of the injury upon plaintiff's health. *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep. 862.—*FOLLOWING* *Houston & G. N. R. Co. v. Randall*, 50 Tex. 261; *Brown v. Sullivan*, 71 Tex. 476, 10 S. W. Rep. 288.—*Davidson v. Southern Pac. R. Co.*, 44 Fed. Rep. 476. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591.

The sickness which plaintiff endured. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 46 N. W. Rep. 773.

The personal inconvenience caused plaintiff. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773. *Baker v. Pennsylvania Co.*, 142 Pa. St. 503, 21 Atl. Rep. 979.

The disfigurement of plaintiff's person. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773.

The permanent annoyance which is liable to be caused by the deformity resulting from the injury. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 46 N. W. Rep. 773.

The resultant physical incapacity of plaintiff to enjoy life. *Fair v. London & N. W. R. Co.*, 21 L. T. 326, 18 W. R. 66.

(2) *Diminished capacity to work, etc.**—In estimating the damages recoverable for personal injuries sustained through the negligence of a company or its servants, the jury may properly take into consideration the effect of the injury upon plaintiff's ability to pursue his trade, vocation, or profession and his diminished capacity to

earn money or support himself by his work and labors. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476. *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep. 862. *Robertson v. Cornelison*, 34 Fed. Rep. 716. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908. *Indiana Car Co. v. Parker*, 100 Ind. 181. *McMahon v. Northern C. R. Co.*, 39 Md. 438. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773. *Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211.

It is proper for the jury to consider the amount the victim would have been able to earn if he had not been hurt, and award the difference between that sum and what he has actually been able to earn. *Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675.—*FOLLOWED IN* *Sherwood v. Chicago & W. M. R. Co.*, 82 Mich. 374.

In assessing damages in such cases the jury may take into consideration the following facts:

Plaintiff's diminished capacity to work, if likely to occur by growing years and infirmities of age. *Central R. & B. Co. v. Passmore*, 90 Ga. 203, 15 S. E. Rep. 760.

The difference between the plaintiff's ability to earn prior to the injury and ability subsequent to the injury. *Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591.

The plaintiff's mental injuries as well as his physical injuries, as affecting his capacity to labor or carry on business. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564.

The plaintiff's incapacity to earn a future improved income. *Fair v. London & N. W. R. Co.*, 21 L. T. 326, 18 W. R. 66.

The rate of wages plaintiff earned in the past by his labor, and his prospect of obtaining steady and remunerative employment in the future. *Central R. & B. Co. v. Passmore*, 90 Ga. 203, 15 S. E. Rep. 760.

(3) *Instructions*.—An instruction that if the jury find for plaintiff they should

* See also *ante*, 45.

"assess his damages at such a sum as they may believe from the evidence will be a fair compensation to him—*first*, for any pain of body or mind; *second*, for any loss of earnings after he shall have attained the age of twenty-one years; *third*, for any physical disfigurement or deformity; *fourth*, for any permanent injury to his body, other than disfigurement or deformity, which plaintiff has sustained or will hereafter sustain by reason of said injuries, and directly caused thereby," cannot be said to be so wanting in perspicuity or clearness that it could have misled or confused the jury. *Rosenkrantz v. Lindell R. Co.*, 108 Mo. 9, 18 S. W. Rep. 890.

Where the court instructed the jury, among other things, that in case they found for the plaintiff they could take into consideration bodily pain and suffering, loss of time, and plaintiff's ability to earn money in her business and calling, the instruction was sustained as being applicable to the evidence produced on the trial. *Chicago, B. & Q. R. Co. v. Starmer*, 26 Neb. 630, 42 N. W. Rep. 706.

The charging that the jury should give such sum as would compensate the plaintiff for the injury and "put him in such a position as he would have been in if he had not been injured," is not error. *Lee v. Manhattan R. Co.*, 21 J. & S. (N. Y.) 260.

The court charged the jury, "that as to the amount of damages you must confine yourself wholly to what would be a compensation for the damages he actually received, and that it has been proven to you he did receive, and which are the proximate and natural result of the injury he received. He was subjected to intense agony. He remained in bed for some weeks. He claims that he is still under the necessity of using medicines and taking remedies. There is no doubt that this plaintiff has suffered pain; there is no doubt that the injury inflicted was, at the time it was inflicted, painful and somewhat severe; and further, that he will be subject to this injury for the future is matter of necessary inference from his present suffering and condition." *Held*, that under the charge the jury were not at liberty to give anything for the cost of medicines theretofore taken. They were confined to compensation for the consequences of the injury as described by the judge. The jury could have found something for the plaintiff's being obliged to take opium,

chloroform, and quinine, as they are uncomfortable, nauseous, and destructive of appetite. *West v. Manhattan R. Co.*, 16 N. Y. S. R. 886.

Where there is no claim in the complaint or in the evidence that plaintiff's mental powers were in any manner impaired by the injury, it is error for the trial court to instruct the jury that in estimating the damages they may take into account the effect of the injury upon plaintiff's mental powers. *Comaskey v. Northern Pac. R. Co.*, (N. Dak.) 55 N. W. Rep. 732.

The court instructed in one charge that the measure of damages will be the physical pain and suffering, the mental anguish, the peril and fright experienced by plaintiff. In another part of the charge the court said: "In estimating damages you will take into consideration the physical pain and suffering, mental anguish and suffering, and the peril and fright which plaintiff was subjected to, if to any she was subjected." *Held*, that the two together correctly stated the law. *Texas & P. R. Co. v. Woodall*, 2 Tex. App. (Civ. Cas.) 413.

An instruction suggesting to the jury a capitalization of plaintiff's earnings, and authorizing an award of a sum not only equal to what his earnings had been in years previous, but also a sum sufficient to support him from year to year, is entirely erroneous, notwithstanding the remarks of the judge to the effect that his suggestions were by way of illustration only. *Gregory v. New York, L. E. & W. R. Co.*, 55 Hun (N. Y.) 303, 28 N. Y. S. R. 726, 8 N. Y. Supp. 525.—FOLLOWING *Houston & T. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 369.

68. Permanent injuries.*—Damages may, in a proper case where the action is brought by the party himself, be given to the same extent as if death had ensued; for example, where the party is permanently disabled. (Tennessee Code, §§ 2291, 2772.) *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. (Tenn.) 829.

In assessing damages for permanent personal injuries the jury may consider the resultant disability for future work and consequent pecuniary loss. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235.

* See also *ante*, 41.

Damages for permanent injuries, see note, 19 AM. & ENG. R. CAS. 160.
Measure of damages for permanent injuries, see 42 AM. & ENG. R. CAS. 98, *abstr.*

And the disability and the anxiety and distress of mind fairly caused by the injury. *Pittsburgh, C. & St. L. R. Co. v. Sponier*, 8 Am. & Eng. R. Cas. 453, 85 Ind. 165.

When there is testimony that a plaintiff suing for permanent personal injuries has Bright's disease of the kidneys, with little, if any, evidence to the contrary, and none to show that said injuries caused the disease, it is proper to direct the jury to consider the fact in determining his expectancy of life and loss of earning power. *Bunting v. Hogsett*, 48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31.

In an action by an employé for injuries which permanently disabled him, it was error to instruct the jury that if they found for the plaintiff, to find no greater sum than a sum which, put at interest, would produce annually a sum equal to the difference between what plaintiff could earn before his injury and what his ability would be restricted to earning in consequence thereof; for if compensation for lessening the ability to labor be assumed as the true measure of actual damages, then it would seem that it should be such an amount as would produce an annuity equal to such interest during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life. *Houston & T. C. R. Co. v. Willie*, 5 Am. & Eng. R. Cas. 541, 53 Tex. 318, 37 Am. Rep. 756.

69. Injury to plaintiff's wife.*—In an action by a married woman to recover damages for personal injuries, she is entitled to nothing for medical attendance or loss of time, unless special circumstances rebutting the presumptive right of the husband to recover therefor are averred and proved. *Ohio & M. R. Co. v. Cosby*, 27 Am. & Eng. R. Cas. 339, 107 Ind. 32, 7 N. E. Rep. 373.

In an action against the company for loss of services of plaintiff's wife caused by negligence of the train-guard in closing the gate so that it struck her, the court charged that plaintiff had a right to recover "for damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." Plaintiff's wife was pregnant at the time of the injury, which resulted in a miscarriage. *Held*, that the instruction was proper. *Butler v. Manhattan R. Co.*, 53 N. Y. S. R. 664.

70. Physical pain and suffering.*—

(1) *Generally*.—In assessing the damages recoverable for personal injuries, the jury may and should consider as an element of such damages the physical pain and suffering caused by or resulting from such injuries. *Mobile & O. R. Co. v. George*, 94 Ala. 199. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818. *Western & A. R. Co. v. Drysdale*, 51 Ga. 644, 7 Am. Ry. Rep. 343. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235. *Chicago & E. I. R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590, 122 Ill. 461, 13 N. E. Rep. 145, 11 West. Rep. 51. *East St. Louis & C. R. Co. v. Frazier*, 26 Ill. App. 437.—QUOTING *Chicago, R. I. & P. R. Co. v. Barrett*, 16 Ill. App. 17.—*Indiana Car Co. v. Parker*, 100 Ind. 181. *Pittsburgh, C. & St. L. R. Co. v. Sponier*, 8 Am. & Eng. R. Cas. 453, 85 Ind. 165. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325. *McMahon v. Northern C. R. Co.*, 39 Md. 438. *Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 20; 9 S. W. Rep. 589. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 99. *Blair v. Chicago & A. R. Co.*, 89 Mo. 383, 1 S. W. Rep. 350. *Caples v. Central Pac. R. Co.*, 6 Nev. 265. *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541. *Klein v. Jewett*, 26 N. J. Eq. 474. *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260.—QUOTED IN *Koetter v. Manhattan El. R. Co.*, 36 N. Y. S. R. 611, 59 Hun 623, 13 N. Y. Supp. 458.—*Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196; *affirmed*, see 6 Alb. L. J. 198. *Ransom v. New York & E. R. Co.*, 15 N. Y. 415.—FOLLOWING *Theobald v. Railway Pass. Assurance Co.*, 26 Eng. L. & Eq. 432; *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437; 18 Q. B. 93; *Seeger v. Barkhamsted*, 22 Conn. 290; *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Linsley v. Bushnell*, 15 Conn. 225; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. (N. Y.) 425.—APPLIED IN *Murray v. Brooklyn C. R. Co.*, 27 N. Y. S. R. 280, 7 N. Y. Supp. 900. CRIT-

* See also HUSBAND AND WIFE, 23, 38.

* Pain and suffering as an element of damages for personal injuries, see note, 11 L. R. A. 45.

ICISED IN *Johnson v. Wells*, 6 Nev. 224. REVIEWED IN *Quinn v. Long Island R. Co.*, 34 Hun N. Y. 331; *Harding v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 72; *Towle v. Blake*, 48 N. H. 92.—*Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552. *Oliver v. North Pac. Transp. Co.*, 3 Oreg. 84. *Pittsburg, A. & M. P. R. Co. v. Donahue*, 70 Pa. St. 119. *Baker v. Pennsylvania Co.*, 142 Pa. St. 503, 21 Atl. Rep. 979. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591. *Robertson v. Cornelson*, 34 Fed. Rep. 716. *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. Rep. 15. *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep. 862. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476.

For pain and suffering there is not any standard for the measurement of the damages to be awarded by the jury. They should give whatever is a fair compensation, according to their intelligence and common sense. It is altogether improper for them to consider what they would take to have inflicted upon themselves injuries similar to those of the plaintiff. *Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258.

A plaintiff is entitled to recover for bodily suffering arising from injury to his person previous to the trial, and for such future suffering, lameness, or other inconvenience as, from the evidence, appears reasonably certain to result therefrom. *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580, 12 Am. Ry. Rep. 204.

The jury may take into account the probable length of plaintiff's life, in assessing damages for past and future sufferings, where his mental and physical condition has been shown and his recovery is probable. *Waterman v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 592, 82 Wis. 613, 52 N. W. Rep. 247, 1136.

In an action for injuries to a woman pregnant with child there can be no recovery for the death of the child and its premature birth as a result of the injuries, but there may be a recovery for the woman's suffering and impaired health resulting from the death and premature birth of the child, if it is shown that such death is due to the negligent injury received by her. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28

Pac. Rep. 1021.—DISTINGUISHING *Shartle v. Minneapolis*, 17 Minn. 308; *Barbee v. Reese*, 60 Miss. 906; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342.

(2) *Instructions*.—In a suit to recover for personal injuries it is proper, if the testimony so authorizes, for the jury to allow the plaintiff compensation for the pain and suffering occasioned him; and the court correctly instructed the jury that, in such cases, "the enlightened conscience of an impartial juror is the guide by which the measure of damages may be ascertained." *Western & A. R. Co. v. Abbott*, 74 Ga. 851.

And in such an action an instruction, on the measure of damages, that it is the jury's duty to consider the plaintiff's physical condition before and since the injuries, the physical and mental pain suffered on account of the injuries during the same time, the amount of future pain to arise therefrom, together with all other circumstances shown in evidence, and considering all the circumstances aforesaid, is proper. *Siddekum v. Wabash, St. L. & P. R. Co.*, 30 Am. & Eng. R. Cas. 640, 93 Mo. 400, 10 West. Rep. 277, 4 S. W. Rep. 701.

And where plaintiff at the time of the trial, three months after the accident, was still suffering from pains in his head, it was proper to instruct the jury that he was entitled to compensation therefor, and that they had a right to consider whether the injury was permanent or not. *Wilson v. Pennsylvania R. Co.*, 132 Pa. St. 27, 18 Atl. Rep. 1087.

The court in instructing the jury as to the elements of damage included as one of them the pain and suffering which the plaintiff "has undergone and may undergo." In a subsequent charge the pain and suffering were limited to "that already experienced and likely to be yet experienced." *Held*, that while the instruction was open to criticism in not bringing out with sufficient prominence the idea of compensation, yet on the whole it was not erroneous. *Lake Shore & M. S. R. Co. v. Frantz*, 39 Am. & Eng. R. Cas. 628, 127 Pa. St. 297, 18 Atl. Rep. 22.

71. Mental anguish.* — (1) *The rule*

* See also *ante*, 14, 40, 63; *post*, 80.

Damages for mental pain and anguish, see notes, 18 AM. & ENG. R. CAS. 297; 13 L. R. A. 859.

Mental anguish as an element of damages in actions for personal injuries, see notes, 8 L. R. A. 765; 7 AM. ST. REP. 534.

stated.—Mental pain or distress is a proper element in estimating damages for personal injuries. *Texas Mex. R. Co. v. Douglas*, 73 Tex. 325, 11 S. W. Rep. 333. *Mobile & O. R. Co. v. George*, 94 Ala. 199. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266. *Wallace v. Wilmington & N. R. Co.* (Del.) 18 Atl. Rep. 818. *Western & A. R. Co. v. Drysdale*, 51 Ga. 644, 7 Am. Ry. Rep. 343. *Chicago v. McLean*, 133 Ill. 148, 8 L. R. A. 765, 24 N. E. Rep. 527. *Louisville, N. A. & C. R. Co. v. Fulvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908. *Pittsburgh, C. & St. L. R. Co. v. Sponier*, 8 Am. & Eng. R. Cas. 453, 85 Ind. 165. *Baltimore & O. R. Co. v. Kean*, 28 Am. & Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325. *McMahon v. Northern C. R. Co.*, 39 Md. 438. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773. *Geweke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675. *Hyatt v. Hannibal & St. J. R. Co.*, 19 Mo. App. 287. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 99. *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541. *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196. *Harding v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 72. *Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552. *Houston & T. C. R. Co. v. Rand*, (Tex.) 9 Am. & Eng. R. Cas. 399. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591. *Robertson v. Cornelison*, 34 Fed. Rep. 716. *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep. 862. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476. *Waterman v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 592, 82 Wis. 613, 52 N. W. Rep. 247, 1136. *Sidekum v. Wabash, St. L. & P. R. Co.*, 30 Am. & Eng. R. Cas. 640, 93 Mo. 400, 10 West. Rep. 277, 4 S. W. Rep. 701.

And the anguish and pain are not restricted to that which arises from the bodily pain inflicted. *Houston & T. C. R. Co. v. Hollis*, 2 Tex. App. (Civ. Cas.) 169.

Where suffering in body and mind is the result of injuries caused by negligence it is proper to take it into consideration in estimating the amount of damages. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *affirming* 11 Ill. App. 386.

In Texas mental suffering is an element

of actual damages where serious bodily injury is inflicted; and where such injury threatens permanent disability and continues for a long time the jury are authorized to consider the suffering of both body and mind in assessing the damages, without direct proof of such suffering. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. Rep. 288.

(2) *Its extent and limits.*—The cases in which damages have been allowed for mental suffering resulting from injury to the person are those in which the mental distress is the incident to the bodily injury suffered by the distressed person, or those where there is injury to the reputation or property, in which pecuniary damage is shown, or where the act is such that the law presumes some damage, however slight, from the act complained of. *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563.—**OVERRULING** *So Relle v. Western Union Tel. Co.*, 55 Tex. 310.

Plaintiff may recover damages for pain and mental anguish caused by a personal injury, but the mental anguish for which damages are recoverable must be connected with a result from the injury; for anguish of mind wholly sentimental in its nature, such as that which arises from the contemplation of a disfigurement, cannot be considered by the jury to aggravate the amount of the damage. *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299.

Mental pain and suffering are properly considered as elements of damage, notwithstanding malice on the part of the defendant may not have been alleged, in the petition. *Porter v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454.—**EXPLAINING** *Flemington v. Smithers*, 2 C. & P. 292; *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437; *Canning v. Williamstown*, 1 Cush. (Mass.) 451.

(3) *An element of, or based upon, physical pain or injury.*—The general rule is "that pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity." *Morse v. Duncan*, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396.—**FOLLOWING** *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.

Mental suffering upon which to base an award of damages for personal injuries

must be connected with physical pain as one of its elements, or it must be the proximate result of some physical injury. *Crawson v. Western Union Tel. Co.*, 47 *Fed. Rep.* 544.—NOT FOLLOWING *Gulf, C. & S. F. R. Co. v. Levy*, 59 *Tex.* 542. QUOTING *Western Union Tel. Co. v. Rogers*, (Miss.) 9 *So. Rep.* 823.—*Salina v. Trosper*, 27 *Kan.* 544.

And anxiety of mind about the safety of others who may be in danger of injury from the same cause cannot be considered. *Keyes v. Minneapolis & St. L. R. Co.*, 36 *Minn.* 290, 30 *N. W. Rep.* 888. — APPROVING *Graves v. Moses*, 13 *Minn.* 335; *Gillett v. Western R. Corp.*, 8 *Allen (Mass.)* 560; *Wheeler v. Townshend*, 42 *Vt.* 15; *Shelbyville L. B. R. Co. v. Newark*, 4 *Ind.* 471; *New Haven S. B. & T. Co. v. Vanderbilt*, 16 *Conn.* 420.

Mental suffering is not readily distinguishable from physical suffering, and to become an element of damages it must be based on bodily injury, or the injury by which it is produced must be attended by circumstances of malice, insult, or oppression. *Dorrah v. Illinois C. R. Co.*, 30 *Am. & Eng. R. Cas.* 576, 65 *Miss.* 14, 7 *Am. St. Rep.* 629, 3 *So. Rep.* 36.

(4) *Illustrations—Instructions—Questions of fact.*—Where a conductor in ejecting a passenger from a train uses insulting or abusive language, such person may recover damages therefor on account of the injury to his feelings, but not damages because the words used by the conductor tended to bring him into ignominy or disgrace. *Southern Kan. R. Co. v. Hinsdale*, 34 *Am. & Eng. R. Cas.* 256, 38 *Kan.* 507, 16 *Pac. Rep.* 937.

Mental anguish may be considered as an element of damages in an action by a widow for delay in the shipment of her husband's body to the place of interment. *Hale v. Bonner*, 49 *Am. & Eng. R. Cas.* 135, 82 *Tex.* 33, 17 *S. W. Rep.* 605.—APPLYING *Western Union Tel. Co. v. Simpson*, 73 *Tex.* 422.

It would be better to omit any instruction to the jury touching sorrow resulting from a miscarriage as an element of damage, pain and suffering being sufficiently comprehensive. *Augusta & S. R. Co. v. Randall*, 85 *Ga.* 297, 11 *S. E. Rep.* 706.

When the basis for damages alleged in a petition as a result of defendant's negligence "is great suffering, permanent ill health, and physical weakness" of the plaintiff, a charge which includes "physical

and mental disability or weakness occasioned by the injuries," as matters on which a verdict for damages may be based, is not error. *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 *Tex.* 623, 8 *S. W. Rep.* 673.

It is a question of fact for the jury to determine whether there was mental suffering connected with the personal injuries of the plaintiff. *Harding v. New York, L. E. & W. R. Co.*, 36 *Hun (N. Y.)* 72.—APPLYING *Matteson v. New York C. R. Co.*, 62 *Barb.* 364. REVIEWING *Hamilton v. Third Ave. R. Co.*, 53 *N. Y.* 25; *Quinn v. Long Island R. Co.*, 34 *Hun* 332; *Ransom v. New York & E. R. Co.*, 15 *N. Y.* 415.

In an action to recover damages for personal injuries caused by negligence it is a question for the jury whether or not there was mental anguish resulting from the injuries; and if there was the plaintiff is entitled to be compensated for it. *Matteson v. New York C. R. Co.*, 62 *Barb. (N. Y.)* 364.—APPLIED IN *Harding v. New York, L. E. & W. R. Co.*, 36 *Hun (N. Y.)* 72.

In an action to recover damages for a personal injury from being struck by a train of passing cars the court instructed the jury, in case they found for plaintiff, in assessing damages they might take into consideration plaintiff's pain and anguish of mind consequent upon such injury. *Held*, that there was no error. But mental anguish not connected with bodily injury is not proper to be considered in such a case. *Indianapolis & St. L. R. Co. v. Stables*, 62 *Ill.* 313, 7 *Am. Ry. Rep.* 365.—EXPLAINING *Illinois C. R. Co. v. Sutton*, 53 *Ill.* 397; *Canning v. Williamstown*, 1 *Cush. (Mass.)* 451.

Where one sues a company for creating a nuisance by throwing dead animals in a stream whence his family obtained their water, there can be no recovery for mental or bodily suffering of plaintiff's wife or children, nor for his own mental suffering caused by their suffering. *Gulf, C. & S. F. R. Co. v. Reed*, (Tex. Civ. App.) 22 *S. W. Rep.* 283.

72. Peril and fright.*—Fright may be treated as an element of the injury for which damages, by way of compensation, should be allowed. *Sherwood v. Chicago & W. M. R. Co.*, 44 *Am. & Eng. R. Cas.* 337, 82 *Mich.* 374, 46 *N. W. Rep.* 773; *former appeal*

* Peril and fright as elements of damage. see note, 37 *AM. & ENG. R. CAS.* 193.

88 Mich. 108.—FOLLOWING *Geveke v. Grand Rapids & I. R. Co.*, 57 Mich. 596; *Power v. Harlow*, 57 Mich. 116.—*Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675.

The fright of the plaintiff directly produced by the wrongful act, and contributing to the consequent increase of sickness, and the trouble, inconvenience, and peril and fatigue of the necessitated return to the station beyond which she had been carried, were elements of damage proper to be considered by the jury, in connection with her aggravated physical suffering. *East Tenn., V. & G. R. Co. v. Lockhart*, 79 Ala. 315.

It is proper for the jury to consider the hazard and jeopardy in which the plaintiff was placed—in other words, the peril to his life—and allow such damages as resulted therefrom in determining the damages which he sustained, and his suffering in mind and body by reason of the injury. *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. Rep. 178.

Where a physical injury is the natural result of the negligence of a defendant, although it proceeds from and is the result of a mental shock caused directly by the negligent act, the defendant is liable if the jury might find from the evidence that the shock caused the injury. *Mitchell v. Rochester R. Co.*, 4 Misc. (N. Y.) 575.—QUOTING *Ewing v. Pittsburgh, C. & St. L. R. Co.*, 147 Pa. St. 40. REVIEWING *Pollett v. Long*, 56 N. Y. 200; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469.

But mere fright, unaccompanied by any injury resulting therefrom, cannot be the subject of damages. *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. Rep. 453.

A woman, being obliged to throw herself on a railroad platform to escape being struck by a piece of timber projecting from a car in motion, had her health impaired by the fright thus occasioned. *Held*, she was entitled to recover damages for such impairment of her health. *Buchanan v. West Jersey R. Co.*, 41 Am. & Eng. R. Cas. 59, 52 N. J. L. 265, 19 Atl. Rep. 254.

Plaintiff was nonsuited on the ground that no action would lie for a negligent act of a defendant where the only injury produced as the result of said act is fright or apprehension of danger, although such

fright is followed by a physical injury which is the result of it. *Held*, that the ruling was erroneous; that the case should have gone to the jury, as on the facts it would have been competent for them to find that the negligence of the defendant was the proximate cause of plaintiff's injuries. *Mitchell v. Rochester R. Co.*, 4 Misc. (N. Y.) 575.—DISAPPROVING *Victorian Ry. Com'rs v. Coultas*, L. R. 13 App. Cas. 222. DISTINGUISHING *Lehman v. Brooklyn City R. Co.*, 47 Hun (N. Y.) 355.

73. Expenses resulting from injury.*—(1) *Generally*.—A plaintiff in a negligence case is entitled to recover, as a part of his damages, his reasonable and necessary outlays in an attempt to be cured of the injuries resulting from the negligence of the defendant. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908. *Geveke v. Grand Rapids & I. R. Co.*, 22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589. *Oliver v. North Pac. Transp. Co.*, 3 Oreg. 84. *Baker v. Pennsylvania Co.*, 142 Pa. St. 503, 21 Atl. Rep. 979. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476.

The jury may consider the expenses of the cure and the probable cost of future treatment or nursing when the injury is permanent. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.

In seeking to recover for a broken arm, in the absence of evidence with reference to the amount of expenses incurred by the plaintiff, the court should not charge the jury that they might consider the necessary expenses resulting from the injury in making the assessment of the damages. *North Chicago St. R. Co. v. Cook*, 43 Ill. App. 634.

Where, in a negligence case brought by a married woman, it appears that sole credit was given to her for the expenses incident to her sickness, she can recover the amount as part of her damages, whether actually

* See also *ante*, 47; and CARRIAGE OF PASSENGERS, 626; CHILDREN, ETC., 184.

paid when the suit was commenced or not. *Lacas v. Detroit City R. Co.*, 92 Mich. 412, 52 N. W. Rep. 745.

In an action on the case for damages for personal injuries, it was error to charge the jury to take into consideration the probable expenses of conducting the suit beyond the amount for taxable costs and attorney's fees. *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. (N. Y.) 425.—FOLLOWED IN *Ransom v. New York & E. R. Co.*, 15 N. Y. 415. QUOTED IN *Loram v. Second Ave. R. Co.*, 11 N. Y. S. R. 652.

Where it appears that a railroad was so constructed as to throw surface water back on plaintiff's premises, causing sickness in his family, he is entitled to recover the expenses incurred thereby, and in such case an instruction to the jury that they may allow whatever, under the evidence, plaintiff is entitled to, is not objectionable as telling the jury that they may allow for physical and mental anguish endured by plaintiff and the members of his family. *San Antonio & A. R. Co. v. Gwynn*, 4 Tex. App. (Civ. Cas.) 338, 15 S. W. Rep. 509.

(2) *Nursing*.—Nursing expenses, as well as medical expenses, may properly be considered by the jury in assessing plaintiff's amount of recovery for personal injuries. *Chicago & E. R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590, 122 Ill. 461, 13 N. E. Rep. 145, 11 West. Rep. 51. *Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552.

Compensation may be allowed for expenses incurred for nursing, where there is evidence that the plaintiff was in bed for five months and was nursed by ladies about the house, who were constant in their attendance. The jurors may measure the value of such services by their own knowledge and experience, and detailed proof of their value is not required. *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. Rep. 817.—DISTINGUISHING *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347.—REVIEWED IN *Smith v. Chicago & A. R. Co.*, 108 Mo. 243.

(3) *Medical attendance*.—Expenses for medical attention are proper elements of damages in an action for personal injuries. *Hulehan v. Green Bay, W. & St. P. R. Co.*,

31 Am. & Eng. R. Cas. 322, 68 Wis. 520, 32 N. W. Rep. 529. *Chicago & E. R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590, 122 Ill. 461, 13 N. E. Rep. 145, 11 West. Rep. 51. *Indiana Car Co. v. Parker*, 100 Ind. 181. *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196; affirmed, see 6 Alb. L. J. 198. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211. *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580, 12 Am. Ry. Rep. 204. *Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552. *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. Rep. 15.

Recovery for services necessary to ameliorate the condition and suffering of the plaintiff may be had, although gratuitously rendered, when a recovery for negligence of defendant can be had. *Pennsylvania Co. v. Marion*, 27 Am. & Eng. R. Cas. 132, 104 Ind. 239, 3 N. E. Rep. 874.

An instruction to compensate plaintiff if there were expended "large sums of money for professional services, physicians, and nurses," does not authorize the jury to allow for professional services other than those of physicians and nurses. *Duke v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 221, 99 Mo. 347, 12 S. W. Rep. 636.

But the plaintiff can only recover the reasonable value of his physician's services, and not the amount of the bill made out by him and based upon the possibilities of a prospective lawsuit. *Gulf, C. & S. F. R. Co. v. Campbell*, 41 Am. & Eng. R. Cas. 100, 76 Tex. 174, 13 S. W. Rep. 19.

Where a passenger injured while on the train calls a physician, and in a suit against the company claims to recover, among other things, for the cost of the medical attendance, there can be no allowance beyond the ordinary charge for such services. Nothing can be allowed because it is expected at the time that there will be a lawsuit and that the doctor will be called as an expert witness. *Gulf, C. & S. F. R. Co. v. Campbell*, 41 Am. & Eng. R. Cas. 100, 76 Tex. 174, 13 S. W. Rep. 19.

(4) *Medicines*.—The plaintiff in a personal-injury case is entitled to be compensated for the value of the medicines necessarily purchased and used in caring for himself properly in his injured condition. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564.

A plaintiff is entitled to recover the value of drugs used for sickness in his family, caused by a pond made by a railroad in

* See also CHILDREN, ETC., 184.

† See also CHILDREN, ETC., 183.

damming a stream. *Central R. & B. Co. v. Wood*, 51 Ga. 515, 8 Am. Ry. Rep. 9.

The defendant's counsel asked the court to charge "that the jury cannot upon the testimony in the case, allow damages for medicines, lotions, or medical material." *Held*, that the request, if charged, would have been ambiguous; that a party should not have a right to avail himself of an exception to a ruling upon a matter unnecessarily introduced by himself only for the sake of the exception. *West v. Manhattan R. Co.*, 16 N. Y. S. R. 886.

74. Loss of time resulting from injury.*—It is proper to take into consideration, in estimating damages for personal injuries, plaintiff's loss of time, although there are neither allegations nor direct proof thereof, but where the injury suffered necessarily imports or raises the implication of such a loss. *Chicago City R. Co. v. Hastings*, 35 Ill. App. 434.

In assessing damages for personal injuries the amount of time lost during which plaintiff was prevented from attending to his usual vocation is material, and should be considered by the jury. *Clifford v. Dam*, 12 J. & S. (N. Y.) 391. — FOLLOWING *Walker v. Erie R. Co.*, 63 Barb. 260.—*Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235. *Chicago & E. R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590, 122 Ill. 461, 13 N. E. Rep. 145, 11 West. Rep. 51. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908. *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773. *Stephens v. Hannibal & St. J. R. Co.*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589. *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260. *Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552. *Oliver v. North Pac. Transp. Co.*, 3 Oreg. 84. *Baker v. Pennsylvania Co.*, 142 Pa. St. 503, 21 All. Rep. 979. *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580, 12 Am. Ry. Rep. 204. *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591.

The jury may consider the loss of time up to the verdict and the probable future loss or incapacity to do as profitable labor

as before, provided the injury is irremedial. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.

The plaintiff should be compensated for his inability to give his business the proper attention by reason of his being injured. The lawful time during which he suffers pecuniary loss consequent upon his being unable to attend to his business, forms a proper item of the remuneration to be made him by the jury. *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260.—APPLIED IN *Nash v. Sharpe*, 19 Hun (N. Y.) 365; *Howard Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. Rep. 665. FOLLOWED IN *Clifford v. Dam*, 12 J. & S. (N. Y.) 391.

Plaintiff proved that he was engaged in business at the time of the injury, but had not been able to attend to it since; he did not show what his business was, or the value of his time, or any facts from which the value could be estimated. *Held*, that he was not entitled to recover compensation for the time lost. *Leeds v. Metropolitan Gas-light Co.*, 90 N. Y. 26.—APPLIED IN *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370. FOLLOWED IN *Klein v. Second Ave. R. Co.*, 22 J. & S. (N. Y.) 164.

A charge that plaintiff should recover compensation "for his being compelled to be away from his business for the time he says he was confined to his bed, although there is no evidence that he has lost anything in consequence of his absence," is not erroneous, where the court also expressly charges the jury that they were not to consider any injury to the business or loss of time or of services, and that nothing was to be allowed for loss of time. *Lee v. Manhattan R. Co.*, 21 J. & S. (N. Y.) 260.

III. ASSESSMENT AND RECOVERY.

1. Rules of Pleading Relative to Damages.*

75. General or actual damages, necessarily resulting, need not be specially pleaded.—In an action for personal injuries all actual damages, resulting naturally from the act complained of, may be recovered under a general averment of damage. *Texas & P. R. Co. v. Kane*, 15 Am. & Eng. R. Cas. 218, 2 Tex. App. (Civ. Cas.) 24.

For the law implies such damages, and

* See also CARRIAGE OF PASSENGERS, 628.

* See also ante, 34.

proof is only necessary to show the extent and amount. *Texas & P. R. Co. v. Curry*, 21 *Am. & Eng. R. Cas.* 448, 64 *Tex.* 85.

General damages are such as the law implies, or presumes, to have occurred from the wrong complained of, and they need not be pleaded. In such cases the wrong itself fixes the right of action. *Brown v. Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 87, 99 *Mo.* 310, 12 *S. W. Rep.* 655. *Vanderslice v. Newton*, 4 *N. Y.* 130.

The rule that where the declaration contains no specifications of the nature and kind of damages claimed, only such as naturally and proximately arise out of the act complained of can be recovered, does not apply in actions for tort. *Alabama & V. R. Co. v. Hanes*, 69 *Miss.* 160, 13 *So. Rep.* 246.—REVIEWING *Murdock v. Boston & A. R. Co.*, 133 *Mass.* 15; *Walsh v. Chicago, M. & St. P. R. Co.*, 42 *Wis.* 23.

Where an employé sues his company for a personal injury, such actual damages as result naturally from the act complained of may be recovered under a general averment of damages, and need not be specially pleaded. It is, therefore, proper to admit evidence of anything that goes to show general damages. *Texas & P. R. Co. v. Kane*, 15 *Am. & Eng. R. Cas.* 218, 2 *Tex. App. (Civ. Cas.)* 24.

76. Special damages must be specially pleaded.—(1) *The rule stated.*—Special damages must be alleged as well as proved. *Schmitt v. Dry Dock, E. B. & B. R. Co.*, 2 *N. Y. City Ct.* 359.

Damages not the necessary result of the act complained of, and therefore not implied by law, must be specially pleaded. *Spencer v. St. Paul & S. C. R. Co.*, 21 *Minn.* 362. *Vanderslice v. Newton*, 4 *N. Y.* 130. *Laing v. Colder*, 8 *Pa. St.* 479.—QUOTED IN *Johnson v. Wells*, 6 *Nev.* 224.

But the rule is satisfied when from the facts alleged the law infers other facts; whatsoever the law infers from a given state of facts, the adverse party is presumed to know, and must take notice of it whether specially pleaded or not. *Texas & P. R. Co. v. Curry*, 21 *Am. & Eng. R. Cas.* 448, 64 *Tex.* 85.—DISTINGUISHING *International & G. N. R. Co. v. Irvine*, 5 *Tex. L. Rev.* 89.

Special damages are such as really took place, and are not implied by law. They are either superadded to general damages, from an act injurious in itself, or are such as arise from an act, not actionable in itself,

but injurious only in its consequences; they must be stated in the petition with a reasonable degree of particularity, and it must appear that the damage is the natural, though not necessary, consequence of the wrong. *Brown v. Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 87, 99 *Mo.* 310, 12 *S. W. Rep.* 655.

(2) *Illustrations.*—When a person seeks to recover damages for a personal injury, he must aver special damage in order to recover any money expended by him or debt created on account of the injury. *South Covington & C. St. R. Co. v. Ware*, 27 *Am. & Eng. R. Cas.* 206, 84 *Ky.* 267, 1 *S. W. Rep.* 493.

Allegations of special damages "that plaintiff had been put to great expense in procuring medicine, medical attendance, and care, in which he had expended the sum of \$500 for physicians' services, nurses, and help," and that he was "greatly and permanently injured, suffered great physical and mental pain, and became sore, sick, lame, and languishing," are not sufficiently specific to admit testimony of any permanent injury. *Kalmbach v. Michigan C. R. Co.*, 50 *Am. & Eng. R. Cas.* 15, 87 *Mich.* 509, 49 *N. W. Rep.* 1082.

Evidence that the plaintiff in an action to recover damages for personal injuries hired others to work in his place, and that he paid them a certain sum, is inadmissible in the absence of an allegation alleging special damages thereby. *Gumb v. Twenty-third St. R. Co.*, 43 *Am. & Eng. R. Cas.* 115, 114 *N. Y.* 411, 21 *N. E. Rep.* 997, 1 *P. S. R.* 748; reversing 21 *J. & S. R.* 4, 1 *N. Y. S. R.* 715.

When, for the purpose of explaining the existence of mental distress, or of enhancing the amount of the damages by enlarging its degree, it is intended to offer any evidence beyond the trespass or act of physical violence complained of, a proper predicate in the pleadings must be laid. *Gulf, C. & S. F. R. Co. v. Hurley*, 74 *Tex.* 593, 12 *S. W. Rep.* 226.

In an action for injuries alleged to have been received by "shock," proof of the plaintiff's nervous condition is mere evidence of the effects of the "shock" to be considered by the jury in determining its severity, and the rules of pleading do not require that all the effects that may follow from the infliction of a particular injury shall be set forth in the declaration. *Chi-*

cago, B. & Q. R. Co. v. Sullivan, (Ill.) 17 N. E. Rep. 460.

From the mere fact that, by their verdict, the jury assessed the plaintiff's damages at a specified sum, "plus" another specified sum, which latter amount was the same as that demanded in the complaint for special damages, it is not to be conclusively inferred that this was awarded by the jury as special damages. *Bishop v. St. Paul City R. Co., 48 Minn. 26, 50 N. W. Rep. 927.*

77. Damages not alleged cannot be recovered—(1) *The rule stated.*—Under a declaration containing no averment of the aggravation of existing physical ailments by the injury complained of, it is error to allow damages therefor. *Fuller v. Mayor, etc., of Jackson, 92 Mich. 197, 52 N. W. Rep. 1075.*

Evidence of loss of time as an element of damages is inadmissible in an action for personal injuries founded on defendant's negligence, without a special averment to that effect in the petition. *Slaughter v. Metropolitan St. R. Co., 58 Am. & Eng. R. Cas. 604, 116 Mo. 269, 23 S. W. Rep. 760.*

Where the evidence of such loss of time is excluded because of the absence of the necessary averments in the petition, an instruction authorizing damages therefor is error. *Slaughter v. Metropolitan St. R. Co., 58 Am. & Eng. R. Cas. 604, 116 Mo. 269, 23 S. W. Rep. 760.*

(2) *Illustrations.*—The declaration only claimed for an injury to plaintiff's leg, caused by its being struck by a steel rail, which bounded back from the car upon which he was assisting in loading it. Upon the trial plaintiff was asked if there was anything on his hip indicating the force of the blow, which question was objected to because the declaration only claimed for an injury to plaintiff's leg; but he was permitted to answer the question on the statement of plaintiff's counsel that the testimony was offered for the purpose of showing the force of the blow, and that he desired the court to instruct the jury that they could not give any damages for an injury to the hip; which action of the court is sustained. *Palmer v. Michigan C. R. Co., 93 Mich. 363, 53 N. W. Rep. 397.*

The plaintiff was a manufacturing dress-maker, but the complaint contained no claim for damages because of inability to carry on his business after the accident. He was allowed to prove, subject to objection,

3 D. R. D.—46.

that he was prevented by the disability the accident produced from carrying on his business. *Held, error. Saffer v. Dry Dock, E. B. & B. R. Co., 24 N. Y. S. R. 210, 53 Hun 629, 2 Silo. Sup. Ct. 343, 5 N. Y. Supp. 700.*

Where attorney's fees or expense incurred by plaintiff in attending court to prosecute a suit are not alleged in the proceedings or included in the evidence as elements of damage, a request by the defendant to charge that the jury should not include in their estimate of actual damages such expense is properly refused. *Missouri Pac. R. Co. v. Mitchell, 41 Am. & Eng. R. Cas. 224, 75 Tex. 77, 12 S. W. Rep. 810.*

It was error to render judgment for damages for the alleged cost of constructing ditches and drains along the right of way which the company failed to provide, when the petition alleged no actual pecuniary loss, and failed to allege that the plaintiff had constructed or paid for or expended labor on them. In such a case damages for the cost anticipated in constructing the drains and ditches cannot be awarded. *International & G. N. R. Co. v. Pape, 62 Tex. 313.*—DISTINGUISHED IN *Texas & S. R. Co. v. Meadows, 39 Am. & Eng. R. Cas. 29, 73 Tex. 32, 3 L. R. A. 565, 11 S. W. Rep. 145.*

A plaintiff cannot recover more for any particular item of damages than he alleges in his petition he sustained; and when the allegation was that his pasture had been damaged \$50 he could not recover more than that sum by proof of \$200 or \$300 damage to it. *Gulf, C. & S. F. R. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285.*

78. Alleging the consequences of the injury.—Where damages for loss of time are claimed because of injuries causing permanent disability it is not necessary that the petition allege the character of the plaintiff's occupation and the amount of his earnings to authorize proof of such facts upon the trial. *Flanagan v. Baltimore & O. R. Co., 83 Iowa 639, 50 N. W. Rep. 60.*

The declaration stated the circumstances of the injury and that plaintiff's arms and legs were broken, and then alleged that plaintiff "remained from that time in a sick, sore, wounded, bruised, and injured condition, so that he is maimed and injured for life." *Held,* that this sufficiently set out that plaintiff sought damages for sickness and disorder and their attendant expenses.

and that evidence was properly admitted of the fact that plaintiff was, after the accident, subject to convulsions, fits, etc., and was injured as to his mind. *Keyser v. Chicago & G. T. R. Co.*, 31 *Am. & Eng. R. Cas.* 399, 66 *Mich.* 390, 10 *West. Rep.* 646, 33 *N. W. Rep.* 867.

An allegation that plaintiff, by reason of personal injuries, has been and is sick, lame, and sore, and unfitted for manual labor, and has suffered great pain of body and mind, is sufficient to admit evidence that the injury caused nervous prostration, spinal irritation, and torpidity of the liver, and is sufficient to apprise defendant of what plaintiff may be expected to prove. *Babcock v. St. Paul, M. & M. R. Co.*, 36 *Minn.* 147, 30 *N. W. Rep.* 449.

An allegation in a petition for damages for injuries caused by the derailment of a train, that by the derailment the plaintiff was put to great inconvenience and delay; that he was expected at a certain place at a certain day, but was unable to reach it; that the weather was bitterly cold, and the place of accident was not near any house, and he was forced to walk to a town for shelter and suffered greatly thereby, and that by reason of said inconvenience and delay he was damaged to the sum of, etc., is too indefinite to warrant the recovery of any sum for inconvenience. *Missouri Pac. R. Co. v. Mitchell*, 41 *Am. & Eng. R. Cas.* 224, 75 *Tex.* 77, 12 *S. W. Rep.* 810.

A Comurrer was properly overruled where the petition alleged that prior to plaintiff's injuries he earned \$1500 per year, and by his injury was made a cripple for life, and incapacitated from ever pursuing his occupation of stockman, which was the only business for which he was qualified; that he was forty-six years, in good health, and would probably live twenty-five years longer. It was proper to show that he was engaged in a particular business, and the loss from incapacity to pursue it. *Galveston, H. & S. A. R. Co. v. Cooper*, 2 *Tex. Civ. App.* 42, 20 *S. W. Rep.* 990.

In a suit for bodily injury plaintiff can allege the resulting necessity for a dissolution of a partnership of which he was a member, for the purpose of showing how far the injury disabled him from pursuing his ordinary occupation. If a plaintiff sought damages based upon such a dissolution a question would arise as to the admissibility of evidence, and it would become necessary

to decide whether the dissolution was the proximate result of the injury; but when he alleged the dissolution merely to show the extent to which he was disabled no such question could arise. *International & G. N. R. Co. v. Irvine*, 23 *Am. & Eng. R. Cas.* 518, 64 *Tex.* 529.

79. — its permanency.—An allegation in the complaint that the injuries are permanent is not necessary to authorize the admission of evidence as to their permanency. *Rosevelt v. Manhattan R. Co.*, 13 *N. Y. Supp.* 598, 37 *N. Y. S. R.* 894.

An allegation that the plaintiff has been permanently disabled from labor is insufficient to permit proof of loss of earnings. *Coontz v. Missouri Pac. R. Co.*, 115 *Mo.* 669, 22 *S. W. Rep.* 572.

80. Averments to warrant exemplary damages.*—Where a party intends to prove malice to affect damages he must expressly aver the same. *Johnson v. Chicago, R. I. & P. R. Co.*, 51 *Iowa* 25.

Whether the damages claimed are actual or exemplary must be stated in the complaint, and to the damages as stated the testimony must be confined and the jury restricted. Exemplary damages are proper where the invasion of the rights of a person is characterized by violence, fraud, malice, wantonness, or reckless disregard of social or civil rights. *Spellman v. Richmond & D. R. Co.*, 35 *So. Car.* 475, 14 *S. E. Rep.* 947.—**APPLYING** *Palmer v. Charlotte, C. & A. R. Co.*, 3 *So. Car.* 597; *Hall v. South Carolina R. Co.*, 28 *So. Car.* 261; *Quinn v. South Carolina R. Co.*, 29 *So. Car.* 381. **QUOTING** *Philadelphia, W. & B. R. Co. v. Quigley*, 21 *How. (U. S.)* 207.

There can be no recovery of exemplary damages unless the complaint contains averments which, if proven, will entitle the party to such damages; so where a complaint only contains averments of actual damages, it is error for the court to instruct the jury as to the law relating to exemplary damages. *Campbell v. Houston & T. C. R. Co.*, 2 *Tex. Unrep. Cas.* 473.

While it is no doubt the better practice, where both actual and exemplary damages are sought, to claim them by separate allegations in the nature of distinct counts, yet the court is not willing to say that it is reversible error in the trial court to overrule a special exception to a petition, which does

* See also **DEATH BY WRONGFUL ACT, 147.**

not state the different claims separately. *Texas & P. R. Co. v. Pollard*, 2 *Tex. App. (Civ. Cas.)* 424.

Where plaintiff prayed judgment for \$6 actual damages and \$2000 exemplary damages, under allegations in his petition of facts warranting a recovery for actual damages only, and the court by his charge limited the recovery to actual damages merely, a verdict for \$391 for actual damages should not be set aside, as it is not the name the pleader gives the facts stated which makes them actual or exemplary, but it is the effect the law places on them which makes them the one or the other. *International & G. N. R. Co. v. Gordon*, 72 *Tex. App.* 44, 11 *S. W. Rep.* 1033.

81. Necessity of averments as to physical and mental suffering.—

Where bodily injuries are alleged in the petition and proof thereof made upon the trial, and the person injured is the plaintiff, physical pain and mental anguish are proper elements of damage, though not stated in the petition. *Brown v. Hannibal & St. J. R. Co.*, 42 *Am. & Eng. R. Cas.* 87, 99 *Mo. App.* 310, 12 *S. W. Rep.* 655.

Evidence of mental suffering, which is inseparable from bodily injury, is admissible without allegation of special damages. *Chicago v. McLean*, 133 *Ill.* 148, 8 *L. R. A.* 765, 24 *N. E. Rep.* 527.

Where a passenger sues for being assaulted by a conductor and for being unlawfully put off the train, it is not error to instruct that plaintiff was entitled to a fair and reasonable compensation for the pain and suffering, both mental and physical, which he had endured, where there is no allegation of mental pain as a recovery for mental suffering may be had as an incident to physical pain. *Caldwell v. Central Park, N. & E. R. Co.*, 27 *N. Y. Supp.* 397, 57 *N. Y. S. R.* 489, 7 *Misc.* 67.

82. General denial—Partial defense.—

Where there are two counts in a declaration, one based upon the contract to safely carry and the other for violations of the contract by the carrier's servant, and the case is tried upon the pleas of not guilty and non-assumpsit, a recovery on the first count entitles the plaintiff to actual damages only. *Springer Transp. Co. v. Smith*, 16 *Lea (Tenn.)* 498, 1 *S. W. Rep.* 280.

In an action for damages to real property caused by defendant's breach of the contract in the manner of locating and building

its road thereon, where the complaint alleges plaintiff's title in fee simple, a general denial puts such title in issue. *Hutchinson v. Chicago & N. W. R. Co.*, 41 *Wis.* 541.

A partial defense to an action or in mitigation of the damages claimed therein ought to be pleaded in the answer as a distinct defense; and an allegation that the defendants cut and removed certain timber from alleged public land, believing that it was the land of the Northern Pac. R. Co., from which they had a license, is such a defense. Where the damages claimed in the complaint are based, not only on the value of the timber in the standing tree, but also the value bestowed on the same in converting it into lumber and putting it into the market. *United States v. Ordway*, 12 *Sawyer (U.S.)* 275, 30 *Fed. Rep.* 30.

2. Rules of Evidence.*

83. What evidence is admissible, generally.—

In a suit for injury to a car by a collision through defendant's fault, evidence is competent of the approximate cost of repairing it, and the difference in its value as it was after it was repaired and as it was before it was injured. *New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 35 *Am. & Eng. R. Cas.* 283, 116 *Ind.* 60, 18 *N. E. Rep.* 182, 15 *West. Rep.* 548.

Where it appears that plaintiff, who had been thrown from a car, is suffering from progressive and incurable spinal trouble as the result of the injury, it is proper to allow him to show the condition of his health for some time prior to the injury. *Cooper v. St. Paul City R. Co.*, 58 *Am. & Eng. R. Cas.* 598, 54 *Minn.* 379, 56 *N. W. Rep.* 42.

When the general statement of the matters from which the alleged injury results is sufficiently specific, all things which are the natural result of the act made the basis for damages can properly be proved. *Texas & P. R. Co. v. Durrett*, 57 *Tex.* 48.

Where it is sought to recover for the destruction of matured but ungathered cotton, it is competent to prove that the cotton destroyed would have yielded three bales to the acre, at the market value of \$40 each, less the cost of gathering, ginning, and baling, which would amount to \$10 per bale; but if the cotton had been immature, then such evidence would have only been

* See also *ante*, 55, 36.

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conjectural, and would not have been competent as to the market value. *Gulf, C. & S. F. R. Co. v. Summers*, 3 *Tex. App. (Civ. Cas.)* 417. *Gulf, C. & S. F. R. Co. v. Sumrow*, 4 *Tex. App. (Civ. Cas.)* 579, 18 *S. W. Rep.* 135.

84. What is inadmissible.—While it is proper to prove the age, habits, health, occupation, expectation of life, ability to labor, and the probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, it is improper to allow proof of a particular possibility, or even probability, of any increase of wages by appointment to a higher public office, especially where the appointment is somewhat controlled by political reasons. *Richmond & D. R. Co. v. Allison*, 48 *Am. & Eng. R. Cas.* 101, 86 *Ga.* 145, 12 *S. E. Rep.* 352.

The city of Fort Scott subscribed \$75,000 of stock in the Missouri, K. & T. R. Co., and issued \$75,000 of its bonds in payment therefor. It also, by virtue of the said contract, issued to the said company \$25,000 of its bonds for the purchase of the right of way through the city, and grounds for machine-shops, engine-houses, etc. The subscription was made upon condition that the company should construct, within six months, a railroad from S., through F., to connect with the line running from J. in a southeasterly direction; that it should make this the great through line to the Indian Territory and Texas, and construct no other line of road south of F. in the same direction; and that it should make F. the end of a division, and erect machine-shops, etc., at F. before doing so at any other point southwest of S. on the through line of its road. The company complied with this contract, except that it did not make F. the end of a division, and did not erect the machine-shops, etc., there, but did so erect them at P. In an action by the city for breach of contract, testimony was admitted tending to show a decline in the population of F., and a depreciation in value of real estate through the city during a period commencing subsequently to the construction of the road, yet prior to the building of the shops at P., and ending after the fact of such building had become known at F. Held, that such testimony was improperly admitted, and that such matters did not enter into or form a part of

the proper measure of damages. *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 *Kan.* 435.

Testimony is objectionable if speculative, and tantamount to inquiry into profits not the direct and immediate fruits of the contract, but remote and uncertain, and it does not disclose the direct pecuniary loss of the plaintiff, which, in an action *ex contractu*, is the proper measure of damages. *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 *Kan.* 435.

Where the plaintiff in an action sues to recover damages for injuries to his wagon, evidence that a sum was expended for repairs thereto, is inadmissible in the absence of evidence that the repairs were proper, or worth the sum paid. *Gumb v. Twenty-third St. R. Co.*, 43 *Am. & Eng. R. Cas.* 315, 114 *N. Y.* 411, 21 *N. E. Rep.* 993, 23 *N. Y. S. R.* 748; reversing 21 *J. & S.* 466, 1 *N. Y. S. R.* 715.

85. Negligence of defendant must be affirmatively proved.—To entitle a plaintiff to damages for bodily pain, suffering, and pecuniary loss, the negligence of the defendant must be affirmatively shown. *Schneider v. Pennsylvania Co., (Pa.)* 3 *Atl. Rep.* 26.

86. Showing plaintiff's circumstances, condition in life, pursuits, etc.—(1) *When admissible.*—The injuries having disabled plaintiff for some time to carry on the business in which he was engaged, he may prove, as an element of his damages, "what he was making at the time he was injured." *Alabama G. S. R. Co. v. Frasier*, 93 *Ala.* 45, 9 *So. Rep.* 303.

Evidence of the amount of plaintiff's earnings is admissible, not as a basis of computation, but merely as a circumstance tending to show his capacity to earn money. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 87.—REVIEWED IN *Stafford v. Oskaloosa*, 64 *Iowa* 251.

Evidence is competent to show the condition of plaintiff's health, his aptitude and qualifications for business, and his habits of industry, or anything else affecting his prospective earnings or savings. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 87.

It was competent to show that plaintiff was dependent upon his earnings as tending to indicate the probable continuance of his industry. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 87.

In an action to recover for personal injuries, whereby the plaintiff, who was an

architect, was incapacitated from pursuing his business, evidence of the nature and extent of his business is competent to go to the jury; not as furnishing a measure of damages, but to guide them in the exercise of that discretion as to the amount of damages which, to a certain extent, is vested in a jury in such cases. *New Jersey Exp. Co. v. Nichols*, 33 *N. J. L.* 434; *affirming* 32 *N. J. L.* 166.

Inquiring into a plaintiff's age, earnings, past earnings, and kind of service are all competent as elements in considering the quantum of damages; but what were his accumulated earnings are immaterial. *Wallace v. Western N. C. R. Co.*, 41 *Am. & Eng. R. Cas.* 212, 104 *N. Car.* 442, 10 *S. E. Rep.* 552.—QUOTING *Phillips v. London & S. W. R. Co.*, 42 *L. T.* 6; *Nash v. Sharpe*, 19 *Hun (N. Y.)* 365.

Plaintiff claimed damages for loss of time occasioned by her disability to pursue her calling resulting from an injury caused by negligence of defendant's driver. *Held*, that it was competent for her to prove that she had a business of her own, and was a widow and compelled to earn her own living. *Corrigan v. Dry Dock, E. B. & B. R. Co.*, 14 *Daly (N. Y.)* 120, 6 *N. Y. S. R.* 243.

Before damages for future pecuniary loss from inability to earn a livelihood can be awarded, there should be proof of the plaintiff's circumstances, condition in life, his wage-earning power, and capacity. *Staal v. Grand St. & N. R. Co.*, 31 *Am. & Eng. R. Cas.* 21, 107 *N. Y.* 625, 1 *Silo. App.* 516, 13 *N. E. Rep.* 624, 11 *N. Y. S. R.* 352; *reversing* 36 *Hun* 208.

In seeking to recover for personal injuries the plaintiff may introduce evidence to prove the following facts:

The nature of his employment and his dependence thereon for support. *Moore v. Central R. Co.*, 47 *Iowa* 688.—REVIEWED IN *Stafford v. Oskaloosa*, 64 *Iowa* 251.—*Louisville, N. A. & C. R. Co. v. Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908. *Grand Rapids & I. R. Co. v. Martin*, 41 *Mich.* 667.

The nature of his business, and the value of his personal services in conducting it. *Lincoln v. Saratoga & S. R. Co.*, 23 *Wend. (N. Y.)* 425.—APPROVED IN *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 422, 94 *Mo.* 255, 13 *West. Rep.* 233, 7 *S. W. Rep.* 1; *Blair v. Milwaukee & P. du C. R. Co.*, 20 *Wis.* 262. FOLLOWED IN

McClain v. Brooklyn City R. Co., 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549. QUOTED IN *Hastings v. Steamer Uncle Sam*, 10 *Cal.* 341.

His occupation before the injury and the state of his health. *Reardon v. Missouri Pac. R. Co.*, 114 *Mo.* 384, 21 *S. W. Rep.* 731.

His condition and situation in life and that of his family. *Winters v. Hannibal & St. J. R. Co.*, 39 *Mo.* 468.—CRITICISED IN *Stephens v. Hannibal & St. J. R. Co.*, 38 *Am. & Eng. R. Cas.* 110, 96 *Mo.* 207, 9 *S. W. Rep.* 589. OVERRULED IN *Dayharsh v. Hannibal & St. J. R. Co.*, 103 *Mo.* 570.

His circumstances, condition in life, and pursuits. *Caldwell v. Murphy*, 1 *Duer (N. Y.)* 233.

That he had a wife and four children. *San Antonio & A. P. R. Co. v. Robinson*, 73 *Tex.* 277, 11 *S. W. Rep.* 327.

(2) *When inadmissible*.—Except in cases where the entire injury is to the peace, happiness, or feelings of the plaintiff, worldly circumstances should not be admitted or weighed in the ascertainment of damages. *Georgia R. Co. v. Homer*, 27 *Am. & Eng. R. Cas.* 186, 73 *Ga.* 251.—FOLLOWING *Higgins v. Cherokee R. Co.*, 73 *Ga.* 149.

In an action by the injured party to recover damages for personal injuries, the fact that the plaintiff has a family depending on him for support is wholly immaterial, having no relevancy to any point in issue. *Pennsylvania Co. v. Keane*, 143 *Ill.* 172, 32 *N. E. Rep.* 260.—APPLYING *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 *Ill.* 341.—*Chicago & A. R. Co. v. Few*, 15 *Ill. App.* 125.

Evidence that the plaintiff was married and as to the number and ages of his children is inadmissible in evidence in an action for personal injuries. *Mahaney v. St. Louis & H. R. Co.*, 108 *Mo.* 191, 18 *S. W. Rep.* 895. *Stephens v. Hannibal & St. J. R. Co.*, 38 *Am. & Eng. R. Cas.* 110, 96 *Mo.* 207, 9 *S. W. Rep.* 589.—APPROVED IN *Dayharsh v. Hannibal & St. J. R. Co.*, 103 *Mo.* 570.—*Dayharsh v. Hannibal & St. J. R. Co.*, 103 *Mo.* 570.—APPROVING *Stephens v. Hannibal & St. J. R. Co.*, 96 *Mo.* 207; *Pennsylvania Co. v. Roy*, 1 *Am. & Eng. R. Cas.* 225, 102 *U. S.* 451; *Kreuziger v. Chicago & N. W. R. Co.*, 73 *Wis.* 158; *Dreiss v. Friedrich*, 57 *Tex.* 70; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 *Ill.* 341. OVERRULING *Winters v. Hannibal & St. J. R. Co.*, 39 *Mo.*

468; *Conroy v. Vulcan Iron Works*, 75 Mo. 652.

But the admission of testimony by plaintiff as to the number and character of his family is harmless error where the court subsequently properly instructs the jury as to the measure of damages. *Johns v. Charlotte, C. & A. R. Co.*, 58 Am. & Eng. R. Cas. 175, 39 So. Car. 162, 17 S. E. Rep. 698.

Whatever may be the rule in cases of slander and of breach of promise of marriage, yet in a suit for damages for personal injury against a railroad company brought by the party himself, although the plaintiff may show the nature of his business and the value of his services in conducting it as grounds for estimating damages, yet his wealth or poverty is an immaterial issue. *Missouri Pac. R. Co. v. Lyde*, 11 Am. & Eng. R. Cas. 188, 57 Tex. 505.—APPLIED IN *Howard Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. Rep. 665.

87. Showing the extent of the injury.*—Where plaintiff sues to recover for injuries received by a derailment, the fact, nature, and extent of her injuries being controverted, she may testify that before and up to the time of the accident she had always enjoyed good health and her physical organs had discharged their functions naturally and regularly; may describe the manner in which she was jostled and tossed about before the car was turned over; and may state that "she could hardly get up," "was suffering great pain," "could not sleep afterwards unless she had some medicine to quiet her," "had not undertaken since to walk any great distance and could not walk any great distance," "that her menstruations had been irregular ever since she was hurt," etc. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

The plaintiff may show by witnesses how he habitually acted after the accident, for the purpose of establishing the extent of his injuries. *Winter v. Central Iowa R. Co.*, 80 Iowa 443, 45 N. W. Rep. 737.

Where an actionable wrong is shown, plaintiff may recover nominal damages from the mere fact of such wrong; but if compensatory damages are asked plaintiff must show data and means by which the jury can ascertain and fix the amount of damages. The jury cannot go by merely arbitrary conjecture. *Watts v. Norfolk & W. R.*

Co., (W. Va.) 57 Am. & Eng. R. Cas. 694, 19 S. E. Rep. 521.

The jury should consider from the evidence whether the injury is permanent or temporary, its effect upon the person injured, whether it was calculated to produce death or serious apprehension of death, loss of time, diminished ability to earn money by some employment familiar to the injured party, pain and suffering, including mental anguish and expenses caused by the injury. Concerning all these elements of damage evidence should be offered as far as practicable. *Gulf, C. & S. F. R. Co. v. Greenlee*, 23 Am. & Eng. R. Cas. 322, 62 Tex. 344.

Evidence is admissible respecting the health and condition of plaintiff before the injury as compared with the same consequent upon the injury. *McMahon v. Northern C. R. Co.*, 39 Md. 438.

88. Proof of the probable consequences of the injury.—(1) *The rule stated.*—An inquiry into the probable consequences of the injury, as transitory or permanent, is eminently proper. *Caldwell v. Murphy*, 1 Duer (N. Y.) 233. *Cook v. New York C. & H. R. R. Co.*, 17 N. Y. S. R. 353, 49 Hun 605, 1 N. Y. Supp. 711.—REVIEWING *Filer v. New York C. R. Co.*, 49 N. Y. 42; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. (N. Y.) 425; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305.—FOLLOWED IN *Gainard v. Rochester C. & B. R. Co.*, 18 N. Y. S. R. 692, 2 N. Y. Supp. 470.—See also *Marvin v. Manhattan R. Co.*, 21 J. & S. (N. Y.) 527.

Evidence as to the ulterior consequences which may result from personal injuries is inadmissible, unless there is such a degree of the probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. *Toser v. New York C. & H. R. R. Co.*, 1 Silv. App. (N. Y.) 371; reversing 38 Hun 100.—FOLLOWING *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305.—*Bailey v. Westcott*, 16 N. Y. S. R. 671, 4 N. Y. Supp. 482.

Any evidence tending to show the character and extent of the injury, its probable results, the likelihood of a recurrence of a disease caused by it, the evidence of an attending physician as to the probability of a recurrence of inflammation in the part injured, and his opinion as to the effect of the injury upon the general health of the person injured, is competent to enable the

* See also EVIDENCE, 28.

jury to ascertain the actual extent of the injury. *Filer v. New York C. R. Co.*, 49 N. Y. 42, 3 Am. Ry. Rep. 460.—FOLLOWED IN *McClain v. Brooklyn City R. Co.*, 40 Am. & Eng. R. Cas. 254, 116 N. Y. 459, 22 N. E. Rep. 1062, 27 N. Y. S. R. 549; *Stouter v. Manhattan R. Co.*, 3 Silv. App. 472.

(2) *Illustrations*.—The fact that plaintiff suffered from convulsions and epileptic fits after having received the personal injuries complained of, which he had never suffered before, is admissible as tending to show the permanency of his injury. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574.

Every physical endowment, function, or capacity, being of presumed importance in the economy of life, any wrongful injury which destroys it, or renders its discharge painful or perilous, is an element of damages; and therefore, where a young unmarried woman sues for personal injuries, her attending physician may testify that her injuries might render child-bearing perilous to life. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

The probable future condition of the man's leg, but not the consequence of a supposed second fracture, may be shown in evidence, where plaintiff brings an action to recover for an injury which broke his leg. *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. (N. Y.) 425.—REVIEWED IN *Cook v. New York C. & H. R. R. Co.*, 17 N. Y. S. R. 353.

89. Proof of pain and mental anguish.*—Proof of the crushing and mangling of a plaintiff's arm from the fingers up to within a few inches of the shoulder, and of its subsequent amputation at the shoulder, is sufficient evidence of such degree of pain on his part as to make it a proper element to be considered by the jury in estimating damages. *Chicago, B. & Q. R. Co. v. Warner*, 18 Am. & Eng. R. Cas. 100, 108 Ill. 538.

Evidence that plaintiff, immediately after the injury, proceeded in his suffering condition along the track to flag an approaching train, and that he suffered great pain thereby, and after flagging the train fell unconscious, is admissible on the ground that he is entitled to recover for physical pain occasioned by injury. *Evansville & T. H. R. Co. v. Gnylon*, 33 Am. & Eng. R.

Cas. 311, 115 Ind. 450, 14 West. Rep. 301, 17 N. E. Rep. 101.

It is not necessary to make specific proof of pain and mental anguish. These elements of damage are sufficiently shown by the evidence, which discloses the nature, character, and extent of the injuries. From such evidence the jury may infer pain and mental anguish. *Brown v. Hannibal & St. J. R. Co.*, 42 Am. & Eng. R. Cas. 87, 99 Mo. 310, 12 S. W. Rep. 655.

Though evidence of mental suffering, naturally resulting from an injury, is sometimes admissible to show actual damage, yet when it results from apprehension that the sufferer cannot make a support for his wife and children, he cannot in a suit for damages for personal injury be questioned regarding such apprehensions as a basis for damages. *Texas Mex. R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. Rep. 77.

90. Proof of physician's bill, expenses for nursing, etc.*—(1) *Generally*.—One cannot, in an action for personal injuries, recover for expenses incurred, "for professional services of physicians and nurses and for drugs," in the absence of evidence showing the amount of such expenses, or that any were ever paid, or any liability incurred therefor. *Duke v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 221, 99 Mo. 347, 12 S. W. Rep. 636.—DISTINGUISHED IN *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236.—*Reed v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 180, 57 Iowa 23, 10 N. W. Rep. 285.—DISTINGUISHED IN *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18; *Flanagan v. Baltimore & O. R. Co.*, 83 Iowa 639. FOLLOWED IN *Gardner v. Burlington, C. R. & N. R. Co.*, 68 Iowa 588.—*Smith v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 483, 108 Mo. 243, 18 S. W. Rep. 971.—REVIEWING *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236.—*Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

(2) *Admissibility*.—While the plaintiff was being treated for his injuries, owing to the application of carbolic acid to his foot while in bed, a mattress, quilt, and bed-springs were injured. *Held*, that evidence as to the amount of such loss was admissible under an allegation in the pleading that plaintiff "has suffered great expense." *Fox v. Chicago, St. P. & K. C. R. Co.*, 53 Am.

* See also *ante*, 14, 46, 63, 71; and EVIDENCE, 74.

* See also *ante*, 73.

80 *Eng. R. Cas.* 430, 86 *Iowa* 368, 53 *N. W. Rep.* 259.

The amount of the bills paid by plaintiff for services of physicians on account of his injuries is admissible in evidence without proof of the value of the services. *Morseman v. Manhattan R. Co.*, 16 *Daly* (*N. Y.*) 249, 10 *N. Y. Supp.* 105, 32 *N. Y. S. R.* 61. —DISTINGUISHING *Gumb v. Twenty-third St. R. Co.*, 114 *N. Y.* 411, 23 *N. Y. S. R.* 748. —*Gulf, C. & S. F. R. Co. v. Harriett*, 80 *Tex.* 73, 15 *S. W. Rep.* 556.

Evidence of expenditures incurred by plaintiff in trips made to healing springs and wells in aid of recovery from an injury is competent, the necessity and reasonableness of such expenditures to be passed upon by the jury. *Hart v. Charlotte, C. & A. R. Co.*, 33 *So. Car.* 427, 12 *S. E. Rep.* 9.

A surgeon may testify to the value of his services where the complaint averred that the plaintiff was put to expense for surgical aid. It is not necessary that the amount should be in fact paid to enable plaintiff to recover; it is sufficient that he is liable to pay. *McNaier v. Manhattan R. Co.*, 22 *N. Y. S. R.* 840, 51 *Hun* 644, 4 *N. Y. Supp.* 310; *affirmed in* 123 *N. Y.* 664, *mem.*, 34 *N. Y. S. R.* 1010.

The value of the services of the daughters of plaintiff who nursed him, but made no charge for such services, is inadmissible in an action for personal injuries. *Chicago, B. & Q. R. Co. v. Johnson*, 24 *Ill. App.* 468.

Evidence as to the amount of a physician's bill is inadmissible without evidence of payment or evidence of the value of the services other than the incidental remark of the physician that his bill was very small. *Gumb v. Twenty-third St. R. Co.*, 43 *Am. & Eng. R. Cas.* 315, 114 *N. Y.* 411, 21 *N. E. Rep.* 993, 23 *N. Y. S. R.* 748; *reversing* 21 *J. & S.* 466, 1 *N. Y. S. R.* 715. —DISTINGUISHED IN *Morseman v. Manhattan R. Co.*, 32 *N. Y. S. R.* 61, 10 *N. Y. Supp.* 105.

(3) *Instructions.*—To justify an instruction directing the jury to allow, as damages for personal injuries, expenses incurred by the plaintiff for medical attendance, there must be evidence of some payment by the plaintiff for such attendance or of the existence of a liability on his part therefor. *Minster v. Citizens' R. Co.*, 53 *Mo. App.* 276.

Where there is no evidence of the amount of medicine or medical treatment employed by the injured person on account of such

injuries, it is error to instruct the jury that they may allow for medicines and medical treatment reasonably and necessarily employed. *Eckerd v. Chicago & N. W. R. Co.*, 27 *Am. & Eng. R. Cas.* 114, 70 *Iowa* 353, 30 *N. W. Rep.* 615. *Fordyce v. Beecher*, 2 *Tex. Civ. App.* 29, 21 *S. W. Rep.* 179.

Where the evidence as to the value of the nurse's services rested merely upon the testimony of the plaintiff, there being no other evidence on that point, the court may charge that the nurse's bill has been proved as testified to by the plaintiff. *Colwell v. Manhattan R. Co.*, 57 *Hun* (*N. Y.*) 452, 32 *N. Y. S. R.* 991, 10 *N. Y. Supp.* 636.

91. Proof of plaintiff's ability and capacity for labor.*—(1) *Generally.*—After stating an injury done to the plaintiff, giving all the material facts touching his physical condition, his previous capacity and present incapacity for labor resulting therefrom, it was not error to allow the witness to state how much less he could do after than before the injury. *Atlanta & W. P. R. Co. v. Johnson*, 66 *Ga.* 259.—APPLIED IN *Chattanooga, R. & C. R. Co. v. Huggins*, 89 *Ga.* 494.

The burden is on the plaintiff to show the fact that his capacity to labor and earn money has been permanently impaired, and the extent of such impairment, and to furnish data to the jury from which they may be able to ascertain his financial loss in this respect. *Central R. & B. Co. v. Passmore*, 90 *Ga.* 203, 15 *S. E. Rep.* 760.

Evidence of the amount of plaintiff's earnings is admissible, not as a basis of computation, but as a circumstance tending to show his capacity and disposition to earn money. In like manner it is competent to show the condition of his health, his aptitude and qualifications for business, and his habits of industry, or anything else which affected his prospective earnings or savings. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 87.—FOLLOWED IN *Van Gent v. Chicago, M. & St. P. R. Co.*, 80 *Iowa* 526. REVIEWED IN *Beems v. Chicago, R. I. & P. R. Co.*, 10 *Am. & Eng. R. Cas.* 658, 58 *Iowa* 150; *Benton v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 496.

It was proper for the plaintiff to testify as to what his time was worth per day, notwithstanding the objection of defendant that the evidence as to the value of his

* See also EVIDENCE, 59.

time per day furnished an improper basis for estimating the damage, where the plaintiff had testified that he was not able to do as much work as he did before the accident, because the value of his time per day would enable the jury to measure the aggregate of his damages. *Baxter v. Chicago, R. I. & P. R. Co.*, 55 Am. & Eng. R. Cas. 138, 87 Iowa 488, 54 N. W. Rep. 350.

Plaintiff may introduce evidence to show the kind and amount of mental and physical labor which he was accustomed to do before receiving the injury, as compared with that which he has been able to do since, for the purpose of aiding the jury to determine what compensation he should receive for his loss of mental and physical capacity. *Ballou v. Farnum*, 11 Allen (Mass.) 73.

Under an allegation that the injuries rendered the plaintiff "incapable of labor," evidence as to the value of his customary earnings may be given, although special damages are not otherwise alleged. *Popp v. New York C. & H. R. R. Co.*, 26 N. Y. S. R. 639, 54 Hun (N. Y.) 635, 4 Silv. Supp. 243, 7 N. Y. Supp. 249.

Plaintiff may show his ability and capacity for labor, as well as skill in any particular art or profession, in order to show what he was capable of earning; but it is not error to reject a question which simply calls for the amount of money which the plaintiff made the year previous. *East Tenn., V. & G. R. Co. v. White*, 8 Am. & Eng. R. Cas. 65, 5 Lea (Tenn.) 540.—APPROVED IN *East Tenn., V. & G. R. Co. v. Gurley*, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46.

(2) *Illustrations.*—When the injury for which damages are claimed resulted in the loss of an arm, the plaintiff should be allowed to show that he had not a sufficient education to earn a livelihood in a clerical calling. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. Rep. 276.

In an action against a company for a permanent injury to a section hand, it was proper to allow him to show that he was a mechanic, and as such capable of earning more money than was paid him by defendant for his services. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520.

A woman sixty-five years old suing for a personal injury disabling her from work

was properly allowed to testify that the preceding season she had one day done all the work of feeding fifteen threshers, and before the injury had done all the cooking for her household, but could not do it since; such evidence was not too remote, nor matter for experts. *Young v. Detroit, G. H. & M. R. Co.*, 19 Am. & Eng. R. Cas. 417, 56 Mich. 430, 23 N. W. Rep. 67.

In an action by a married woman against a street-railway company for damages for fracturing plaintiff's arm, it is proper to admit evidence that she had been in the habit of making her own clothes, but since the injury (although a year had passed) she was unable to do so, and also that she had employed a hairdresser, who came to her room and dressed her hair during a period of months, for the reason that she was unable to do so for herself. *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367.

In an action for the breach of a contract of settlement, whereby the defendant had agreed to pay the plaintiff a certain sum per day during the continuance of his disability, it was error to permit the plaintiff to prove his capacity to earn money prior to the injury, and for the court to instruct the jury that, if they found for the plaintiff, they should award him such damages as he may have sustained on account of the diminution of his ability to earn wages after the time the defendant ceased paying him under the settlement, and "for all future time thereafter," provided the injury was permanent in its character. There being no fraud or mistake charged in the case, and the complaint not seeking to rescind or set aside the settlement, the damages recoverable for the total breach of the agreement would be the present worth of the *per diem* during the probable duration of the disability, without regard to plaintiff's previous earning capacity. *Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. Rep. 802.

92. Showing expectancy of life—Life tables.*—It was not improper to introduce in evidence standard life tables to show the expectancy of life of a person of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover. *Atlanta & W. P. R. Co. v. Johnson*, 66 Ga. 259.

The loss is the difference between what

* See also EVIDENCE, 82.

the annual earnings were before an injury and what they would be, if any, with the diminished capacity; and when it has been shown that the injury is permanent, as was done in this case, it is proper to show what the expectation of life is, to enable the jury to form an estimate as nearly as possible of what the damage or loss may be. *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. Rep. 990.

If the life expectancy is necessary for the jury's consideration in estimating damages for a personal injury, mortuary tables are not the only competent proof, but inspection and observation would, in many cases, be sufficient as a basis in estimating the probable length of life, with reference to damages for permanent injury and future pain and anguish. (Per Ellison, J.) *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367.

In determining the expectancy of life for the purpose of compensating for loss of earning power, it is proper to direct the jury to take into consideration the fact that plaintiff was diseased at the time of the injury, having an affection of the kidneys known as Bright's disease. *Bunting v. Hogsett*, 48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31.

Where death has resulted from the injury, or where the capacity of the person injured is entirely destroyed, the evidence is admissible to show the probable duration of the life of the injured party had no injury been inflicted, and the value of an annuity for the life of such person, calculated on the basis that he earned a designated sum per annum. But unless the capacity of the party to earn money has been entirely destroyed by the injury, such evidence would not be admissible. *Texas Mex. R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. Rep. 77.—NOT FOLLOWED IN *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

93. Showing loss of earnings. —

(1) *Generally.*—In the absence of proof in a negligence case of the value of the plaintiff's time while laid up from the injury, or how much he was capable of earning before the injury, there is no basis upon which the jury can estimate his future damages on account of the impairment of his power to earn money by reason of the injury. *Britton v. Grand Rapids St. R. Co.*, 90 Mich. 159, 51 N. W. Rep. 276.

In actions for damages for personal injuries the plaintiff may show the value of

his time lost by reason of the injury. *Hayes v. St. Louis R. Co.*, 15 Mo. App. 583.

Evidence of plaintiff's loss of earnings is inadmissible against defendant's objection, in the absence of its special averment as an element of damages. *Coontz v. Missouri Pac. R. Co.*, 115 Mo. 669, 22 S. W. Rep. 572.

Evidence of the amount the plaintiff is earning at his trade, at the time of and immediately preceding the accident, is admissible upon the question of damages. *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9. *Lynch v. Brooklyn City R. Co.*, 24 N. Y. S. R. 447, 52 Hun 614, 1 Silo. Supp. Ct. 361, 5 N. Y. Supp. 311.

But damages for loss of earnings or receipts are not recoverable without some evidence as to the loss and its extent. *Klein v. Second Ave. R. Co.*, 22 J. & S. (N. Y.) 164.

Evidence showing the amount of plaintiff's business earnings prior to the injury complained of, and the extent to which they were diminished in consequence of the injury, was properly admitted, as indicating a proper element of compensation to which plaintiff was entitled in seeking to recover damages for the personal injury. *Griveaud v. St. Louis Cable & W. R. Co.*, 33 Mo. App. 458.

(2) *Illustrations.*—Plaintiff may testify that "in consequence of loss of time and physical disability from the injuries she had been prevented from earning money by her labor, and had been injured fifty dollars within the four months next after the fall, in consequence of the hurts caused by the fall." This in substance is an assertion that her labor during that time would have been worth fifty dollars. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.

Evidence is properly admitted to show plaintiff's relations with his stepfather, where they were of an unfriendly nature, and as showing that he had been driven from home. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 Iowa 87.

Plaintiff was a peddler; evidence of an annual amount of his sales and the profit he made tended to show the amount he might have earned if he had been able to attend to his business, and was admissible. *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.—FOLLOWED IN *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47.

Plaintiff was a manufacturer of clothing,

in which business he employed hands to sew and make up clothing, which was cut and furnished to him in large quantities by dealers in clothing upon contract, and he made the contracts personally and overlooked the work. He was allowed to show his earnings in this business, upon the ground that his personal skill and experience and knowledge were required in it, and that he could not have employed another person to take his place with equal efficiency. *Held*, that this was erroneous; for while the success of a business may be due to the special fitness of the man at the head of it, the profits of such business do not depend solely upon the skill of the individual, and are not, therefore, the measure of damages for a loss of his time, ability, and opportunity to earn money arising from personal injuries. *Marks v. Long Island R. Co.*, 14 *Daly* (N. Y.) 61, 3 *N. Y. S. R.* 562.

94. — loss of business.—Where it is sought to prove damages for loss of business, evidence of particular facts, where there is no effort to make the testimony the ground of any claim for damages for specific loss therefrom, is admissible to show the general character of the business lost. *MacLennan v. Long Island R. Co.*, 20 *J. & S.* (N. Y.) 22; *affirmed* (P) 107 *N. Y.* 623, *mem.*, 13 *N. E. Rep.* 939, 11 *N. Y. S. R.* 882.

Where a boarding-house keeper is injured by the negligent conduct of another, it is proper to permit her to show that on account of the disability caused by the injury she had been deprived of carrying on her business of keeping a boarding-house. Such evidence is not an effort to show loss of profits, but loss of earning power in her business or occupation. *Malone v. Pittsburgh & L. E. R. Co.*, 152 *Pa. St.* 390, 25 *Atl. Rep.* 638.

95. — loss of rental value.—Where a company so constructed its road as to cut off or impair the only outlet from plaintiff's farm to a highway, the measure of damages is the diminution so caused in the value of plaintiff's farm; and proof of the loss of rents resulting from the same act is proper for the purpose of indicating the extent of such decrease in value. *Antenrieth v. St. Louis & S. F. R. Co.*, 36 *Mo. App.* 254.

When a permanent injury to the use of real property is shown to have resulted from the unlawful act of another, it is proper for the owner to show the depreciation in the

rental value, diminution in business to which the property is adapted, or diminution in other like things resulting from the unlawful act. *Houston & T. C. R. Co. v. Molloy*, 25 *Am. & Eng. R. Cas.* 244, 64 *Tex.* 607.

96. What may be shown in aggravation of damages.*—On the trial of an action against a street railway and conductor to recover for personal injuries, the court received evidence of the pecuniary ability of the company in aggravation of damages. *Held*, that the admission of the evidence was improper, as the conductor was liable for the judgment, and the evidence as to him was highly prejudicial. *Chicago City R. Co. v. Henry*, 62 *Ill.* 142.

Any circumstance attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence with a view of affecting the question of damages, save where the circumstances themselves constitute an independent cause of action. *Louisville & N. R. Co. v. Ballard*, 28 *Am. & Eng. R. Cas.* 135, 85 *Ky.* 307, 7 *Am. St. Rep.* 600, 3 *S. W. Rep.* 530.

Whether evidence that the plaintiff had a family was competent is not necessary to determine, as such evidence, if incompetent, was not prejudicial, the jury being restricted in estimating the damages to such sum as would "reasonably compensate plaintiff for the injuries sustained by him because of such neglect, the bodily and mental suffering, if any, resulting directly from such injuries, and the impairment of capacity, if any, to labor and enjoy life resulting also from said injury." *Louisville & N. R. Co. v. Mitchell*, 87 *Ky.* 327, 8 *S. W. Rep.* 706.—*REVIEWING Louisville, C. & L. R. Co. v. Mahony*, 7 *Bush* (Ky.) 238; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 *Ill.* 341.

The case being one in which punitive damages may be allowed, evidence as to the defendant's wealth is admissible. *Hayes v. St. Louis R. Co.*, 15 *Mo. App.* 583.

In an action for damages arising from injuries caused by the negligence of an employé, evidence that the latter was a man of intemperate habits, that he was intoxicated at the time of the injury, and that the agent of the company, who had power to discharge him, had knowledge of his habits,

* See also *ante*, 33.

is competent evidence and admissible, under a claim for exemplary damages on the ground of gross negligence. *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44, 6 Am. Ry. Rep. 179.—DISTINGUISHING *Warner v. New York C. R. Co.*, 44 N. Y. 465.

Evidence of knowledge by the company of facts intimately connected with those upon which actual damage done to the party rests is admissible to show acts of so wilful and negligent a character as to make the company liable for exemplary damages. Such a rule is not changed by the fact that the jury gave no exemplary damages. *Texas & P. R. Co. v. De Milley*, 60 Tex. 194.

Evidence that the plaintiff has a child of tender years is inadmissible. *Kreuziger v. Chicago & N. W. R. Co.*, 73 Wis. 158, 40 N. W. Rep. 657.—APPLIED IN *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570.

97. What may be shown in mitigation of damages.*—When a physician claims compensation for inability to practice his profession by reason of injuries received through a company's negligence, the latter may show that the physician's practice was an unlawful one, and his general reputation with reference to such practice may also be shown. *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61, 6 Am. Ry. Rep. 1.

In an action for a failure by defendant, to excavate a basin upon the plaintiff's land, at the head of a canal, according to contract, evidence to show that the basin would have been useless to the plaintiff, is admissible, in mitigation of damages. *Louisville & P. C. Co. v. Rowan*, 4 Dana (Ky.) 606.

It being the duty of one with an injury to take proper care thereof, and, if necessary, to employ a competent surgeon, evidence touching the injury and its treatment is properly submitted to the jury; and the question of the negligence of the plaintiff in regard to the injury is for the jury. *Maloy*

v. New York C. R. Co., 58 Barb. (N. Y.) 182.

The plaintiff's negligence or wrongful conduct may be considered in mitigation of damages, however wanton, wilful, and reckless the act of the defendant which produced the injury may have been. *Louisville & N. R. Co. v. Wallace*, 90 Tenn. 53, 15 S. W. Rep. 921.

98. Evidence not admissible in mitigation.—If property be damaged by an illegal act of a corporation, the president thereof cannot bar the right to recover or mitigate the damages by an offer to buy the property from the injured person at a price put on it by any real-estate agent, and such an offer is not admissible in evidence. *Mayor, etc., of Macon v. Harris*, 75 Ga. 761.

The defendant has no cause of complaint for the exclusion of evidence in mitigation of damages in an action for personal injuries, where the court by its instructions has limited the recovery to compensatory damages. *Merchants' Nav. Co. v. Amsden*, 25 Ill. App. 307.

In an action for damages for personal injuries, the moral character of the plaintiff is not relevant as an element in the measure of damages. Therefore the fact that plaintiff kept a house of ill-fame was inadmissible on the question of damages. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582.

It is not competent for the defendant to show by way of mitigating the damages to which plaintiff is entitled, that the latter was a man of intemperate habits and had by his habit greatly abused himself. *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568, 10 Am. Ry. Rep. 506.

The defendant cannot show what was the average cost of living for a person in plaintiff's condition at the town in which he lived at the time he suffered the injury. *Simonson v. Chicago, R. I. & P. R. Co.*, 49 Iowa 87.

Evidence of the peaceable character of the conductor who inflicted the injury having been admitted, the jury are properly told not to consider this in mitigation of damages or as rebutting evidence of malice. *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584.

The fact that the injury has been aggravated by the mistake of a competent surgeon who was employed by plaintiff in good faith cannot be shown by the company for the purpose of reducing the damages.

* Proving that injured or killed person was suffering from disease as a defense, or in mitigation of damages, see note, 10 AM. ST. REP. 64.

Contributory negligence in mitigation of plaintiff's damages, see COMPARATIVE NEGLIGENCE, 21, 24; CONTRIBUTORY NEGLIGENCE, 2, 51; TRESPASSERS, INJURIES TO, 116.

See also ANIMALS, ETC., 593; CHILDREN, INJURIES TO, 188; DEATH BY WRONGFUL ACT, 285-288; EMINENT DOMAIN, 637, 638.

Houston & T. C. R. Co. v. Hollis, 2 Tex. App. (Civ. Cas.) 169.

Where one is under a disability prior to the time of an accident from which he suffers personal injury, his damages may include only an amount for the additional disability which directly results from his injury. *Whelan v. New York, L. E. & W. R. Co.*, 38 Fed. Rep. 15.

The fact that the plaintiff in an action for personal injuries carried accident insurance cannot be taken into account so as to reduce the damages. *Bradburn v. Great Western R. Co.*, L. R. 10 Ex. 1, 44 L. J. Ex. 9, 31 L. T. 464, 23 W. R. 468.

3. By Whom and How Damages are Assessed.

99. Right to have damages assessed by a jury.—In the assessment of damages in actions instituted in the courts of the United States for injuries resulting from negligence, where the defendant suffers a default, the plaintiff has no absolute right to the mode and method of assessing his damages, but the assessment depends upon a matter of practice, and is made usually according to the practice of the courts of the state in which the federal court is held. *Raymond v. Lambury & N. R. Co.*, 14 Blatchf. (U. S.) 133.

Under section 3331 of the Iowa Code, where a party sues for damages occasioned by a nuisance, he is entitled to have his damages assessed by a jury, notwithstanding he may seek in the same action to have the continuation of the nuisance enjoined. *Miller v. Keokuk & D. M. R. Co.*, 14 Am. & Eng. R. Cas. 293, 63 Iowa 680, 16 N. W. Rep. 567.—FOLLOWED IN *Platt v. Chicago, B. & Q. R. Co.*, 74 Iowa 127, 37 N. W. Rep. 107.

Where treble damages are recoverable in the district court in a civil action, under the Kansas Trespass Act, they ought to be assessed by the jury under proper instructions from the court. *Chicago, K. & W. R. Co. v. Watkins*, 40 Am. & Eng. R. Cas. 499, 43 Kan. 50, 22 Pac. Rep. 985.

The plaintiff in a suit wherein an interlocutory judgment has been rendered is entitled to have the damages assessed by the jury attending the court, under the Pa. Act of May 22, 1722. *McHenry v. Union Pass. R. Co.*, 17 Phila. (Pa.) 195.

In an action for personal injuries, the

jury, in the face of uncontradicted evidence of substantial damages, having rendered a verdict for 6½ cents, a provisional order for a new trial, directing its refusal on payment of \$400 to the plaintiff within 30 days, which sum the plaintiff was unwilling to accept, was error, the plaintiff being entitled to have his damages assessed by a jury. *Bradwell v. Pittsburgh & W. E. Pass. R. Co.*, 139 Pa. St. 404, 20 Atl. Rep. 1046.

100. When damages are to be assessed by the court.—It is the province of the court to determine the proper elements of damages in a suit for personal injuries. *Hawes v. Kansas City Stock-Yards Co.*, 103 Mo. 60, 15 S. W. Rep. 751.

The Conn. act of 1889 (Session Laws of 1889, ch. 157) provides that "in every action of tort in which the defendant suffers a default, and there is a hearing in damages, the hearing shall be to a jury unless the defaulting defendant shall give notice," etc. Held, that a demurrer to a complaint overruled and a failure of the defendant to answer over did not constitute a default, and that the hearing in damages in such a case did not fall within the statute and was to be held before the court, and not before the jury. *Falken v. The Housatonic R. Co.*, 63 Conn. 258, 27 Atl. Rep. 1117.

101. Rules for assessing damages.*

—(1) *Generally.*—Where there are successive acts of negligence resulting ultimately in injury to a passenger, the jury may, in determining the degree of culpability of the defendant, look to the chain of causation of the wrong done for which they are to fix the amount of damages. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

In cases of tort, the question as to the number of causes of action which the same person may have turns upon the number of torts, and not upon the number of different pieces of property which may have been injured thereby. Each separate tort gives a separate cause of action, and but a single one, and whenever by one act a permanent injury is done to several pieces of property, the damages are assessed once for all, and the cause of action is wholly merged in a

* Effect of previous disease of injured person in fixing damages, see note, 16 L. R. A. 268.

See also CROSSING OF RAILROADS, 40; ELEVATED RAILWAYS, 136, 138; EMINENT DOMAIN, 448-594, 793, 823, 1020; TRIAL, 188.

recovery of damages for injury to one of the parcels. *Beronio v. Southern Pac. R. Co.*, 46 Am. & Eng. R. Cas. 66, 86 Cal. 415, 24 Pac. Rep. 1093.

The rule that damages recoverable for injuries received because of the negligence of the defendant should not exceed an amount upon which the legal interest would equal the value of the injured party's past earnings, and probable future earnings, does not apply to a case where the cause of action is the plaintiff's own personal injury, but is applied only to cases where suit is brought for the death of a relative. *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. Rep. 601.

The damage is to be fixed by the jury from facts testified to, such as the loss of the use of such a member of the body as the right hand, the diminution of ability in a laboring man to make a living after such loss, the pain and suffering caused by the wound, the bill of the physician and the expense of nursing, and all other facts and circumstances connected with the case; and the jury's opinion should be influenced by that of no witness, given in round numbers, of the amount of the damage, but be made up from facts, when capable of proof, of actual damage and of the enlightened, conscientious belief of impartial jurors in respect to items incapable of exact proof, such as the feelings, the pain and suffering of the plaintiff, etc. *Central R. & B. Co. v. Kelly*, 58 Ga. 107, 16 Am. Ry. Rep. 114.

Damages cannot be estimated by setting off against the greater fault of the railroad the negligence of plaintiff and abating them accordingly. He who is guilty of the greater negligence or wrong must be considered the original aggressor, and accountable accordingly. *Macon & W. R. Co. v. Davis*, 27 Ga. 113.

Damages for personal injuries must be assessed for the entire injuries sustained. The plaintiff has no right to require the damages to be itemized or to be assessed in separate amounts for each element entering into and constituting the total sum of the damages awarded. *Ohio & M. R. Co. v. Judy*, 120 Ind. 397, 22 N. E. Rep. 352.

Although a court may be justified in refusing to set aside a verdict rendered by the jury on the "average theory," yet the trial court ought not to suggest to the jury, if the witnesses differ as to values, that they ascertain what the average of the esti-

mates is first, and then afterwards decide whether such an average is fair or full value. *Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. Rep. 108.—FOLLOWED IN *Kansas City, W. & N. W. R. Co. v. Fisher*, 49 Kan. 17; *Kansas City, W. & N. W. R. Co. v. Whitaker*, 49 Kan. 19.

The jury by their special findings fixed the damages at five thousand dollars, and required the one defendant to pay of that amount two thousand dollars and the other to pay three thousand dollars. *Held*, that the jury had the right to thus apportion the damages; but even if they had not the defendants were not prejudiced, as otherwise there would have been a joint judgment against both for five thousand dollars, the whole of which might have been recovered of one with no right of contribution against the other. *Central Pass. R. Co. v. Kuhn*, 32 Am. & Eng. R. Cas. 16, 86 Ky. 578, 6 S. W. Rep. 441.

Where the elements of injury are shown, and the damages not being such as require expert testimony, the court or jury may form an opinion as to their amount. *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215 (Gil. 188), 4 Am. Ry. Rep. 216, 8 Am. Ry. Rep. 247.—REVIEWED IN *Uline v. New York C. & H. R. R. Co.*, 23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536.

Where there is proven an injury which of necessity makes the person injured more helpless, and where from the very nature of the case there can be given no positive evidence further than this fact, the jury in estimating the damages must estimate it as they would the value of a life, with no more specific basis. *Lang v. New York, L. E. & W. R. Co.*, 22 N. Y. S. R. 110.—APPLYING *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445. *DISTINGUISHING Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 16 N. Y. S. R. 998.

The defendant tendered the following issues: (1) Were plaintiff's injuries caused by the negligent running of defendant's engine? (2) Was there contributory negligence on the part of the plaintiff? (3) What damages is the plaintiff entitled to recover? The court declined to submit these and substituted instead a single issue: What damages, if any, is the plaintiff entitled to recover? *Held*: (1) to be error, (2) the question of the quantum of damages is a mere incidental one, depending upon the real issues of fact raised by the pleadings.

Denmark v. A. & N. C. R. Co., 107 N. Car. 185, 12 S. E. Rep. 54.

Special damages must be proved, to be recovered. *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582.

(2) *Questions of law and fact.*—The amount of damages a party will sustain in an action at law on account of the injuries proved is a question of fact, but the rule for ascertaining the damages is a question of law. *Chicago, B. & Q. R. Co. v. Sullivan*, (Ill.) 17 N. E. Rep. 460. *Galeston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

The assessment of damages in an action on the case for a personal injury is a question of fact depending on the evidence, and hence this court is prohibited from inquiring whether the damages assessed in such a case are excessive. *Wabash, St. L. & P. R. Co. v. Peyton*, 18 Am. & Eng. R. Cas. 1, 106 Ill. 534, 46 Am. Rep. 705.

It is the duty of the jury to be governed by the charge of the court as to what matters may be considered in assessing damages. *Texas & P. R. Co. v. Morin*, 25 Am. & Eng. R. Cas. 539, 66 Tex. 133.

The plaintiff testified that he had paid a physician named five dollars, while the physician testified that he did not know whether the money received was for services rendered the plaintiff or other members of the family. *Held*, that whether the sum was paid by plaintiff on account of the injury sustained by him through defendant's negligence was a question for the jury to decide. *Annaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa 267, 47 N. W. Rep. 68.

(3) *Actions for death.*—In an action for death where defendant withdraws its pleas and contests only the assessment of damages, the jury may consider any negligence charged in the complaint which conduced to the injury complained of or added to the culpability of the alleged negligent acts and omissions. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

In assessing such damages the jury have no right to consider the pendency of actions by other persons against the same defendant for injuries arising out of the same casualty. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

Where in an action for damages against a railroad company for negligence in killing a passenger the defendant withdraws its

pleas and suffers judgment *nil dicit* and contests only the amount of damages, the jury in assessing damages may consider any negligence on the part of the defendant or its employes which is counted on in the complaint and which tended to produce the injury. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

102. Discretionary power of the jury.—(1) *Generally.*—In actions for personal injuries the assessment of damages must, within reasonable bounds, be confided to the judgment and discretion of the jury. *Colorado Midland R. Co. v. O'Brien*, 48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701. *Choppin v. New Orleans & C. R. Co.*, 17 La. Ann. 19. *Harves v. Kansas City Stock-Yards Co.*, 103 Mo. 60, 15 S. W. Rep. 751.

The jury, however, are not at liberty to give any sum they please. *Waldhier v. Hannibal & St. J. R. Co.*, 87 Mo. 37.

An instruction to the jury that "they should assess plaintiff's damages at whatever sum the evidence would sanction," was not proper because it embodied no rule of damages, but left the whole subject to the unlimited discretion of the jury. *Union S. Y. & T. Co. v. Monaghan*, 13 Ill. App. 148.

About all the court can do is to confine the jury in their assessment to such damages as are shown by the evidence to result necessarily from the injury complained of. *Chicago, B. & Q. R. Co. v. Warner*, 18 Am. & Eng. R. Cas. 100, 108 Ill. 538.

In an action for personal injuries there is no measure of sums or value fixed by custom, market, or law, and so the law makes it the exclusive discretion and peculiar province of the jury to name the amount. *Brown v. Union R. Co.*, 51 Mo. App. 192.

The question of the loss and the value of the capacity to earn money, that was impaired by injury in a railroad accident, is properly left to the discretion of the jury. *Reading v. Pennsylvania R. Co.*, 52 N. J. L. 264, 19 Atl. Rep. 321.

In an action by a passenger to recover for being assaulted by a conductor and wrongfully ejected from the train, there is no rule limiting the damages for the assault to a sum which is merely nominal, but the amount to be awarded is for the discretion

* See also *post*, 100.

of the jury. *Caldwell v. Central Park, N. & E. R. R. Co.*, 27 N. Y. Supp. 397, 57 N. Y. S. R. 489, 7 Misc. 67.

Where a plaintiff sues for an injury done him, although he really has a right of action, the jury may consider the conduct of both parties in estimating the damages, and if they think the plaintiff has acted in an obstinate and perverse manner, that also may be taken into consideration. *Davis v. North-Western R. Co.*, 4 Jur. N. S. 1303.

The jury, when the facts are definitely ascertained, may fix the amount of damages in actions for a breach of covenant restricting an easement in property by an interference with its lawful enjoyment. *Avery v. New York C. & H. R. R. Co.*, 121 N. Y. 31, 24 N. E. Rep. 20, 30 N. Y. S. R. 471; reversing 2 N. Y. Supp. 101, 17 N. Y. S. R. 417.

(2) *Damages for physical pain and mental anguish.*—Mental suffering and physical pain as elements of damages cannot be dissociated, and the law furnishes no standard by which to measure and compensate either in money. The amount of compensation to be allowed is a question for the jury, whose discretion is limited by the amount claimed in the complaint, and subject to the power of the court to grant a new trial if the verdict is excessive. *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. Rep. 363.

Though where special damages, such as expenses of nursing, physician's bill, medicine, etc., are sought, the rule of assessment according to the enlightened consciences of impartial jurors is not applicable, it is so where the special damages alleged are not insisted upon, and the only recovery sought is for injuries to the person and for pain and suffering. *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. Rep. 706.

Necessarily the estimate of damages for personal injury and physical suffering must depend upon the judgment of the jury. There can be no direct proof in regard to it, and no witness can be allowed to express his opinion upon the point. *Chicago, P. & St. L. R. Co. v. Lewis*, 48 Ill. App. 274. *International & G. N. R. Co. v. Gilbert*, 22 Am. & Eng. R. Cas. 405, 64 Tex. 536.

In an action for damages for personal injuries, the amount of the award for loss of power to earn money, and for pain and anguish suffered by reason of the injury, rests

within the discretion of the jury. *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa 29.

The law affords no certain standard for the measurement of damages for the permanent injury and future pain and anguish resulting from a personal injury. While it informs the jury as to the items to be considered, the amount is peculiarly within their sound discretion, and in the case of a married woman, her age, coupled with her life expectancy, would not afford a useful rule in estimating the damages. *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367.—RECONCILING *Gessley v. Missouri Pac. R. Co.*, 26 Mo. App. 156.

It is largely dependent upon the discretion of the trial jury to determine the amount of damages for physical and mental injuries resulting from being wrongfully compelled to ride in a second-class coach. *St. Louis, A. & T. R. Co. v. Mackie*, 37 Am. & Eng. R. Cas. 94, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. Rep. 451.

(3) *Conclusiveness of verdict.*—Where there is no fixed rule by which damages may be computed, the court should instruct the jury on the proper subject-matter, and leave the question to them; and their verdict will not be disturbed, unless so excessive as to demand interference. *Nashville & C. R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12, 19 Am. Ry. Rep. 363.

The amount of damages is peculiarly for the jury; and unless, in view of the evidence, the damages are so excessive and disproportioned to the injury alleged as to indicate that the verdict was the result of passion, prejudice, or partiality, the judgment will not, on appeal, be set aside. *International & G. N. R. Co. v. Stewart*, 57 Tex. 166.

Unless outside influences excite their passions and prejudices so that they abuse this discretion, the verdict will not be interfered with on appeal. *International & G. N. R. Co. v. Gilbert*, 22 Am. & Eng. R. Cas. 405, 64 Tex. 536.—QUOTED IN *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634. REVIEWED IN *International & G. N. R. Co. v. Wilkes*, 34 Am. & Eng. R. Cas. 331, 68 Tex. 617.

It is within the exclusive province and discretion of the jury to fix the amount of damages, and their verdict will not be disturbed in a case of gross personal indignity and injury, where the court cautioned them against excessive verdict, due to prejudice

and passion. *Brown v. Memphis & C. R. Co.*, 1 *Am. & Eng. R. Cas.* 247, 7 *Fed. Rep.* 51.

It was error for the court to require a jury to remit a portion of the amount of damages found by them in an action for personal injuries because he deemed a particular amount should not have been exceeded in the verdict. *Savannah, F. & W. R. Co. v. Harper*, 70 *Ga.* 119.—DISAPPROVING *Dublin v. Murphy*, 3 *Sandf. (N. Y.)* 19. EXPLAINING *Atlanta & W. P. R. Co. v. Venable*, 67 *Ga.* 697. QUOTING *Lang v. Hopkins*, 10 *Ga.* 45.—DISTINGUISHED IN *Central R. Co. v. Crosby*, 74 *Ga.* 737.

103. Duty to instruct the jury.—It is the duty of the court to give definite instructions to the jury as to the true measure of damages to which a plaintiff may be entitled under the issues and facts of the particular case. *Houston & T. C. R. Co. v. Nixon*, 52 *Tex.* 19.—REVIEWING *Potter v. Chicago & N. W. R. Co.*, 21 *Wis.* 377.—QUOTED IN *Houston & T. C. R. Co. v. Cowser*, 57 *Tex.* 293.

Where doubt arises as to whether damages are proximate, or speculative and remote, the issue should be presented to the jury by proper instructions. *Clemens v. Hannibal & St. J. R. Co.*, 53 *Mo.* 366, 12 *Am. Ky. Rep.* 351.

Although, in an action for damages, a circuit court has set aside two former verdicts as excessive, it cannot refuse, on the third trial, to instruct the jury that it is the sole judge of the amount of damages to be assessed under the evidence. The court has no power by instructions to limit the jury to the amount of the former verdicts, or to an amount it may deem adequate. *Illinois C. R. Co. v. Minor*, 52 *Am. & Eng. R. Cas.* 441, 69 *Miss.* 710, 16 *L. R. A.* 627, 11 *So. Rep.* 101.

104. What instructions are proper.*—An instruction in an action to recover for a personal injury resulting in the loss of an arm, etc., informed the jury that in case they found for the plaintiff it would be proper to consider certain things, and "all damages, present and future, which, from the evidence, can be treated as the necessary and direct result of the injury com-

plained of." *Held*, that the instruction was not subject to the objection of leaving a question of law to the jury. *Chicago, B. & Q. R. Co. v. Warner*, 18 *Am. & Eng. R. Cas.* 100, 108 *Ill.* 538.

Though an instruction on the measure of damages may even be the subject of criticism, it will not vitiate a verdict where there was also given an instruction declaring the proper measure of damages, and the amount of the verdict showed the jury had not been misled by the faulty instruction. *Farris v. Chicago, S. F. & C. R. Co.*, 51 *Mo. App.* 297.

Where an instruction states that if the jury find any damage was done to the property in question, but it is qualified by being limited to damage done through the negligence of the defendant, this restricts the damage within the limits of defendant's proper liability. *Jones v. Chicago & A. R. Co.*, 28 *Mo. App.* 28.

The court below charged: "The law is that plaintiff is only entitled to recover the pecuniary value of the injuries sustained, and so we lay it down to you. In its application to the question of damages for the physical pain suffered by plaintiff you must exercise your own discretion, governed by your own sense of justice and right, taking care not to indulge in your imaginations or sympathies so as to be led into an assessment of damages that would be unjust or oppressive to defendant." *Held*, not to be error. *Pennsylvania R. Co. v. Allen*, 53 *Pa. St.* 276.—REVIEWED IN *Whipple v. West Philadelphia Pass. R. Co.*, 11 *Phila. (Pa.)* 345.

In an action for personal injuries to a person accustomed to the management of a restaurant, where it is alleged that she was greatly hurt and permanently injured, it is proper for the trial judge to direct the jury in assessing damages to ask themselves, "What salary would a lady of experience in the trade be able to command for managing a public house in London, at a fair salary?" *Potter v. Metropolitan R. Co.*, 28 *L. T.* 735.

105. What instructions are improper.*—Instructions which leave the measure of damages at the discretion of the jury, except limiting them to the amount claimed by plaintiff, are erroneous. *Edmunds v. St. Louis R. Co.*, 3 *Mo. App.* 603.

* See also *ante*, 18, 25, 38, 41 (2), 42 (2), 44 (3), 68 (3), 70 (2), 71 (4), 90 (3).

See also DEATH BY WRONGFUL ACT, 322-326, 344-346; TRIAL, 130-132, 156-158.

* See also TRIAL, 170.

The jury should not be instructed to consider, in estimating the damages, the aggravating circumstances they should find in the case, it not being one warranting vindictive or exemplary damages. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 *Am. & Eng. R. Cas.* 229, 91 *Mo.* 509, 10 *West. Rep.* 54, 4 *S. W. Rep.* 389.

An instruction as to the amount of damages to be awarded for personal injuries is erroneous which without designating the proper elements of damages merely tells the jury that in the event of a verdict for the plaintiff they will find in such sum as will compensate him for his injuries. *Hawes v. Kansas City Stock-Yards Co.*, 103 *Mo.* 60, 15 *S. W. Rep.* 751.—DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 87 *Mo.* 37; *Tetherow v. St. Joseph & D. M. R. Co.*, 98 *Mo.* 74.

A charge suggesting capitalization of plaintiff's earnings, and that a sum be given which should support him from year to year, is erroneous, although such suggestion is only given by way of illustration. *Gregory v. New York, L. E. & W. R. Co.*, 8 *N. Y. Supp.* 525, 28 *N. Y. S. R.* 726.

Where defendant introduces testimony which tends to show that plaintiff was suffering from lumbago of long standing, and that this disease was the cause of his ill health, and not the injury alleged to have been suffered on defendant's train, it is error for the court to entirely refrain from alluding to such testimony in its charge. *Herstine v. Lehigh Valley R. Co.*, 151 *Pa. St.* 244, 25 *Atl. Rep.* 104.

The judge instructed the jury that "You may ascertain the value of plaintiff's services to himself before the injury and the value of his services since, and ascertain the difference, and then the jury would be authorized to give such a sum as would, at legal rate of interest, produce a sum equal, per annum, to that difference." *Held*, to be not maintainable upon principle, as thereunder plaintiff would not only receive full compensation, but in addition would receive a donation. *Houston & T. C. R. Co. v. Burke*, (Tex.) 9 *Am. & Eng. R. Cas.* 369.—QUOTING *Houston & T. C. R. Co. v. Crowser*, 4 *Tex. L. J.* 755.

Where no testimony was produced from which with any certainty the jury could estimate the amount of a medical bill, it was error to incorporate it in the charge upon the measure of damages. *Missouri Pac. R.*

Co. v. Lyde, 11 *Am. & Eng. R. Cas.* 188, 57 *Tex.* 505.

The court should not suggest in his charge to the jury any methods by which they must estimate the damages in reaching their conclusions. *Sabine & E. T. R. Co. v. Broussard*, 34 *Am. & Eng. R. Cas.* 199, 69 *Tex.* 617, 7 *S. W. Rep.* 374.

4. Interest on Damages.*

106. When allowable, generally.† —Interest should be computed and added to the amount of damages found by the jury in their verdict, reckoning down to the time of the rendition of the judgment. *Johnson v. Atlantic & St. L. R. Co.*, 43 *N. H.* 410.

Where a city granted a license to use a wharf, and afterward gave a railroad company the right to construct its track along the wharf, whereby the occupier of the wharf was injured, interest on a claim against the city for damages was allowable. *Allegheny v. Campbell*, 107 *Pa. St.* 530.

107. When not allowable.—Interest at the legal rate cannot be added by the jury in their discretion, to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased. *Western & A. R. Co. v. Young*, 37 *Am. & Eng. R. Cas.* 489, 81 *Ga.* 397, 7 *S. E. Rep.* 912.—DISTINGUISHING *Georgia R. & B. Co. v. Garr*, 57 *Ga.* 280; *Central R. Co. v. Sears*, 66 *Ga.* 493; *Western & A. R. Co. v. McCauley*, 68 *Ga.* 818. FOLLOWING *Ratteree v. Chapman*, 79 *Ga.* 574.—APPROVED IN *Louisville & N. R. Co. v. Wallace*, 91 *Tenn.* 35.

In fixing the amount of damages under a suit for killing live stock interest is not re-

* See also title INTEREST.

See also ANIMALS, ETC., 591; CARRIAGE OF LIVE STOCK, 101; CARRIAGE OF MERCHANDISE, 158, 773, 774; DEATH, ETC., 100-111; ELEVATED RAILWAYS, 134; EMINENT DOMAIN, 759-767, 1200, 1249; INTEREST.

† Allowance of interest in actions against carriers, see note, 30 *AM. & ENG. R. CAS.* 40.

When interest not allowable on damages, see 24 *AM. & ENG. R. CAS.* 479, *abstr.*

Interest on damages for the destruction of property by fire, see note, 40 *AM. & ENG. R. CAS.* 253.

When interest allowed on damages for personal injuries, for causing death, injury by fires, for stock killed, or for property injured or lost in transportation, see note, 18 *L. R. A.* 449.

coverable *eo nomine*, but the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of the damages allowed accordingly. *Western & A. R. Co. v. McCauley*, 68 Ga. 818.—DISTINGUISHED IN *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.

Interest may be charged in case of gross negligence. In the absence of negligence interest may be withheld. *Gray v. Missouri River Packet Co.*, 64 Mo. 47.

Interest is not recoverable in an action for negligent injury to property. The error of the lower court, however, in authorizing the recovery of interest may be cured by a remittitur in the supreme court. *Kimes v. St. Louis, I. M. & S. R. Co.*, 85 Mo. 611.

Plaintiff sued in equity to compel the removal of obstructions to his drains and to recover certain damages. Held, that interest on the damages annually sustained could not be allowed, for interest is in the nature of damages for the detention of money, and is never allowed in unliquidated damages. *Lamar v. Charlotte & S. C. R. Co.*, 10 So. Car. 476.

In suit for personal injuries not causing death it is error for the court to instruct the jury that they may in their discretion allow interest upon the amount of damages awarded and include it in their verdict. Interest cannot be allowed at all in such case. *Louisville & N. R. Co. v. Wallace*, 49 Am. & Eng. R. Cas. 490, 91 Tenn. 35, 17 S. W. Rep. 882.—APPROVING *Rattenev v. Chapman*, 79 Ga. 574; *Western & A. R. Co. v. Young*, 81 Ga. 397; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306. DISTINGUISHING *Fasholt v. Reed*, 16 S. & R. (Pa.) 266.

But where in such case the jury's verdict shows the amount of damages awarded and the amount of interest allowed thereon, in separate items, this court will not reverse the case, there being no other error, if the plaintiff will enter remittitur of the interest. *Louisville & N. R. Co. v. Wallace*, 49 Am. & Eng. R. Cas. 490, 91 Tenn. 35, 17 S. W. Rep. 882.

In an action for damages judgment should be for the amount of the verdict and interest on this amount from the date of the judgment, and not from the date of the

verdict. *Fowler v. Baltimore & O. R. Co.*, 8 Am. & Eng. R. Cas. 480, 18 W. Va. 579.

108. The rule in actions in tort.*—

(1) *Allowable*.—In an action to recover damages where fraudulent misrepresentations were made in the sale of mortgage coupons, interest was added to the purchase price. *South Covington & C. S. R. Co. v. Gest*, 34 Fed. Rep. 628; affirmed in 36 Fed. Rep. 307.

In an action for tort where exemplary damages are not allowed interest may be added by the court from the date of the commencement of the action to the sum which it finds to represent the loss. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. Rep. 455.—FOLLOWING *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213.

Where it does not appear that anything more than actual compensation for the property destroyed by the negligence of the defendant was awarded by the jury, unless the addition of interest would increase the damages to so great an extent as to be clearly unjust in view of the value of the property, such addition is not ground for error. *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. Rep. 567.

In awarding damages for an injury resulting from a tort, compensation in the nature of interest may be included. *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.—APPLIED IN *Gralton v. Baltimore & O. R. Co.*, 17 Am. & Eng. R. Cas. 200, 21 Fed. Rep. 309.

(2) *Not allowable*.—In actions *ex delicto* based upon the simple negligence of defendant, where no pecuniary benefit could arise from the injury, it is error to allow interest on the amount of damages found by the jury. *Eagan v. Missouri Pac. R. Co.*, 6 Mo. App. 594.

There is no authority for adding interest to unliquidated damages in an action for damages for tortious acts. *So held*, in an action to recover damages for wrongful expulsion from defendant's cars. *Nichols v. Union Pac. R. Co.*, 7 Utah 510, 27 Pac. Rep. 693.

In actions of tort the plaintiff is generally not entitled to interest on his damages when he refused, before suit, to accept for damages a sum larger than he was entitled to. *Thompson v. Boston & M. R. Co.*, 58 N. H. 524.

109. The discretionary power of the jury.*—It is discretionary with the

* See also *ante*, 102.

jury whether they should allow interest or not in actions sounding in damages. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 182.—FOLLOWED IN *Moore v. New York El. R. Co.*, 4 Silv. App. 488.

Interest is not allowable as matter of law. It can only be awarded as damages, and is in the discretion of the jury. *Hodge v. New York C. & H. R. R. Co.*, 27 Hun (N. Y.) 394.

In actions for damages for negligence, interest may be awarded or withheld in the discretion of the jury. *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336.

Where, in an action of tort, damages not exemplary are found to be due the plaintiff, the jury trying the cause may, in its discretion, add interest to the sum which it finds to represent the loss; unless the addition of interest would increase the damages so much as to be clearly unjust, an objection to its allowance will not be allowed to prevail. *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. Rep. 328.—FOLLOWED IN *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

While the jury might include in their verdict interest on the assessment of damages from the date of the injury, it is not competent for the court to add the same to their verdict. *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa 121.

Interest may legally be allowed by a jury, in its discretion, in estimating the amount of damages sustained by the plaintiff through an injury to his property caused by the negligence of the defendant. The interest may be computed on the amount of the depreciation in value of the property. *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. Rep. 44, 48 N. Y. S. R. 364.—EXPLAINING *Seyre v. State*, 123 N. Y. 291.

The distinction in this respect between actions sounding in tort, and actions to recover unliquidated damages on contract, pointed out. *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. Rep. 44, 48 N. Y. S. R. 364.

In an action for breach of contract, whether interest is recoverable does not rest in the discretion of the jury, but is a question of law for the court; while in actions sounding in tort, when the recovery of interest is permissible, is, with some exceptions, a question for the jury. *Mansfield v. New York C. & H. R. R. Co.*, 114 N. Y. 331, 21 N. E. Rep. 735, 1037, 23 N. Y.

S. R. 739, 24 N. Y. S. R. 534, 40 Alb. L. J. 89, 4 L. R. A. 566; modifying and affirming 46 Hun 680, 12 N. Y. S. R. 871.—DISTINGUISHING *McMahon v. New York & E. R. Co.*, 20 N. Y. 463.

When the jury are instructed in an action for negligence, to award the damages the plaintiff has sustained, the court may leave it to them to say whether on such damages the plaintiff is entitled to interest; but it is erroneous to instruct them as matter of law, that the plaintiff is entitled to interest on the damages. *Black v. Camden & A. R. & T. Co.*, 45 Barb. (N. Y.) 40.

110. Time from which calculated.

—(1) *From time of injury.*—The plaintiff should be allowed interest on the amount of his damages, not from the commencement of his action, but from the time the injury was done. *Georgia Pac. R. Co. v. Fullerton*, 79 Ala. 298.

In an action to recover for an injury to property, resulting from the negligence of defendant, it is proper to allow interest from the time the injury was done. *Chicago & N. W. R. Co. v. Shultz*, 55 Ill. 421, 2 Am. Ry. Rep. 417.—DISTINGUISHED IN *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.

When a party is entitled to recover damages for the wrongful destruction of his property, interest on its value should be allowed from the date of its destruction. *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57.—FOLLOWING *Texas & P. R. Co. v. Levi*, 59 Tex. 679.—QUOTED IN *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

Interest upon the amount of the value of the property destroyed from the time of its destruction through negligence is a material and necessary element of damage as complete compensation, and it is proper for the court to instruct the jury to allow it. *Jacksonville, T. & K. W. R. Co. v. Peninsular L. T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.—QUOTING *Ancrum v. Slone*, 2 Spears (So. Car.) 594; *Parrott v. Knickerbocker & N. Y. Ice Cos.*, 46 N. Y. 361; *Chapman v. Chicago & N. W. R. Co.*, 26 Wis. 304.

(2) —*to date of judgment.*—Where a suit is brought for the destruction of property that has a definite money value, susceptible of easy proof, a just indemnity to the plaintiff requires the addition to the value of the property at the time of its destruction, of interest from that time to the date of the

judgment. *Regan v. New York & N. E. R. Co.*, 49 Am. & Eng. R. Cas. 550, 60 Conn. 124, 22 All. Rep. 503.

(3) *From institution of suit.*—Interest may be allowed on the amount of damages sustained, to be computed from the institution of the suit. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

For injuries to property, interest may be recovered from the commencement of the action, on the immediate damages. *Dean v. Chicago & N. W. R. Co.*, 43 Wis. 305.—FOLLOWING *Chapman v. Chicago & N. W. R. Co.*, 26 Wis. 295.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132.

111. What rate governs.—Where interest is allowed, not by virtue of any contract to pay it, but simply as damages because of default in discharge of an obligation, the legal rate of interest must govern. *Sanders v. Lake Shore & M. S. R. Co.*, 94 N. Y. 641.—FOLLOWED IN *Stoddard v. Lake Shore & M. S. R. Co.*, 94 N. Y. 643. REVIEWED IN *Jermain v. Lake Shore & M. S. R. Co.*, 31 Hun (N. Y.) 558.—*Jermain v. Lake Shore & M. S. R. Co.*, 31 Hun (N. Y.) 558.—REVIEWING *Sanders v. Lake Shore & M. S. R. Co.*, 94 N. Y. 641.

Where an injunction restraining defendants from obstructing a lane was dissolved upon their taking into court as security the amount of damages, and thereupon defendants did obstruct the lane—*held*, that they were liable for the legal rate of interest on the amount from the time when the injunction was dissolved. Defendants must bear the entire loss of such interest though the amount deposited had drawn but four per cent. *Carpenter v. Easton & A. R. Co.*, 28 N. J. Eq. 390, 14 Am. Ry. Rep. 195.

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aware, *L. & W. R. Co.*, 50 *N. J. L.* 317, 11 *Cent. Rep.* 574, 13 *All. Rep.* 233.—DISAPPROVING *Sullivan v. Union Pac. R. Co.*, 3 *Dill.* (U. S.) 334.

Prior to the Massachusetts statute of 1886, ch. 140, a street-railway company was not liable to an action of tort for negligently causing the death of a person, whether a passenger or not, upon its road. *Holland v. Lynn & B. R. Co.*, 30 *Am. & Eng. R. Cas.* 648, 144 *Mass.* 425, 4 *N. Eng. Rep.* 320, 11 *N. E. Rep.* 674.—FOLLOWED IN *Gunn v. Cambridge R. Co.*, 30 *Am. & Eng. R. Cas.* 652, 144 *Mass.* 430.—*Gunn v. Cambridge R. Co.*, 30 *Am. & Eng. R. Cas.* 652, 144 *Mass.* 430, 11 *N. E. Rep.* 678.

An action on the case cannot be maintained by a widow to recover damages for the loss of her husband, or by a father for the loss of service of his child, in consequence of the death of the husband or child occasioned by the carelessness or fault of the agent or servants of a railroad corporation. *Carey v. Berkshire R. Co.*, 1 *Cush. (Mass.)* 475.—DISTINGUISHING *Ford v. Monroe*, 20 *Wend. (N. Y.)* 210.—FOLLOWED IN *Eden v. Lexington & F. R. Co.*, 14 *B. Mon. (Ky.)* 165; *Kearney v. Boston & W. R. Corp.*, 9 *Cush. (Mass.)* 108; *Shaw v. Boston & W. R. Corp.*, 8 *Gray (Mass.)* 45, *Palfrey v. Portland, S. & P. R. Co.*, 4 *Allen (Mass.)* 55. REVIEWED IN *Sullivan v. Union Pac. R. Co.*, 3 *Dill. (U. S.)* 334.—*Sullivan v. Union Pac. R. Co.*, 1 *McCrory (U. S.)* 301, 2 *Fed. Rep.* 447. *Lyons v. Woodward*, 49 *Me.* 29. *Worley v. Cincinnati, H. & D. R. Co.*, 1 *Handy (Ohio)* 481.—APPROVED IN *Palfrey v. Portland, S. & P. R. Co.*, 4 *Allen (Mass.)* 55.—*Thomas v. Union Pac. R. Co.*, 1 *Utah* 232.

The cause of action for an injury to the person dies with the person, though a husband may maintain a civil action for an injury to the wife, so far as medical service and funeral expenses were incurred, or a parent for a child up to its death, but not for the loss of life. *Eden v. Lexington & F. R. Co.*, 14 *B. Mon. (Ky.)* 165.—FOLLOWING *Carey v. Berkshire R. Co.*, 1 *Cush. (Mass.)* 475.—APPROVED IN *Palfrey v. Portland, S. & P. R. Co.*, 4 *Allen (Mass.)* 55. REVIEWED IN *Sullivan v. Union Pac. R. Co.*, 3 *Dill. (U. S.)* 334.

No action lies at common law on a promise by a railroad company to pay the widow of one who was killed by an accident on its road a certain sum of money in considera-

tion of her forbearance to sue the company for damages. *Palfrey v. Portland, S. & P. R. Co.*, 4 *Allen (Mass.)* 55.—APPROVING *Hubgh v. New Orleans & C. R. Co.*, 6 *La. Ann.* 495; *Eden v. Lexington & F. R. Co.*, 14 *B. Mon. (Ky.)* 165; *Worley v. Cincinnati, H. & D. R. Co.*, 1 *Handy (Ohio)* 481; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.*, 25 *Conn.* 265.

2. Civil law and admiralty rule.—By the civil law an action will lie for the wrongful death of a person, and it seems that the same action may be maintained in admiralty. *Holmes v. Oregon & C. R. Co.*, 6 *Sawy. (U. S.)* 262, 5 *Fed. Rep.* 75.—QUOTING *Sullivan v. Union Pac. R. Co.*, 3 *Dill. (U. S.)* 341.—FOLLOWED IN *The Clatsop Chief*, 8 *Fed. Rep.* 163. QUOTED IN *Ladd v. Foster*, 12 *Sawy. (U. S.)* 547. REVIEWED IN *Conroy v. Oregon C. Co.*, 10 *Sawy. (U. S.)* 630, 23 *Fed. Rep.* 71.

In Louisiana an action for damages caused by the homicide of a free human being cannot be maintained. *Hubgh v. New Orleans & C. R. Co.*, 6 *La. Ann.* 495.—APPROVED IN *Palfrey v. Portland, S. & P. R. Co.*, 4 *Allen (Mass.)* 55. FOLLOWED IN *Herman v. New Orleans & C. R. Co.*, 11 *La. Ann.* 5.

A child which was a passenger on a steamship from Liverpool to New York was poisoned on the passage, and died, as was alleged, in consequence of negligence on the part of the officers of the ship. The father, having been appointed administrator of the child, filed a libel against the vessel to recover damages, to which libel exceptions were filed by the claimants of the vessel. *Held*, that the cause of action arose on contract and survived to the administrator, and might be sued for *in rem*. *Steamship City of Brussels*, 6 *Ben. (U. S.)* 370.

3. Survival of right of action for the injury.—At common law a person injured by the wrongful acts, neglect, or default of another might, if the injuries were not fatal, maintain an action to recover damages therefor. The remedy thus allowed did not survive, but abated upon the death of a person injured. If instantly killed, no right of action existed. *Maney v. Chicago, B. & Q. R. Co.*, 49 *Ill. App.* 105.

An action against a passenger carrier in the nature of an action on the case for the injuries resulting from a breach of the carrier's contract to transport the passenger

safely, survives to the personal representative, and the fact that the death of the person injured resulted from the injuries received does not affect the right of recovery, the action being for the injuries, and not for the death. *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.—QUOTED IN *Wise v. Covington & C. St. R. Co.*, 91 Ky. 537.

Section 1, ch. 35, of the Laws of New Hampshire of 1879 provided that in cases of negligent killing, where, if death had not ensued, the person injured would have been entitled to recover damages, his executor or administrator might recover damages for the injury, such damages to be divided in certain proportions among the widow and children or next of kin of deceased. *Held*, that this statute caused the right of action, which at common law died with the decedent, to survive. *Corliss v. Worcester, N. & R. R. Co.*, 21 Am. & Eng. R. Cas. 208, 63 N. H. 404.

4. Action for death caused by breach of contract.—Where it is alleged in the complaint that a person riding upon a train under a contract with the company for safe carriage was, without his fault, injured by the negligence of the company, and died without obtaining satisfaction for such injury, his administrator may maintain an action for breach of the contract, and thus recover the pecuniary damages resulting to the deceased prior to his death. *Kelley v. Union Pac. R. Co.*, 16 Colo. 455, 27 Pac. Rep. 1058.

The executrix of a passenger injured so that after an interval he died may recover, in an action for a breach of contract, the damages to his personal estate arising in his lifetime for medical expenses and loss occasioned by his inability to attend to business. *Bradshaw v. Lancashire & Y. R. Co.*, L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. 847.—COMMENTED ON IN *Leggott v. Great Northern R. Co.*, L. R. 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. 334, 24 W. R. 784.

Privity of contract between a postal agent and the railroad is not essential to recovery by the widow in case of his death by the company's negligence. The widow can in such case recover under the Damage Act (Rev. St. 1889, § 4425). *Magoffin v. Missouri Pac. R. Co.*, 47 Am. & Eng. R. Cas. 489, 102 Mo. 540, 15 S. W. Rep. 76.

In an action by a quarry company against

a railway company for damages for breach of contract to furnish the quarry with strong and amply sufficient and properly inspected cars for the transportation of the product of the quarry, the complaint alleged that the railway company had in its service a car inspector, whose duty it was to inspect the cars that were to be furnished the appellant; that a defective car was delivered to the plaintiff by the railway company; that its defective condition might have been discovered by the railway company on proper inspection, but that it carelessly and negligently failed to inspect the car, and knowingly delivered it to the plaintiff without inspection; that the plaintiff, relying upon the fact that the railway company had performed its duty to inspect, received from it said car, believing it to be safe and secure, the defect being hidden and unknown to the plaintiff; that the car, by reason of its defective condition and without any default on the part of the plaintiff, broke loose and ran down a grade, killing one of the plaintiff's employés. *Held*: (1) that the complaint stated a good cause of action against the railway company for breach of duty; (2) that as it cannot be said that merely nominal damages are recoverable, the judgment sustaining the demurrer to the complaint must be reversed. *Hoosier Stone Co. v. Louisville, N. A. & C. R. Co.*, 131 Ind. 575, 31 N. E. Rep. 365.

In such an action the defendant cannot successfully demur to the complaint on the ground that it does not show that the employé that was killed was free from contributory negligence, when the complaint avers that the railway company, through its general counsel and solicitor, represented the administrator of the deceased employé in an action brought by him against the quarry company for damages resulting from the death of his intestate, and that the railway company, after receiving notice from the quarry company of the pendency of the action, and that it would hold the railway company liable for all damages recovered, refused to defend said action, and the quarry company defended it at its own expense, and judgment was rendered against it. The conduct of the railway company in said behalf worked an estoppel, as a recovery could not have been had by the administrator if his intestate had been guilty of contributory negligence. *Hoosier*

Stone Co. v. Louisville, N. A. & C. R. Co., 131 Ind. 575, 31 N. E. Rep. 365.

5. Action for loss of services between time of injury and time of death.*—At common law a mother who is the only surviving parent may recover for the loss of services of her unemancipated minor son from the time that he is fatally injured until the time of his death; and for any expenses incurred during that time for medical attendance, and for care and nursing. *Natches, J. & C. R. Co. v. Cook*, 63 Miss. 38.—DISTINGUISHED IN *Amos v. Mobile & O. R. Co.*, 63 Miss. 509.

An action cannot be maintained against a railroad by a parent for loss of the services of a child two years old killed by the railroad, the common law action being for loss of present services. *Allen v. Atlanta St. R. Co.*, 54 Ga. 503.—REVIEWED IN *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350.

II. STATUTES GRANTING THE REMEDY.

1. Their Constitutionality.

6. Alabama.—The Code of 1876, § 2899, giving the parent a right of action for the death of a child by the wrongful act of a corporation, is violative of section 12 of article 14 of the state constitution, providing that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons," and is void. *Smith v. Louisville & N. R. Co.*, 21 Am. & Eng. R. Cas. 157, 75 Ala. 449.—APPROVING *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641. FOLLOWING *South & N. Ala. R. Co. v. Morris*, 65 Ala. 193. QUOTING *San Mateo County v. Southern Pac. R. Co.*, 8 Sawy. (U. S.) 238, 8 Am. & Eng. R. Cas. 1.

This provision of the constitution must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons in the matter of prosecuting or defending suits. *Smith v. Louisville & N. R. Co.*, 21 Am. & Eng. R. Cas. 157, 75 Ala. 449.

7. Georgia.—The act of 1850 giving an action for a homicide against the person causing such homicide embraces railroads,

and such act is constitutional. *South Western R. Co. v. Paulk*, 24 Ga. 356.

The act of 1878, allowing the wife to recover the full value of her husband's life in case of his homicide, is not unconstitutional. *Georgia R. Co. v. Pittman*, 26 Am. & Eng. R. Cas. 474, 73 Ga. 325.

8. Kentucky.—Gen. St. ch. 57, § 1, giving a right of action to the representatives of one not in the employment of a railroad company, who shall lose his life through the negligence or carelessness of the operators of such railroad, is not a violation of the fourteenth amendment of the constitution of the United States, forbidding a state to deny to "any person" the equal protection of the laws, nor of state constitutional provisions which guarantee equal rights to all persons. *Louisville S. V. & T. Co. v. Louisville & N. R. Co.*, (Ky.) 48 Am. & Eng. R. Cas. 1, 17 S. W. Rep. 567.

As the business of operating a railroad is attended by peculiar dangers, and persons engaged in that business possess some rights not generally enjoyed by others, such persons should be regarded as a separate and distinct class, and a law may be made to apply to them as a class, although it does not apply to persons engaged in any other business. Therefore, Gen. St. ch. 57, § 1, which gives a right of action against the proprietors of railroads for the loss of life by their negligence, is not unconstitutional. *Schoolcraft v. Louisville & N. R. Co.*, 92 Ky. 233, 17 S. W. Rep. 567.—APPROVING *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 27.

9. Missouri.—The second section of the Damage Act (Rev. St. § 2121), which authorizes the recovery of five thousand dollars in cases of death of persons occasioned by the negligence of railroads, etc., is constitutional. *Carroll v. Missouri Pac. R. Co.*, 26 Am. & Eng. R. Cas. 268, 88 Mo. 239.

10. Texas.—The act of Feb. 2, 1860, giving a right of action for compensatory damages against any railroad or steamboat, to certain surviving relatives, for carelessly or negligently killing a person, is not abrogated by the Constitution of 1869, § 30, providing that "every person, corporation, etc., that may commit a homicide through wilful act or omission, is responsible in exemplary damages to the surviving husband, widow," etc. *Gohen v. Texas Pac. R. Co.*, 2

* Right of parent to recover for loss of services of child that has been negligently killed, see note, 17 L. R. A. 79.

Woods (U. S.) 346. *Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31.

2. Their Operation and Effect.

11. Lord Campbell's Act.—Under Lord Campbell's Act (9 & 10 Vict. c. 93) a personal representative of the deceased is given a cause of action beyond that which the deceased would have had if he had survived, and based on a different principle. *Pym v. Great Northern R. Co.*, 4 *B. & S.* 396, 10 *Jur. N. S.* 199, 32 *L. J. Q. B.* 377, 11 *W. R.* 922, 8 *L. T.* 734; affirming 2 *B. & S.* 759, 8 *Jur. N. S.* 819, 31 *L. J. Q. B. D.* 249, 10 *W. R.* 737, 6 *L. T.* 537.

An action for the death of a person whose income arose from land and personally independently of any exertion of his own, no portion of which was lost to his family by his death, is maintainable, if the mode of distributing such income among his family is changed. *Pym v. Great Northern R. Co.*, 4 *B. & S.* 396, 10 *Jur. N. S.* 199, 32 *L. J. Q. B.* 377, 11 *W. R.* 922, 8 *L. T.* 734; affirming 2 *B. & S.* 759, 8 *Jur. N. S.* 819, 31 *L. J. Q. B. D.* 249, 10 *W. R.* 737, 6 *L. T.* 537.

No independent cause of action is given by Lord Campbell's Act, but a mere right of action when there was at the time of the death a subsisting cause of action. *Read v. Great Eastern R. Co.*, 9 *B. & S.* 714, 37 *L. J. Q. B.* 278.

Where a passenger injured by the negligence of a railway company accepts in his lifetime a sum of money in satisfaction of all claims, his death does not create a fresh cause of action as to his widow, and she is not entitled to recover for his death. *Read v. Great Eastern R. Co.*, 3 *L. R. Q. B.* 555, 16 *W. R.* 1040, 18 *L. T.* 82.

An action by an administratrix whose husband was killed, having been injured through the negligence of a railway company so that he was unable to attend to his business until his death, and whereby he incurred expenses, is not barred by a judgment and satisfaction in a former action by such administratrix to recover damages for his death, for the benefit of herself as wife and of his children. *Loggott v. Great Northern R. Co.*, *L. R. 1 Q. B. D.* 599, 35 *L. T.* 334.

An action by an administratrix for damage caused to the personal estate of an intestate is not brought in the same right as an action under Lord Campbell's Act to re-

cover compensation for his death, and an admission in the latter action creates no estoppel in the former. *Loggott v. Great Northern R. Co.*, 24 *W. R.* 784, 45 *L. J. Q. B. D.* 557, *L. R. 1 Q. B. D.* 599.

Under the provisions of Lord Campbell's Act the husband of a woman killed by accident, suing as her administrator, is entitled to recover damages for himself and her children, although there may be no evidence showing that she was entitled for life to rents or other income. *Lett v. St. Lawrence & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 165, 11 *Ont. App.* 1.

The injury contemplated by the statute means injury resulting in the loss of money, present or prospective, but proximate or direct. *Lett v. St. Lawrence & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 165, 11 *Ont. App.* 1.

Where a father sues under Lord Campbell's Act for the death of his son, there is evidence for the jury of pecuniary injury to the father from the son's death if it is shown that the father was scarcely able to work and that the son used to contribute to his support. *Hetherington v. North Eastern R. Co.*, 9 *Q. B. D.* 160, 51 *L. J. Q. B.* 495, 30 *W. R.* 797.

An action for damages under Lord Campbell's Act was commenced in the Admiralty Division, and no application was made to transfer the cause to any other division. *Held*, that upon default in pleading by the defendants the plaintiffs were entitled, under Order xxvii., rule 4, to enter interlocutory judgment, and to have the damages assessed and apportioned by a jury. *The Orwell*, 13 *P. D.* 80.—DISTINGUISHING *The Bernina*, 12 *P. D.* 58. *The Gertrude*, 12 *P. D.* 204.

12. Alabama.—The act approved February 21, 1860, entitled "An act to prevent homicides," which repealed sections 1938 and 1939 of the Code of 1852, having been omitted from the Revised Code of 1867, in which the repealed sections were inserted, and the act of the same title, approved February 21, 1872, having been passed to remedy the omission, section 1641 (Rev. Code, § 2300), which gives against corporations the same remedy for wrongful acts causing death, which said sections 1938 and 1939 gave against individuals, now gives the same remedy as by the amending act of 1872. *Savannah & M. R. Co. v. Shearer*, 58 *Ala.* 672, 20 *Am. Ky. Rep.* 451.

An act to prevent homicides, approved

February 5, 1872, was intended not merely to give compensation for the lost earnings of the slain by the wrongful act or omission of another, but is also punitive in its purpose, and its provisions apply as well to corporations as to natural persons. *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272.

Section 2899 of the Code of 1876, providing that "when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or, if the father be not living, the mother, may maintain an action against such corporation, or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess," creates a new cause of action, is highly penal in its terms, and must be construed as a penal statute. *Smith v. Louisville & N. R. Co.*, 21 Am. & Eng. R. Cas. 157, 75 Ala. 449.

At common law, if the father consented to the employment of his minor son in a dangerous service, and the son had arrived at the age of fourteen years, each of them assumed the risks incident to the service, and neither could maintain an action for damages against the employer on account of personal injuries to the minor resulting from the negligence of another person employed in the same service, and there is nothing in the statutory provisions giving and regulating actions for damages on account of wrongful acts causing death or personal injuries (Code, §§ 2588-2593), which gives the father, in such case, a right of action against the employer for personal injuries causing the death of the son while in the service. *Lovell v. De Bardelaben C. & I. Co.*, 90 Ala. 13, 7 So. Rep. 756.

13. Arkansas.—Section 3 of the act of February 3, 1875 (Acts 1874-5, p. 133), providing a special right of action where a person is killed by a railway train, has been repealed by the general act of March 6, 1883 (Mansf. Dig. §§ 5225, 5226). *Davis v. St. Louis, I. M. & S. R. Co.*, 44 Am. & Eng. R. Cas. 690, 53 Ark. 117, 13 S. W. Rep. 801.

The act of 1838 (Mansf. Dig. § 5332), which provides that an action for wrongs done to the person of another may, after his death, be brought by his personal representative for the benefit of his estate, is not repealed by the act of 1883 (Mansf. Dig. §§ 5225, 5226), which provides for an action

by the personal representative for the benefit of the widow and next of kin for pecuniary loss sustained by the death of a person caused by the wrongful act, neglect, or default of another. Both actions may proceed *pari passu*, and a recovery in one action will not bar a recovery in the other. *Davis v. St. Louis, I. M. & S. R. Co.*, 44 Am. & Eng. R. Cas. 690, 53 Ark. 117, 13 S. W. Rep. 801.

The common law right of action of a parent for the loss of his minor child's services, caused by injuries inflicted by another which resulted in death, has not been abolished, but the recovery is confined, in point of time, to the value of such services during the period intervening between the injury and death. *Davis v. St. Louis, I. M. & S. R. Co.*, 44 Am. & Eng. R. Cas. 690, 53 Ark. 117, 13 S. W. Rep. 801.—NOT FOLLOWING *Sullivan v. Union Pac. R. Co.*, 3 Dill. (U. S.) 334.

14. California.—The action given by the statute is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury. *Monro v. Pacific Coast Dredging & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303.

15. Colorado.—The repeal of the act of 1872, giving compensatory damages for injuries resulting in death, through the negligence of a railway company, to be recovered by the administrator, does not take away any accrued right which, by authority of law and in the manner pointed out by statute, had been previously asserted. Section 11 of the Bill of Rights, prohibiting retrospective legislation, operates, as to pending causes under the statute, as a saving clause incorporated into the repealing statute. *Lundin v. Kansas Pac. R. Co.*, 4 Colo. 433. *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 162. See also *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1.

Section 1508, Mill's Ann. Stat., fixing a liability upon railroad companies and the like for personal injuries to passengers and others, may be divided with reference to the persons injured into two parts—the first giving a right of action to any person injured by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, etc., the second furnishing a right of action where the death of a passenger resulted from a defect or insufficiency of a railroad, locomotive, stage-coach, or other public

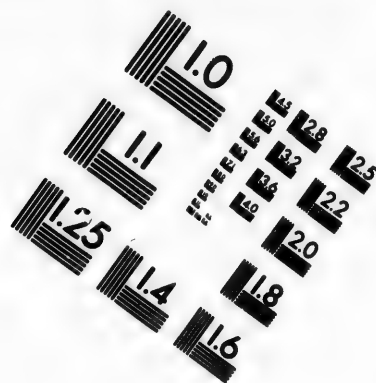
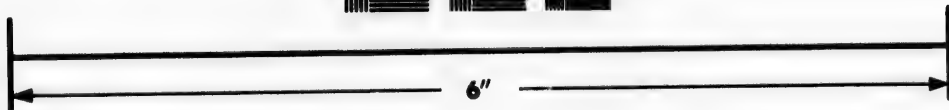
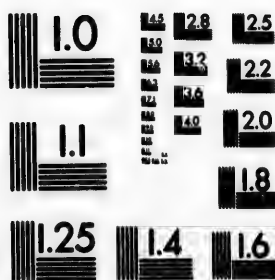


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conveyance. *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. Rep. 185.—FOLLOWING *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 498.

16. Georgia.—An action for a homicide is based upon the violation by the defendant of some of the public or private obligations it was under to deceased, and the test is, would the deceased if he had lived have had a right of action? *Western & A. R. Co. v. Sherry*, 52 Ga. 461, 8 Am. Ry. Rep. 13.

If an employé contract to assume all the risks of his employment, and not to hold the company liable for the negligence of its servants, and he be killed under such circumstances as under his contract and under the law he could not, had he lived, have recovered damages for an injury received, then his wife cannot recover damages for his death. *Western & A. R. Co. v. Strong*, 52 Ga. 461, 8 Am. Ry. Rep. 13.—FOLLOWING *Western & A. R. Co. v. Bishop*, 50 Ga. 465.—CRITICISED IN *Runt v. Herring*, 21 N. Y. Supp. 244. NOT FOLLOWED IN *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 31 Am. & Eng. R. Cas. 176.

The intention of the act of the legislature of October 27, 1887, "to amend section 2971 of the code," etc., providing that "a mother, or if no mother, a father, may recover for the homicide of a child, minor or *sui juris*, upon whom she or he is dependent or who contributes to his or her support," was not to give the right of recovery to the mother or father unless she or he was dependent upon the child for support, and the child, before his death, contributed to the support of such parent. For the word "or" after the word "dependent" the word "and" should be substituted. *Clay v. Central R. & B. Co.*, 42 Am. & Eng. R. Cas. 76, 84 Ga. 345, 10 S. E. Rep. 967.—EXPLAINED IN *Daniels v. Savannah, F. & W. R. Co.*, 86 Ga. 236.

In the absence of allegation that the parent plaintiff was dependent upon the deceased child, and it being uncertain from the evidence that the deceased contributed to the support of the parent, a new trial was proper, after verdict in the parent's favor. *Clay v. Central R. & B. Co.*, 42 Am. & Eng. R. Cas. 76, 84 Ga. 345, 10 S. E. Rep. 967.

17. Illinois.—The glaring absurdity of the common law in allowing a husband and

father if injured but not killed a right of action for recovery of the damages thus sustained, and denying to the widow and children any compensation for the damages inflicted upon them, should the injury be greater and result in his death, has been changed by the St. of 1874. *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105.

The general doctrine that a railroad company is not liable at common law, or under the statutes imposing liability for injuries resulting in death, for the negligence of mortgagees who are operating the road under a possession taken and held adversely, is not controverted. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412, affirming 43 Ill. App. 454.

18. Indiana.—The provision of 1 Rev. St. 1852, p. 426, § 3, which gives to the wife, or if there is no wife then to the minor children of a person killed by the negligence or carelessness of the managers of railroad trains, a right of action against the company, is by implication repealed by 2 Rev. St. 1852, p. 205, § 784. *Peru & I. R. Co. v. Bradshaw*, 6 Ind. 146.—FOLLOWED IN *Jeffersonville R. Co. v. Millet*, 8 Ind. 255, Indianapolis & C. R. Co. v. Davis, 10 Ind. 398.—*Madison & I. R. Co. v. Bacon*, 6 Ind. 205.

If there be no father, mother, or guardian, then an administrator may sue, under section 784 of the code. And in either event, the limitation of the action, the amount of recovery, and the distribution thereof, will be governed by the provisions of section 784. *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513.

19. Iowa.—Under acts of 9th Gen. Assembly, ch. 169, § 7, making a railroad liable "to any person sustaining such damage," an action accrues to the representatives of an employé killed by the neglect or mismanagement of the other employés of the company. *Philo v. Illinois C. R. Co.*, 33 Iowa 47.

While at common law an action could not be maintained for a personal injury resulting in immediate death, yet the reasons for that rule are abrogated by §§ 2525-2527 of the code, and now an action by the administrator may be maintained in such a case. *Conners v. Burlington, C. R. & N. R. Co.*, 71 Iowa 490, 32 N. W. Rep. 465.

The code, § 2527, providing that the action for wrongful injury causing death "shall be deemed a continuing one and to have accrued to such representative or successor at the same time as it did to the deceased if he had survived," gives but one right of action for such injury. *Ewell v. Chicago & N. W. R. Co.*, 29 *Fed. Rep.* 57.

20. Kentucky.—In an action under Gen. St. ch. 57, § 3, to recover for the death of one whose life is alleged to have been lost by the wilful neglect of the defendant, the plaintiff may recover under section 1 of that chapter, upon proof of ordinary neglect, provided the deceased was not an employé of the defendant, and it is not necessary to that end that the petition should allege that the deceased was not in the employment of the defendant, that fact may be developed by the proof so as to control the right of recovery. *Louisville & N. R. Co. v. Smith*, 87 *Ky.* 501, 10 *Ky. L. Rep.* 514, 9 *S. W. Rep.* 493.

When an employé of a railroad is injured by the gross or wilful neglect of the company, and death ensues, his personal representative may maintain an action for mental and bodily suffering of the decedent during the period intervening between the time of the injury and the death, but there can be no recovery by the personal representative if the neglect was merely ordinary. For this degree of neglect the employé himself would have no right of action if he had survived injury, and therefore no right survives to the personal representative. *Louisville & N. R. Co. v. Coniff*, 90 *Ky.* 560, 14 *S. W. Rep.* 543.—REVIEWING *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 *Ky.* 40.

The character of neglect alleged determines whether an action is brought under section 1 or section 3. Therefore, if the averment be that the life was lost by "wilful neglect" the recovery, if any, must be had under section 3 of the statute, and there can be no recovery if the person left neither widow nor child. The "wilful neglect" of the statute is *sui generis* and does not include the common law degrees of negligence. *Cincinnati, N. O. & T. P. R. Co. v. Privitt*, 92 *Ky.* 223, 17 *S. W. Rep.* 484.—OVERRULING *Louisville, C. & L. R. Co. v. Case*, 9 *Bush (Ky.)* 728; *Claxton v. Lexington & B. S. R. Co.*, 13 *Bush* 636.—*Louisville, S. V. & T. Co. v. Louisville & N. R. Co.*, (Ky.) 48 *Am. & Eng. R. Cas.* 1, 17 *S. W. Rep.* 567.

Where a personal representative sues to recover for the death of his intestate, through the wilful and gross neglect of a railroad company, if there be no claim for damages for the mental and physical suffering of the deceased, the court will assume that the suit is under Gen. St. ch. 57, § 3, providing for an action by the widow, heir, or personal representative of a person killed by wilful neglect of a person or corporation, and no recovery can be had if it appear that the deceased left no surviving widow or child. *Baker v. Louisville & N. R. Co.*, (Ky.) 17 *S. W. Rep.* 191.—FOLLOWING *Given v. Kentucky C. R. Co.*, 15 *S. W. Rep.* 1057.

Under Gen. St. ch. 57, § 1, a complaint is good on demurrer that seeks to recover for the death of a transfer agent who was killed while on a train for the purpose of checking baggage, etc., but in the employ of a transfer company. *Mefford v. Louisville & N. R. Co.*, (Ky.) 20 *S. W. Rep.* 263.—FOLLOWING *Givens v. Kentucky C. R. Co.*, 89 *Ky.* 231, 12 *S. W. Rep.* 257.

21. Louisiana.—Recovery of independent damages for the death of a freeman caused by an accident occurring before the passage of the act of July 10, 1884, cannot be had in the face of the uniform jurisprudence forbidding it. *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 *La. Ann.* 650.

The act of March 18, 1855, providing that the right of action for injuries causing death shall survive in favor of certain relatives for the space of one year from the death, is a legal subrogation in favor of the persons designated in the statute as having the right to sue, and the plaintiff must allege in his complaint his cause of action as being derived from the deceased. *Earhart v. New Orleans & C. R. Co.*, 17 *La. Ann.* 243.—DISTINGUISHED in *Frank v. New Orleans & C. R. Co.*, 20 *La. Ann.* 25.

Under that act plaintiff must allege a cause of action in and damages suffered by the deceased. *Frank v. New Orleans & C. R. Co.*, 20 *La. Ann.* 25.—DISTINGUISHING *Earhart v. New Orleans & C. R. Co.*, 17 *La. Ann.* 243.

22. Maryland.—Under the statute giving an action in the name of the state for the use of the person entitled to damages, whenever death shall be caused by wrongful act, neglect, or default, an action may be had where an actual pecuniary damage has resulted from the death of a child, whether

over twenty-one years of age or not. *Maryland v. Baltimore & P. R. Co.*, 1 *Hughes* (U. S.) 337.

23. Massachusetts.—The statute of 1881, ch. 199, allowing an action for loss of life by negligence, does not apply to an action instituted after the statute went into effect, for a loss of life occurring before its enactment. *Kelley v. Boston & M. R. Co.*, 135 *Mass.* 448.

The transfer of freight by a railroad company from a vessel to its cars is a railroad operation within the meaning of Pub St. ch. 112, § 212, and St. 1883, ch. 243, providing for damages for death from the "negligence of a corporation operating a railroad." *Daley v. Boston & A. R. Co.*, 33 *Am. & Eng. R. Cas.* 298, 147 *Mass.* 101, 6 *N. Eng. Rep.* 349, 16 *N. E. Rep.* 690.

Under the provision of the statute that damages for the death of a passenger shall be "assessed with reference to the degree of culpability of the corporation or of its agents or servants," there must be some degree of culpability on the part of the corporation or of its servants, and when the accident occurred through defects in a leased line which the lessor undertook to keep in repair, there can be no recovery against the lessee except it be shown that it had notice of the defective condition of the track. *Littlejohn v. Fitchburg R. Co.*, 37 *Am. & Eng. R. Cas.* 54, 148 *Mass.* 478, 20 *N. E. Rep.* 103, 2 *L. R. A.* 502.

The defendant company operated a railroad belonging to the commonwealth under an agreement by which the defendant was to furnish the motive power and operate the road and the commonwealth to maintain the roadbed and track in good condition. An accident occurred to passengers by reason of the settling of the track, due to a failure to keep ditches open. *Held*, that the company was liable if the danger might have been discovered by the exercise of due care, whether the defect was in the original construction of the road or was due to a failure on the part of the commonwealth to make necessary repairs. If it carried its passengers into a place which it knew, or ought to have known, was dangerous, it was negligent, although it did not create and had no right to remove the danger. *Littlejohn v. Fitchburg R. Co.*, 37 *Am. & Eng. R. Cas.* 54, 148 *Mass.* 478, 20 *N. E. Rep.* 103, 2 *L. R. A.* 502.

The company is liable under the statute

although the persons killed were children who were being carried without the payment of any fare. *Littlejohn v. Fitchburg R. Co.*, 37 *Am. & Eng. R. Cas.* 54, 148 *Mass.* 478, 20 *N. E. Rep.* 103, 2 *L. R. A.* 502.

One who steps from a street-railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every occupier, and over which place the company has no control. His rights are those of a traveler upon the highway, and not of a passenger, and if he is killed immediately after leaving the car by being struck by another car, his administratrix cannot maintain an action against the railway company under the St. of 1886, ch. 140. *Creamer v. West End St. R. Co.*, 52 *Am. & Eng. R. Cas.* 558, 156 *Mass.* 320, 31 *N. E. Rep.* 391, 16 *L. R. A.* 490.

The Employers' Liability Act (St. 1887, ch. 270, § 1, cl. 3, and § 3) does not give the administrator of an employé a right of action against an employer for causing the employé's death in addition to the right as legal representative to recover damages accruing to the intestate in his lifetime. *Ramsdell v. New York & N. E. R. Co.*, 151 *Mass.* 245, 23 *N. E. Rep.* 1103.

If an unmarried employé who is instantly killed leaves as his sole next of kin a brother not dependent upon him and a sister who is dependent, an action against the employer to recover for the death under the St. of 1887, ch. 270, § 2, should properly be brought in her name alone. *Daly v. New Jersey S. & I. Co.*, 155 *Mass.* 1, 29 *N. E. Rep.* 507.

An action under the St. of 1887, ch. 270, against an employer for the instantaneous death of an employé, by the latter's widow, is supported by a notice, in the form required by the statute as amended by the St. of 1888, ch. 155, given by the administrator of the employé's estate within thirty days after his appointment. *Jones v. Boston & A. R. Co.*, 157 *Mass.* 51, 31 *N. E. Rep.* 727.—*QUOTING Daly v. New Jersey S. & I. Co.*, 155 *Mass.* 1.

24. Michigan.—The right of action given by How. St. § 8314 to the personal representatives of a deceased person for the pecuniary injury resulting from his negligent killing, and that which survives under Act No. 113, Laws of 1885 (3 How. St. § 7397), for negligent injuries to the person, are separate and distinct causes of action, and the latter cannot be introduced into a cause

based upon the right given under the statute first cited by way of amendment to the declaration. *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 N. W. Rep. 44.

25. Missouri.—The provision of the Code, 1855, p. 647, § 2, allowing the recovery of damages to passengers killed on railroads, applies only to persons being transported strictly as passengers, and does not extend to a person who has been employed by a company, but who is temporarily out of work, and is riding in the baggage car on his own private business without payment of fare. *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418.—DISTINGUISHING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474; *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9; *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 340.—QUOTED IN *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608. REVIEWED IN *Ewald v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12.

The right designed to be conferred by Wagn. St. 519, § 2, is analogous to that given by section 3, and not an original one created after the death of the employé, but a right which the deceased might have exercised had he survived, and which is transmitted to his representative. Nor is any new right of action given by the latter clause of section 2 to the representatives of a deceased passenger against an owner of the road as contradistinguished from the corporation having charge of it. The term "owner" is therein used in the sense of proprietor or operator at the time of the accident. The above construction is aided by the following considerations: 1. Were the interpretation different the deceased might recover for his injuries independently of the statute if he survived long enough, and after his death recovery might again be had under section 2 for the same casualty. 2. Under the first clause of the section, in case of death from the negligence of the co-employé, a right is given the representative after the decease which had no existence before. 3. And under the second clause, in case of death resulting from defective appliances the representative is denied a right which the deceased might have exercised had he survived. *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, 9 Am. Ry. Rep. 440.—OVER-RULING *Schultz v. Pacific R. Co.*, 36 Mo. 18.—FOLLOWED IN *Elliott v. St. Louis & I. M.*

R. Co., 67 Mo. 272; *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350.

A track walker is not a fellow-servant with an engineer or fireman on a passenger train; and if he be negligently killed, the measure of damages is \$5000, under section 2. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, 10 S. W. Rep. 852.—APPROVED IN *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350. REVIEWED IN *Crumpley v. Hannibal & St. J. R. Co.*, 37 Am. & Eng. R. Cas. 357, 98 Mo. 34, 11 S. W. Rep. 244.

Section 2 of the special act of March 3, 1869, authorizing compensation to persons injured on the Iron Mountain railroad, did not limit the claim to party injured personally, but his administrator would be entitled under it to receive payment of the amount after his death. Section 2 was intended to guard against a sale of the claim, and nothing more. *Hickey v. Dallmeyer*, 44 Mo. 237.

Under Rev. St. §§ 2121-2123, providing that suit for injuries resulting in death might be brought by the husband or wife, and if he or she failed to sue within six months after death, then by the minor children, a widow began suit which she voluntarily dismissed, and after the six months the children began another. *Held*, that the action would not lie, as she did not "fail to sue." *McNamara v. Slavens*, 76 Mo. 329.—APPROVING *Shepard v. St. Louis, I. M. & S. R. Co.*, 3 Mo. App. 550.

Section 2122 only authorizes an action for damages where the death of the injured party was caused by the wrongful act of the party sued, and an action cannot be maintained where the death was only hastened by such wrongful act. *Jackson v. St. Louis, I. M. & S. R. Co.*, 25 Am. & Eng. R. Cas. 327, 87 Mo. 422.

Where one assuming to act as an officer, represents himself as such to the conductor of a railroad train, and offers to put upon the train as a passenger a person whom he claims to have arrested for crime, the conductor is not required to inquire into the cause of the arrest and the authority of the officer, but is justified in taking such prisoner in good faith upon the train, and is guilty of no wrongful act in so receiving and transporting him. *Jackson v. St. Louis, I. M. & S. R. Co.*, 25 Am. & Eng. R. Cas. 327, 87 Mo. 422.

Section 2122 is in derogation of the common law, and should receive a reasonably

strict construction. *Jackson v. St. Louis, I. M. & S. R. Co.*, 25 *Am. & Eng. R. Cas.* 327, 87 *Mo.* 422.

Rev. St. 1879, § 2121, giving a penalty of five thousand dollars whenever any person shall die from an injury occasioned by the negligence of "any officer, agent, servant, or employé whilst running or managing any locomotive, car, or train of cars," includes the negligence of any and all servants who are engaged in running or managing said locomotive, car, or train of cars. *Rine v. Chicago & A. R. Co.*, 41 *Am. & Eng. R. Cas.* 555, 100 *Mo.* 228, 12 *S. W. Rep.* 640.

26. Nevada.—A complaint under Comp. Laws, p. 39, § 115, need not in all cases set forth that there are kindred as named in the act; but the fact must be averred if proof is to be introduced of injury to such kindred. If the object of the suit is for the recovery of exemplary damages, such averment is not necessary. *Roach v. Consolidated Imperial Min. Co.*, 7 *Sawyer (U. S.)* 224.—DISTINGUISHING *Kearney v. Boston & W. R. Corp.*, 9 *Cush. (Mass.)* 108. REVIEWING *Blake v. Midland R. Co.*, 10 *Law & Eq.* 437.

27. New Mexico.—The New Mexico statute, giving a right of action for wrongfully causing death, and providing, *inter alia*, that "if such deceased be a minor and unmarried," then the action may be by the father and mother, does not authorize an action where the deceased is unmarried, but above age. The word "and" cannot be read as meaning "or." *Isaac v. Denver & R. G. R. Co.*, 12 *Daly (N. Y.)* 340; affirmed in 102 *N. Y.* 718, *mem.*—REVIEWED IN *Lakin v. Oregon Pac. R. Co.*, 34 *Am. & Eng. R. Cas.* 500, 15 *Oreg.* 220.

The common law rule of the non-liability of the master for the negligence of fellow-servants is not changed by a statute providing that when "any person" comes to his or her death by reason of the negligence or carelessness or criminal action of an agent, officer, or other employé of the railroad company, his or her representative may recover of the company \$5000. The words "any person" in such statute do not include one who is a fellow-servant. *Lutz v. Atlantic & P. R. Co.*, (*N. Mex.*) 53 *Am. & Eng. R. Cas.* 478, 30 *Pac. Rep.* 912.

28. New York.—Under the statutes of 1847 and 1849, giving a right of action to the next of kin for wrongfully causing death, a recovery may be had without proof

of resulting damages to the next of kin. *Keller v. New York C. R. Co.*, 2 *Abb. App. Dec. (N. Y.)* 480, 24 *How. Pr. (N. Y.)* 172; affirming 17 *How. Pr.* 102.—FOLLOWING *Oldfield v. New York & H. R. Co.*, 14 *N. Y.* 310.

The cause of action provided for by acts of 1847 and 1849 is an independent remedy depending wholly upon the statute. *Crowley v. Panama R. Co.*, 30 *Barb. (N. Y.)* 99.—APPROVING *Blake v. Midland R. Co.*, 10 *Eng. L. & Eq.* 442.—QUOTED IN *Needham v. Grand Trunk R. Co.*, 38 *Vt.* 294.—*Whitford v. Panama R. Co.*, 23 *N. Y.* 465; affirming 3 *Bosw. (N. Y.)* 67.—APPLYING *Blake v. Midland R. Co.*, 10 *Eng. L. & Eq.* 443.—CRITICISED IN *Fowles v. Nashville & D. R. Co.*, 5 *Baxt. (Tenn.)* 663. DISAPPROVED IN *Fowles v. Nashville & D. R. Co.*, 9 *Heisk. (Tenn.)* 829. QUOTED IN *Schlichting v. Wintgen*, 25 *Hun (N. Y.)* 626.

Whether a person entitled to the services of another, as a parent to those of a child, may not maintain an action against one by whose negligence, resulting in death, he has been deprived of such services—reserved as an open question. *Whitford v. Panama R. Co.*, 23 *N. Y.* 465; affirming 3 *Bosw.* 67.—REFERRING TO *Green v. Hudson River R. Co.*, 28 *Barb.* 9.—REVIEWED IN *Jeffersonville R. Co. v. Swayne*, 26 *Ind.* 477.

29. Pennsylvania.—The words "parents" and "children" in the act of April 26, 1855, relating to actions for personal injuries by negligence, are used to indicate the family relation in point of fact as the foundation of the right of action without regard to age. Under age the relation is presumed to exist until the contrary appears; over age it must be shown to exist. *Pennsylvania R. Co. v. Adams*, 55 *Pa. St.* 499.—DISTINGUISHING *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 318.—REVIEWED IN *Harkins v. Philadelphia & R. R. Co.*, 15 *Phila. (Pa.)* 286.

By the act of April 26, 1855, the right of action in cases of death from injuries was conferred only upon parents for the loss of their children, and children for the loss of parents, and reciprocally upon husband and wife. The constitution of 1873 declares that in cases of death resulting from injuries "the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted." No legislation on the subject has been enacted since the adoption of this

constitution. *Held*, that the act of 1855 is still the law, and that no right of action under the constitutional provision survives to the administrator of the deceased person. *Books v. Borough of Danville*, 95 Pa. St. 158.

30. Rhode Island.—Corporations are within the provisions of Rev. St. ch. 176, § 21, which provides for an action against the person inflicting an injury which causes the death of another, and are, as such, liable in damages for deaths caused by carelessness or negligence of their servants. *Chase v. American Steamboat Co.*, 10 R. I. 79.

31. South Carolina.—The provision of the law that the remedy given by Gen. St. § 2183 "shall not apply to any case where the person injured has, for such injury, brought action which has proceeded to trial and final judgment before his or her death," is not an exception to the previous sections, nor does it imply that action in behalf of the widow and children will be defeated only by judgment already had in an action instituted by the intestate, but was only intended to prevent a double remedy for the same wrongful act in any possible case. *Price v. Richmond & D. R. Co.*, 33 So. Car. 556, 12 S. E. Rep. 413.

32. South Dakota.—Comp. Laws, § 5499, which provides that "if the life of any person * * * is lost or destroyed, * * * then the widow, heirs, or personal representative of the deceased shall have the right to sue * * * and recover damages for the loss or destruction of the life aforesaid," creates a new cause of action in favor of the widow, heirs, or personal representative that can only arise after the death of the party. *Belding v. Black Hills & Ft. P. R. Co.*, (So. Dak.) 52 Am. & Eng. R. Cas. 624, 53 N. W. Rep. 750.

33. Tennessee.—Under code, §§ 2291, 2292, which give a right of action to the personal representative of a deceased person for injuries resulting in his death, an action cannot be maintained unless the death was the natural and proximate cause of the acts complained of. *Wagner v. Woolsey*, 1 Heisk. (Tenn.) 235.

Sections 2291 *et seq.* of the code abrogate the common law rule that actions of trespass for physical injuries die with the person. *Collins v. East Tenn., V. & G. R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46.—APPROVING Nashville & C. R. Co. v. Stevens, 9 Heisk. 12.

3 D. R. D.—48.

The act of March 26, 1883, which provides that sections 2291 *et seq.* of the code be so amended that damages resulting to parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, does not apply to suits where the cause of action arose prior to the passage of the act. The act constitutes a new or additional cause of action. The rights of the parties were fixed under the law as it existed at the time of the injury, and the law which undertook to change those rights would be retrospective and void. *Chicago, St. L. & N. O. R. Co. v. Pounds*, 15 Am. & Eng. R. Cas. 510, 11 Lea (Tenn.) 127. — DISTINGUISHED IN *Pritchard v. Savannah St. & R. R. Co.*, 87 Ga. 294.

At common law the right to recover damages for personal injuries was extinguished by the death of the injured person. In Tennessee this rule of the common law has been modified by statute so far only as to preserve this cause of action, upon the death of the injured party, for the benefit of his surviving widow or children, or other next of kin. In all other cases the common law rule prevails. *East Tenn., V. & G. R. Co. v. Lilly*, 49 Am. & Eng. R. Cas. 495, 90 Tenn. 563, 18 S. W. Rep. 243.

Under the statutes of Tennessee, which confer a right of action upon the personal representative of a decedent whose death is caused by the wrongful act or omission of another for the wrong sustained by the deceased, and a right of action upon his next of kin for the injury resulting to them from his death, when the next of kin of such decedent is the sole distributee of his estate and the administrator thereof, he may recover damages on both of the grounds above mentioned in one suit. *Illinois C. R. Co. v. Crudup*, 63 Miss. 291.

34. Texas.—The right to suits for damage for causing death being given by statute, parties who seek to avail themselves of their benefit must be governed by their provisions. *Galveson, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.—REVIEWING *Baker v. Bolton*, 1 Camp. 493.

Actions for injuries resulting in death can be maintained only against such corporations and persons as the statute gives such actions against, and only in favor of such persons as the statute names, and the courts have no power to extend its operation by

construction not authorized by the words of the statute. *Turner v. Cross*, 83 *Tex.* 218, 18 *S. W. Rep.* 578.

The omission from the constitution of 1876 of the words "separately and consecutively," touching suits for damage for wrongfully causing death, shows an intention to allow thereafter but one suit in behalf of the widow and children, in such cases the recovery to be for the benefit of all interested. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 *Tex.* 189.—QUOTING *Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31.—QUOTED IN *Houston & T. C. R. Co. v. Baker*, 11 *Am. & Eng. R. Cas.* 667, 57 *Tex.* 419. REVIEWED IN *Dallas & W. R. Co. v. Spicker*, 59 *Tex.* 435.—*Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31.

In such cases if all the parties in interest are not made actual plaintiffs the suit should proceed in the name of one or more plaintiffs for the use of all who are interested. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 *Tex.* 189.

Rev. St. article 2899 only authorizes a recovery for wrongfully causing death where it is caused either by the negligence of the company, or the gross negligence of its employes. *Galveston, H. & S. A. R. Co. v. Kutac*, 37 *Am. & Eng. R. Cas.* 470, 76 *Tex.* 473, 13 *S. W. Rep.* 327.

Prior to the act of March 25, 1887, omitting the word *gross* from article 2899, paragraph 2, a railroad company was not liable for injuries resulting in death caused by the negligence of the servants of the company unless the negligence was gross. *Sabine & E. T. R. Co. v. Hanks*, 73 *Tex.* 323, 11 *S. W. Rep.* 377. *Texas & P. R. Co. v. Hill*, 71 *Tex.* 451, 9 *S. W. Rep.* 351.

35. Utah.—Under 2 Comp. Laws 1888, § 2961, providing that where death shall be wrongfully caused and the deceased would have had an action, that the person that would have been liable if death had not ensued shall be liable in damages; and section 2962, providing that such action shall be in the name of the personal representative; and section 3187, providing that an action shall not abate by death if the cause of action continue, the rule that a personal action does not survive is not changed. An action brought for a personal injury by the injured party in his lifetime will not survive. *Mason v. Union Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 449, 7 *Utah* 77, 24 *Pac. Rep.* 796.

36. Vermont.—Two causes of action

may arise where death is negligently caused: one in favor of the decedent under the act of 1847 for loss and suffering during his lifetime, and the other to his widow or next of kin under the act of 1849 for damages resulting to them from his death. *Needham v. Grand Trunk R. Co.*, 38 *Vt.* 294.—QUOTING *Blake v. Midland R. Co.*, 10 *Eng. L. & Eq.* 443.—DISTINGUISHED IN *Hegerich v. Keddle*, 99 *N. Y.* 258, 1 *N. E. Rep.* 787.

37. Virginia.—A party was injured in a railroad accident, his injury brought on insanity, and about eight months after this accident he committed suicide in a fit of insanity. Under the statute, giving to the personal representative of the deceased a right of action for death caused by negligence or default, the accident is too remote a cause of the death to be actionable. *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 8 *Am. & Eng. R. Cas.* 59, 105 *U. S.* 249.—APPLIED IN *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun (N. Y.)* 430. DISTINGUISHED IN *Terre Haute & I. R. Co. v. Buck*, 18 *Am. & Eng. R. Cas.* 234, 96 *Ind.* 346, 49 *Am. Rep.* 168.

38. Washington.—Under the rule that, where statutes upon the same subject-matter are irreconcilable and repugnant, the latest legislative enactment shall stand as the law, and repeal the prior enactment by implication, code 1881, § 717, providing for recovery of damages for death caused by the wrongful act of another, is superseded by § 8 of the code on the same subject-matter, the latter having been subsequently enacted. (Hoyt, J., dissenting.) *Graetz v. McKenzie*, 3 *Wash.* 194, 28 *Pac. Rep.* 331.—QUOTING *Winn v. Jones*, 6 *Leigh (Va.)* 74.

39. Ontario.—The right conferred by Lord Campbell's Act, adopted by Consolidated Statutes of Ontario, ch. 135, §§ 2 and 3, to recover damages in respect of death occasioned by wrongful act, neglect, or default, is restricted to the actual pecuniary loss sustained by the plaintiff. *Grand Trunk R. Co. v. Jennings*, 13 *App. Cas.* 800.—APPLYING *Pym v. Great Northern R. Co.*, 2 *B. & S.* 759, 4 *B. & S.* 396; *Hicks v. Newport, A. & H. R. Co.*, 4 *B. & S.* 403.

Action by plaintiff, an administrator of C., for damages under 44 *Vict. c. 22 (O.)*, by reason of the omission to pack a frog on the Midland railway, which the defendants were operating, whereby C.'s foot was caught in the frog and he was killed by a train. *Held*, that defendants were not liable; that the

Midland railway was a railway connecting with or crossing the defendants' railway, and under 46 Vict. c. 24 (D.) was exempt from the operation of the Ontario act. *Clegg v. Grand Trunk R. Co.*, 10 Ont. 708.—QUOTING *Monkhouse v. Grand Trunk R. Co.*, 8 Ont. App. 637.

The omission to state in the statement of claim, as required by section 8, sub-sec. 2 of said Ontario act, and to prove that the defendants knew that the frog was not packed, or that the deceased did not know it, or that he had notified the defendants, or any person superior to himself in the service of the defendants, or that such person was not aware thereof, would preclude any recovery. *Clegg v. Grand Trunk R. Co.*, 10 Ont. 708.

III. RIGHT OF ACTION. BENEFICIARIES.

1. Who Entitled to Damages.

40. In general.—In an action under the Colorado statute for negligently causing death, the existence of any of the next of kin or descendants of the deceased is sufficient to maintain the action. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

Under Tex. Rev. St. art. 2904 any one of the parties entitled to damages may bring an action for the benefit of all, and in an action by a wife to recover damages for the death of her husband it is not error to render judgment for the benefit of the wife and her minor child where the petition alleges that the husband left a child, and claims damages on its part also. *Texas & N. O. R. Co. v. Berry*, 31 Am. & Eng. R. Cas. 147, 67 Tex. 238, 5 S. W. Rep. 817.

The common law gave no action for wrongfully causing the death of another to the surviving relatives; and a person seeking to maintain such a suit must show such facts as will bring him within the provisions of the statute. *Campbell v. Houston & T. C. R. Co.*, 2 Tex. Unrep. Cas. 473.

41. There must be a widow or children.—Under Ga. Code, § 2971, the recovery against a railroad for a homicide is limited to the widow and children of the husband or parent. *Miller v. South Western R. Co.*, 55 Ga. 143.

Under the Ill. statute, in an action for negligently or wrongfully causing death, it must be averred and proved that there is a surviving widow or next of kin for whose benefit the action is brought. *Chicago &*

R. I. R. Co. v. Morris, 26 Ill. 400.—FOLLOWING *Chicago v. Major*, 18 Ill. 349.—DISTINGUISHED IN *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S.) 412, 453. EXPLAINED IN *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303. FOLLOWED IN *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Conant v. Griffin*, 48 Ill. 410.

Under the Ky. statute a personal representative cannot maintain an action against a railroad for the negligent killing of a person, where the deceased leaves neither a widow nor child. *Kentucky C. R. Co. v. Wainwright*, (Ky.) 13 S. W. Rep. 438. *Cincinnati, N. O. & T. P. R. Co. v. Previtt*, 92 Ky. 223, 17 S. W. Rep. 484.—FOLLOWING *Henderson v. Kentucky C. R. Co.*, 86 Ky. 389, 5 S. W. Rep. 875; *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 Ky. 40, 11 S. W. Rep. 1013.—*Conley v. Cincinnati, N. O. & T. P. R. Co.*, 41 Am. & Eng. R. Cas. 537, 89 Ky. 402, 12 S. W. Rep. 764. *Louisville & N. R. Co. v. Merriwether*, (Ky.) 12 S. W. Rep. 935.—FOLLOWING *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 Ky. 40, 11 S. W. Rep. 1013.

The widow and child, or children, of one who has been killed by the wilful neglect of another have the prior right to sue for, and the exclusive right to, what may be recovered in an action authorized by Ky. Gen. St. ch. 57, § 3; for, though the right to sue is given to the personal representative, he can exercise that right only for the use and benefit of the child and widow, if there be any, the word "heir," as used in the statute, being intended to mean child, and not apply to any other description of person. *Henderson v. Kentucky C. R. Co.*, 86 Ky. 389, 5 S. W. Rep. 875.

An administrator who sued in two counts for the killing of his intestate—in one for wilful neglect, and in the other for gross and ordinary neglect—cannot recover on the count for wilful neglect, the intestate having left neither widow nor child. *Conley v. Cincinnati, N. O. & T. P. R. Co.*, 41 Am. & Eng. R. Cas. 537, 89 Ky. 402, 12 S. W. Rep. 764.

Under the Montana Statutes of 1879, p. 508, § 2, allowing a right of action to a personal representative, for the benefit of the widow and next of kin of one negligently killed, it is essential that there be a widow or next of kin, which must be set out in the complaint. *Serensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407.

Where death ensues to a party by the wrongful act of another, and the deceased leaves no surviving widow, an action may be maintained, under the New Jersey statute, by his personal representative for the benefit of the next of kin. *Haggerty v. Central R. Co.*, 31 N. J. L. 349.

42. Deceased must have been entitled to recover.—In order to maintain an action under Lord Campbell's Act it must appear that the deceased if he had survived would have been entitled to recover. *Haigh v. Royal Mail Steam Packet Co.*, 52 L. J. Q. B. D. 640, 49 L. T. 802, 48 J. P. 230, 5 Asp. M. C. 189, 4 Ry. & C. T. Cas. xv.; *affirming* 52 L. J. Q. B. D. 395, 48 L. T. 267, 5 Asp. M. C. 47. *Armsworth v. South Eastern R. Co.*, 11 Jur. 758.—APPROVED IN *Rowley v. London & N. W. R. Co.*, 29 L. T. 180, L. R. 8 Ex. 221, 21 W. R. 869.

The right of action conferred by the statute upon the representatives of a person whose death is caused by the wrongful act of another, arises only in cases where the former might, had he lived, have maintained an action for the injury. *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366. *Texas & N. O. R. Co. v. Berry*, 31 Am. & Eng. R. Cas. 147, 67 Tex. 238, 5 S. W. Rep. 817.

43. Dependency for support.—The Illinois Statute of Feb. 12, 1853, providing for the recovery of damages, in case of wrongful death, for the benefit of the next of kin, does not exclude those who are not dependent on the deceased; nor is it necessary, in order to recover, to prove actual pecuniary loss. *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S.) 412, 453.

So also under the Ohio act requiring "compensation for causing death by wrongful act, neglect, or default." *Grotenkemper v. Harris*, 25 Ohio St. 510.

An invalid sister, unable to work regularly or to earn enough to pay her doctor's bills, who has received from a brother on an average from thirty to thirty-five dollars a month for three or four years, and who, in fact, receives her support from him and is dependent upon him for support, comes within the meaning of Mass. St. of 1887, ch. 270, § 2, and may maintain an action against his employer for causing his instantaneous death. *Daly v. New Jersey S. & J. Co.*, 155 Mass. 1, 29 N. E. Rep. 507.

The testimony of the plaintiff, the next

of kin of the deceased, who was killed while in the employ of a railroad, that she was his half sister and had two children; that he used to come in and see her, and sometimes gave her money; that he sent her money every other week or so to pay her rent; and that she had no other means of support but her earnings, and since his death had had to support herself, is not sufficient to prove that she was dependent upon his wages for support within the meaning of the Statute of 1887, ch. 270, § 2. *Hodnett v. Boston & A. R. Co.*, 156 Mass. 86, 30 N. E. Rep. 224.

Under So. Car. Gen. St. § 2184, adult children may recover for the death of their mother, though they have no legal claim on her for support. *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.

44. Expectation of pecuniary benefit.—If there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose, will sustain an action. *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.—QUOTED IN *St. Lawrence & O. R. Co. v. Lett*, 11 Can. Sup. Ct. 422. RECORDED IN *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.) 116.—*Grotenkemper v. Harris*, 25 Ohio St. 510. *Pym v. Great Northern R. Co.*, 4 B. & S. 396; 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 11 W. R. 922, 8 L. T. 734; *affirming* 2 B. & S. 759, 8 Jur. N. S. 819, 31 L. J. Q. B. 249, 10 W. R. 737, 6 L. T. 537.

If the only pecuniary benefit a person had in the life of the deceased was derived from a contract with him, such person cannot sue. *Sykes v. North Eastern R. Co.*, 44 L. J. C. P. 191, 23 W. R. 473, 32 L. T. 199.

Where a person killed was possessed of personalty amounting to £3400, and was tenant for life of an estate worth nearly £4000, with remainder to his eldest son in tail, and a jointure of £1000 per annum was settled on his wife and £20,000 secured to the younger children on his death, his widow and younger children had sufficient expectation of pecuniary interest from the continuance of his life to maintain an action for his death. *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 11 W. R. 922, 8 L. T. 734; *affirming* 2 B. & S. 759, 8 Jur. N. S. 819,

31 *L. J. Q. B.* 249, 10 *W. R.* 737, 6 *L. T.* 537.

45. Father.*—Under the Alabama statute defining the liability of the master (or employer) for injuries to the servant (or employé) while in the service (Code, §§ 2590-2591), the right of action for injuries which result in death is given only to the personal representative of the decedent; but a right of action is given to the father by another statute (§ 2588) when the death of his minor child is caused by the wrongful act, omission, or negligence of any person or corporation. *Williams v. South & N. Ala. R. Co.*, 91 *Ala.* 635, 9 *So. Rep.* 77.

Under Ga. Code, § 2971, a father cannot recover for the wrongful killing of his infant daughter; but under section 2960 he may recover for the loss of her services to the time of her majority. *McDowell v. Georgia R. Co.*, 60 *Ga.* 320.—FOLLOWING *Chick v. Southwestern R. Co.*, 57 *Ga.* 357; *Shields v. Yong*, 15 *Ga.* 349.

In an action by the administrator of an infant to recover for his death, caused by injuries received, the recovery of damages is limited to those accruing to the estate after the infant would have attained his majority. For the damages accruing before that period the father, if living, if not, the mother, might, under our statute (Iowa Rev. St. § 2792), maintain an action. *Walters v. Chicago, R. I. & P. R. Co.*, 36 *Iowa* 458.—DISTINGUISHING *State v. Baltimore & O. R. Co.*, 24 *Md.* 84; *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 318; *Lehman v. Brooklyn*, 29 *Barb.* 234.—APPROVED IN *Hedrick v. Ilwaco R. & N. Co.*, 4 *Wash.* 400.

The word "heir" used in Ky. Gen. St. ch. 57, § 3, providing for an action by the widow, heir, or personal representative of one killed by a wilful neglect of another, is equivalent to the word "child"; hence no right of action exists in favor of a father, though he may be an heir of the deceased. *Louisville & N. R. Co. v. Coppage*, (Ky.) 13 *S. W. Rep.* 1086.—FOLLOWING *Henderson v. Kentucky C. R. Co.*, 86 *Ky.* 389, 5 *S. W. Rep.* 875; *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 *Ky.* 40, 11 *S. W. Rep.* 1013.

* Right of husband or father to maintain action for negligently killing wife or child at common law and under statutes, see note, 37 *AM. REP.* 716.

Right to recover damages for death of emancipated minor child, see note, 27 *AM. & ENG. R. CAS.* 325.

In South Carolina a father is not entitled to recover damages for the negligent killing of his infant child. *Edgar v. Castello*, 14 *So. Car.* 20.—DISTINGUISHING *Pennsylvania R. Co. v. Bantom*, 54 *Pa. St.* 495. REVIEWING *Osborn v. Gillett*, L. R. 8 Ex. 88.

46. Mother.—For the homicide, by the negligence of a railroad company, of her child unmarried and childless a mother may recover where the child contributed to her support and she was substantially dependent upon such child in part for support, although she was likewise dependent upon her husband and her own labor. *Daniels v. Savannah, F. & W. R. Co.*, 86 *Ga.* 236, 12 *S. E. Rep.* 365.—EXPLAINING *Clay v. Central R. & B. Co.*, 84 *Ga.* 345.—FOLLOWING IN *Richmond & D. R. Co. v. Johnston*, 89 *Ga.* 560.

Plaintiff sued under the New York Act of 1847, as administrator of his wife, to recover for injuries causing her death. It appeared that the next of kin to the deceased was a mother who was dependent on her for support, who, in addition to the loss of support, had sustained pecuniary expense for nursing and burial. *Held*, that such facts brought the case within the act, and the action could be maintained. *Green v. Hudson River R. Co.*, 16 *How. Pr. (N. Y.)* 263; *affirmed in 31 Barb.* 260.—REVIEWING *Oldfield v. New York & H. R. R. Co.*, 14 *N. Y.* 310; *Lucas v. New York C. R. Co.*, 21 *Barb.* 245.

Under § 34, Hill's Oreg. Code, a mother, during the continuance of the relation of parent and child, may maintain an action in her own right for damages caused by the death of her child, while section 371 gives to the personal representative a right to recover for any injury which the estate may have sustained by reason of the death of an adult or one emancipated from parental service. *Putnam v. Southern Pac. R. Co.*, 21 *Oreg.* 230, 27 *Pac. Rep.* 1033.

The mother can sue for herself and for the benefit of her husband for damages for negligently causing the death of their son. *Missouri Pac. R. Co. v. Henry*, 75 *Tex.* 220, 12 *S. W. Rep.* 828.

A mother, being the only person living entitled to damages, sued a railway company for damages for negligently causing her son's death. She could join in the suit damages as well for loss of labor during minority as for the remedy provided by statute. *Gulf, C. & S. F. R. Co. v. Compton*,

44 *Am. & Eng. R. Cas.* 637, 75 *Tex.* 667, 13 *S. W. Rep.* 667.—REVIEWING *Winnt v. International & G. N. R. Co.*, 74 *Tex.* 32.

The Pennsylvania Act of April 26, 1855, providing that the "husband, widow, children or parents of the deceased and no other relatives" shall be entitled to recover damages for an injury causing death, excludes the mother of an illegitimate child. *Harkins v. Philadelphia & R. R. Co.*, 15 *Phila. (Pa.)* 286.—REVIEWING *Pennsylvania R. Co. v. Adams*, 55 *Pa. St.* 503; *Dickinson v. Northeastern R. Co.*, 2 *H. & C.* 734.

The plaintiff, as administratrix, sued the defendants, under 44 *Vict. c. 22, § 7, O.*, for the death of her illegitimate son, a brakeman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that act, while on one of their trains passing underneath it. The bridge belonged to another railway company which had the right to cross the defendant's line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge. *Held*, that the plaintiff was not entitled to recover: (1) because section 7 of the act applies only to bridges within the control of the company whose servant has been injured; and (2) the act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased prevented her recovery. *Gibson v. Midland R. Co.*, 15 *Am. & Eng. R. Cas.* 507, 2 *Ont.* 658.—APPROVING *Dickinson v. North Eastern R. Co.*, 2 *H. & C.* 735.

47. Husband.—A husband cannot recover damages resulting from the death of his wife. *Georgia R. & B. Co. v. Wynn*, 42 *Ga.* 331. *Western Union Tel. Co. v. McGill*, 57 *Fed. Rep.* 699.

Where an injury to a wife results in immediate death the husband, under the Georgia statute, cannot maintain an action although it is in form an action to recover for the loss of her services. *Womack v. Central R. & B. Co.*, 80 *Ga.* 132, 5 *S. E. Rep.* 63.

Where a husband sues as administrator for the killing of his wife, the recovery is limited to the pecuniary loss resulting to the next of kin, and does not extend to

damages resulting to the husband for loss of his wife's services. *Dickins v. New York C. R. Co.*, 23 *N. Y.* 158; *reversing* 28 *Barb.* 41.—FOLLOWED IN *Drake v. Gilmore*, 52 *N. Y.* 389.

The New York Act of 1847, ch. 470, does not give a husband a right of action where his wife is killed, for loss of her services and society. *Green v. Hudson River R. Co.*, 2 *Abb. App. Dec. (N. Y.)* 277.—DISTINGUISHING *Cross v. Guthery*, 2 *Root (Conn.)* 90; *Plummer v. Webb, Ware (U. S.)* 75. EXPLAINING *Ford v. Monroe*, 20 *Wend. (N. Y.)* 210; *Pack v. Mayor, etc., of N. Y.*, 3 *N. Y.* 489. NOT FOLLOWING *Lynch v. Davis*, 12 *How. Pr. (N. Y.)* 323.

A husband who was separated from his wife and had lived apart for eight years at the time of her death is not entitled to maintain an action for damages under Lord Campbell's Act, although his wife if she had survived her mother would have come into a large sum of money. *Harrison v. London & N. W. R. Co.*, 1 *C. & E.* 540.

48. Widow.—Under the Georgia statute the right to sue for the wrongful killing of a husband vests in the widow, and is not affected by her subsequent marriage, either as to the right to sue or as to the amount of the recovery. *Georgia R. & B. Co. v. Garr*, 57 *Ga.* 277.—DISTINGUISHED IN *Western & A. R. Co. v. Young*, 37 *Am. & Eng. R. Cas.* 489, 81 *Ga.* 397, 7 *S. E. Rep.* 912.

And the same is the rule in Texas. *International & G. N. R. Co. v. Kuchn*, 35 *Am. & Eng. R. Cas.* 421, 70 *Tex.* 582, 8 *S. W. Rep.* 484.

A widow may recover for the homicide of her husband; she will have a right of action whenever the husband, had he lived, would have had such right, and whatever would have been a good defense to his suit, had he lived, will be equally available against one brought by her. *Berry v. Northeastern R. Co.*, 28 *Am. & Eng. R. Cas.* 575, 72 *Ga.* 137.

Where a statute authorizes an action for the death of a person to be brought by his administrator, the damages recovered to enure to the exclusive benefit of the widow and children of the deceased, the widow cannot compromise the cause of action and release the damages so as to terminate the suit instituted by the administrator, even where there are no children. *Yelton v. Evansville & I. R. Co.*, 54 *Am. & Eng. R. Cas.* 69, 33 *N. E. Rep.* 629.—REVIEWING

Dowell v. Burlington, C. R. & N. R. Co., 62 Iowa 629, 15 Am. & Eng. R. Cas. 153.

Ky. Gen. St. ch. 57, § 3, gives a cause of action to the widow of the decedent for the wilful neglect of the company or its agents and employes which resulted in his death, although he was an employe of the company. *McLeod v. Ginther*, 8 Am. & Eng. R. Cas. 162, 80 Ky. 399.

The personal representative, at the widow's request, instituted an action under the statute. Subsequently the widow instituted another action against the same defendant upon the same cause of action. The defendant chose to defend the action instituted by the widow, and pleaded the pendency of that action in bar of recovery in this. *Held*, that the widow, being a sole beneficiary, had the right to institute the second action, and the defendant had the right to defend either of the actions and plead dependency of either one of them in bar of recovery in the other; though if there had been children of the deceased entitled jointly with the widow to what might be recovered she could not have defeated this action, instituted at her request, nor prejudiced their rights by subsequently commencing another in her own name. *Henderson v. Kentucky C. R. Co.*, 86 Ky. 389, 5 S. W. Rep. 875.—DISTINGUISHED IN *Givens v. Kentucky C. R. Co.*, 89 Ky. 231. FOLLOWED IN *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 Ky. 40.

Under Miss. Code 1880, § 1510, which gives the widow of one whose death is caused by the wrongful act of another the right to sue therefor, but provides that if she has children the damages shall be distributed as personal property of the husband, the widow alone has the right of action, and even after judgment, pending an appeal, she may accept less than the recovery and discharge the defendant, and the children will be bound by her action in so doing. *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672, 7 So. Rep. 542.—APPROVING *Stephens v. Nashville, C. & St. L. R. Co.*, 10 Lea (Tenn.) 448.

Where a person whose death has been occasioned by negligence leaves him surviving a widow but no children, and also parents, the right to recover damages for his death is, by virtue of the provisions of the Pa. Act of April 26, 1855 (P. L. p. 309), vested solely in the widow, and the parents are entitled to no part of the damages which

said widow may recover. *Lehigh Iron Co. v. Rupp*, 7 Am. & Eng. R. Cas. 25, 100 Pa. St. 95, 12 W. N. C. 47.

Under the Tenn. Act of 1871, ch. 78, a suit for wrongfully killing one leaving a widow and children surviving is brought by the widow for the benefit of herself and children; yet she may dismiss the action over their objection. *Greenlee v. East Tenn., V. & G. R. Co.*, 4 Am. & Eng. R. Cas. 351, 5 Lea (Tenn.) 418.—DISTINGUISHED IN *Webb v. East Tenn., V. & G. R. Co.*, 42 Am. & Eng. R. Cas. 44, 88 Tenn. 119, 12 S. W. Rep. 428. FOLLOWED IN *Stephens v. Nashville, C. & St. L. R. Co.*, 10 Lea (Tenn.) 448. QUOTED IN *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376.

Likewise a suit originally brought by the administrator, but revived in the name of the wife, may be dismissed by her without the consent of the guardian of the children. *Stephens v. Nashville, C. & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 671, 10 Lea (Tenn.) 448.—FOLLOWING *Greenlee v. East Tenn., V. & G. R. Co.*, 5 Lea 418.—APPROVED IN *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672. REVIEWED IN *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376.

An administrator's suit for personal injuries resulting in his intestate's death, brought on behalf of the "widow and children" of such intestate, cannot be lawfully compromised by the widow alone without the consent of the administrator or the concurrence of the other beneficiaries. *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. Rep. 348.

49. Adult child.—The adult son of one who has been killed by a railroad and who has left neither widow nor minor child cannot maintain a suit against a corporation to recover damages for the homicide. *Mott v. Central R. Co.*, 70 Ga. 680, 48 Am. Rep. 595.

There is no distinction under the Texas statute giving a right of recovery for the death of a person from negligence to the surviving children, between one more than twenty-one years old and those younger. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. Rep. 127. *Galveston, H. & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cas. 470, 76 Tex. 473, 13 S. W. Rep. 327.

The fact that the children were all of age when their mother's death was caused by negligence would not preclude a recovery

for the loss of such pecuniary benefits as they had a reasonable expectation of securing from her additional accumulations. *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505, 46 N. W. Rep. 897.

The word "child," as used in the Indiana statute, is not equivalent to the word "minor," but must be limited to persons under age who are dependent for support, protection, etc., upon their parents. It would not include one who, though a minor, had assumed the responsibilities of the head of a family. *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513.

50. Illegitimate child.*—The term "next of kin," as used in the Ohio Act of March 25, 1851, entitled "An act requiring compensation for causing death by wrongful act," includes an illegitimate son. *Muhl v. Michigan Southern R. Co.*, 10 Ohio St. 27.

An illegitimate child cannot sue under Lord Campbell's Act. *Dickinson v. North E. R. Co.*, 2 H. & C. 735, 33 L. J. Ex. 91, 12 W. R. 52, 9 L. T. 299.

51. Posthumous child.—A posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted by the negligence of a railroad company, under a statute (Rev. St. Tex. art. 2903) providing that an action on account of injuries causing death "shall be for the sole and exclusive benefit of the surviving children." The term "children" in this statute includes a posthumous child. *Nelson v. Galveston, H. & S. A. R. Co.*, 48 Am. & Eng. R. Cas. 8, 78 Tex. 621, 14 S. W. Rep. 1021.—DISAPPROVING *Louisville & N. R. Co. v. Sanders*, 5 S. W. Rep. 563. QUOTING *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61.—*Texas & P. R. Co. v. Robertson*, 82 Tex. 657, 17 S. W. Rep. 1041.

The fact that the mother of a posthumous child was capable of suing for damages for the death of her husband when the cause of action accrued, does not set the statute of limitations in motion as against such child. *Nelson v. Galveston, H. & S. A. R. Co.*, 48 Am. & Eng. R. Cas. 8, 78 Tex. 621, 14 S. W. Rep. 1021.

52. Next of kin.—Under the Ill. statute (Scates's Comp. 422), allowing an action where death is caused by wrongful act, for the use of the widow and next of kin, the term "next of kin" is not confined to any

particular degree of consanguinity; and wherever there are next of kin, the action will lie for the recovery at least of nominal damages. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.

Under Kan. Gen. St. 1889, par. 4518, giving a right of action for death caused by wrongful act, the damages recoverable are exclusively for the benefit of the widow and children, if there are any; and it is only where there are no widow and children that other relatives enjoy the benefit of the damages recoverable. *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699.

Under Mass. Gen. St. ch. 63, § 98, providing for the recovery of a fine for the benefit of the next of kin of a person negligently killed by a railroad, excepting passengers, no recovery can be had by the "next of kin" unless there is living a widow or children. *Commonwealth v. Boston & A. R. Co.*, 121 Mass. 36.

Under the Mass. St. of 1887, ch. 270, § 2, giving a right of action against an employer for the instantaneous death of an employé, who leaves no widow, to the "next of kin * * * dependent upon the wages of such employé for support," such next of kin, in order to establish a dependency, need not come within the class of persons whom the deceased, if able, was legally bound to support; the fact of dependence is sufficient. *Daly v. New Jersey S. & I. Co.*, 155 Mass. 1, 29 N. E. Rep. 507.

In an action under W. Va. Act of 1863, ch. 98, plaintiff proved that she was maintained by the decedent, her son, in his lifetime, and also what it would cost to support her since his death; that he lived with and supported her, and that he was only 23 years of age and unmarried. Held, that it might be fairly implied from such proof that the plaintiff was next of kin to the decedent. *Baltimore & O. R. Co. v. Gettle*, 3 W. Va. 376.

53. Non-residents.—The right of action given by the statute to a mother for the homicide of her son, upon whom she is dependent in whole or in part for support, is not confined to residents of Georgia, but belongs alike to all mothers under like circumstances, wheresoever they may reside. *Augusta R. Co. v. Glover*, (Ga.) 58 Am. & Eng. R. Cas. 269, 18 S. E. Rep. 406. *Philpott v. Missouri Pac. R. Co.*, 27 Am. & Eng. R. Cas. 323, 85 Mo. 164.

The right of action given by Ky. Gen.

* Right of illegitimate children to recover, see note, 15 AM. & ENG. R. CAS. 510.

St. ch. 57, to the personal representative of any person whose life is lost by the negligence of a railroad company, is not confined to citizens or residents of the state, nor to personal representatives appointed in the state. *Marvin v. Maysville St. R. & T. Co.*, 49 *Fed. Rep.* 436.

Such right of recovery is not an asset upon which administration, in the case of a non-resident, can be obtained in Kentucky. *Marvin v. Maysville St. R. & T. Co.*, 49 *Fed. Rep.* 436.

An action lies, under the Tennessee statutes, in favor of a non-resident widow against a railroad company by whose negligence her husband has been killed, in that state, while in the employ of such railroad company; although the deceased was a non-resident, and entered the service of such company outside the state, and the greater part of defendant's road lay beyond the limits of the state. *Chesapeake, O. & S. W. R. Co. v. Higgins*, 85 *Tenn.* 620, 4 *S. W. Rep.* 47.

54. Effect of death of one of those entitled.—Under Cal. Act of April 26, 1862, § 3, where the action is for causing the death of a husband and parent, who leaves a widow and children surviving, the damages should be sufficient to cover the loss sustained both by the widow and children; but if the widow be dead at the time of the trial, then the damages that would have gone to her are to be ignored entirely, and evidence relating thereto is improper; but in determining what is a just compensation to the children, the business, habits, education, sobriety, and economy of the decedent may be considered. *Taylor v. Western Pac. R. Co.*, 45 *Cal.* 323.

An action by a father charging that the death of his infant child was caused by the negligence of the defendant does not abate with the death of the father, and may be continued in the name of the executor. Section 282, Rev. St. Ind. 1881, provides against abatement by death in such case in which action is given for causing the death of any person. *Pennsylvania Co. v. Davis*, 4 *Ind. App.* 51, 29 *N. E. Rep.* 425.

Where both parents sue for damages for the death of a minor son, under the Missouri statute (1889, § 4425), and one parent dies before judgment, the entire right of action survives to the other. *Tobin v. Missouri Pac. R. Co.*, (Mo.) 18 *S. W. Rep.* 996.

2. Distribution Under Statutes.

55. Alabama.—Under the act of Feb. 5, 1872, providing for the recovery of damages for death caused by wrongful act, the damages are recoverable by the personal representative, but become assets of the estate, not subject to the payment of debts, and must be distributed in the same manner as other personalty. *South & N. Ala. R. Co. v. Sullivan*, 59 *Ala.* 272.

56. Connecticut.—A husband and wife were both fatally injured at the same time, but the husband died before the wife. They left no children. *Held*, that under the statute, the right to damages vested absolutely in the wife, and upon her death went to her heirs at law and not to those of the husband. *Waldo v. Goodsell*, 33 *Conn.* 432.

57. Illinois.—Where a personal representative sues a railroad for the death of the intestate, and two claim as widow, the legality of neither marriage is material, as a court in making distribution must determine that matter. *Toledo, W. & W. R. Co. v. Brooks*, 81 *Ill.* 245.

A married woman, a resident of Illinois, while traveling in Indiana was killed upon a railroad. A person not her husband was appointed, in Illinois, administrator of the deceased. *Held*, that under the statute in force in 1859, the right to sue for damages against the company for the death vested in the administrator, and he could be held accountable as such to the heirs at law, for money received or which ought to have been received by him in such suit. *Perry v. Carmichael*, 1 *Am. & Eng. R. Cas.* 174, 95 *Ill.* 519.

58. Indiana.—A claim for damages for causing the death of a party, under section 784 of the code, is prosecuted by the administrator for the benefit of the widow and children, or next of kin, of the deceased, and is not assets of the deceased within the meaning of the statute authorizing the granting of letters of administration in this state. *Jeffersonville R. Co. v. Swayne*, 26 *Ind.* 477.—REVIEWING *Whitford v. Panama R. Co.*, 23 *N. Y.* 465.

Under the statute of Indiana in force in 1859, in case of the death of a minor from the negligence of a railroad company, the right to recover compensation was in the father of such minor, if he were living. So, when the administrator of such minor permitted the father to receive the money

arising from that cause his liability ended. *Perry v. Carmichael*, 1 Am. & Eng. R. Cas. 174, 95 Ill. 519.

59. Iowa.—The right of action for a wrongful act producing death is in favor of, and the damages recovered accrue to, the estate of the deceased, and not to his next of kin. *Sherman v. Western Stage Co.*, 24 Iowa 515.

60. Kansas.—A claim for damages for causing the death of a party, under the code, § 422, is prosecuted by the administrator for the benefit of the widow and children, or next of kin, of the deceased, and is not an "estate" of the deceased to be administered within this state within the meaning of the act respecting executors and administrators. *Perry v. St. Joseph & W. R. Co.*, 11 Am. & Eng. R. Cas. 663, 29 Kan. 420.—COMMENTED ON IN *Limekiller v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 184, 33 Kan. 83.

A personal representative bringing an action under the Kansas statute for the recovery of death by wrongful act, recovers not for himself, nor in the right of the estate, but as trustee for the distributees, i. e., the next of kin. *Union Pac. R. Co. v. Dunder*, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501.

61. Kentucky.—The word "heir" as used in Gen. St. ch. 57 § 3, was intended to mean child, and, therefore, the widow and children of a person whose life has been destroyed by wilful neglect have the prior right to bring the action authorized by that statute, and the exclusive right to what may be recovered in such an action; and, consequently, the alternative right of action given to the personal representative can be exercised only for their use and benefit. *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 Ky. 40, 11 S. W. Rep. 1013.—FOLLOWING *Henderson v. Kentucky C. R. Co.*, 86 Ky. 389.

62. Missouri.—A second wife recovered damages, under the statute, for negligently killing her husband and invested the money for the benefit of her children. *Held*, that upon her death the children would hold the estate in trust for themselves and any children by a former marriage, to be equally divided among them. *Thomas v. Armstrong*, 4 McCrary (U. S.) 176.

63. Nebraska.—A personal representative appointed in Nebraska may recover there damages for the death of a person

occurring in Kansas; and the distribution of the money may be enforced by the courts of Nebraska in a manner prescribed by the Kansas statute. *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 2 L. R. A. 67, 40 N. W. Rep. 401.

64. New Jersey.—The statute which gives a right of action is intended for the benefit of all the next of kin who may be deprived of a reasonable expectation of a pecuniary advantage from a continuance of the life of the deceased. *Paulmier v. Erie R. Co.*, 34 N. J. L. 151.—QUOTING *Pym v. Great Northern R. Co.*, 4 B. & S. 396.—QUOTED IN *Hunn v. Michigan C. R. Co.*, 78 Mich. 513.

65. New York.—A husband is not the next of kin of his wife within the meaning of the New York Act of 1847, ch. 450, as amended in 1849, and he cannot, therefore, share in the damages recoverable; and the amendment to said statute in 1870, ch. 78, does not change the rule of distribution. *So held*, where a husband sued as administrator for the death of his wife prior to the act of 1870, but recovered the money subsequent thereto. *Drake v. Gilmore*, 52 N. Y. 389.—FOLLOWING *Dickins v. New York C. R. Co.*, 23 N. Y. 158.

Though the statute providing for the recovery of damages for wrongfully causing death, declares that the damages shall be exclusively for the benefit of the next of kin, yet they are nevertheless subject to the payment of the decedent's debts and expenses of administration, and also subject to the debts of the next of kin. *Wynkoop v. Myers*, 17 Civ. Pro. (N. Y.) 443, 7 N. Y. Supp. 898, 26 N. Y. S. R. 81.

66. North Carolina.—An administrator who recovers damages of one for negligently causing the intestate's death, holds the fund solely for the use of those entitled under the statute of distributions, and free from the claims of creditors and legatees (code, § 1500), subject, however, to commissions and reasonable counsel fees. *Baker v. Raleigh & G. R. Co.*, 91 N. Car. 308.

The portion of the recovery due the widow in this case, released to the defendant, is chargeable with its share of such expenses, and the defendant gets no benefit under the assignment until the *pro rata* amount thereof is ascertained and paid. *Baker v. Raleigh & G. R. Co.*, 91 N. Car. 308.

In actions under the statute, for damages

for negligently causing the death of the intestate, if there be no next of kin who are entitled to the recovery under the statute of distributions, the recovery goes to the university. *Warner v. Western N. C. R. Co.*, 25 Am. & Eng. R. Cas. 432, 94 N. Car. 250.

67. Ohio.—The amount recovered in an action under the act of 1851 is for the exclusive benefit of the widow and next of kin, and is to be distributed among them in the proportions provided by law in relation to the distribution of personal estates of persons dying intestate. The risk of ascertaining the persons entitled to the benefits of the recovery, and the duty of making the distribution, are not imposed on the defendant, but on the personal representatives of the deceased. *Weidner v. Rankin*, 26 Ohio St. 522.

68. Oregon.—The damages recoverable by a personal representative under the code, § 367, are assets of the estate and are to be determined in amount by the pecuniary loss to the estate resulting from the death; and it seems that money derived from insurance on the life of the deceased cannot be deducted in determining such loss. *Ladd v. Foster*, 12 Sawy. (U. S.) 547; 31 Fed. Rep. 827.—QUOTING *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 294; *Franklin v. South Eastern R. Co.*, 3 H. & N. 211. REVIEWING *Bradburn v. Great Western R. Co.*, L. R. 10 Ex. 1.

69. Tennessee.—Under the provisions of the statutes the husband is entitled to the damages which may be recovered for an injury to the wife resulting in death, and not the next of kin. *Trafford v. Adams Exp. Co.*, 8 Lea (Tenn.) 96.—REVIEWING *Tilley v. Hudson River R. Co.*, 24 N. Y. 471.—DISTINGUISHED IN *Webb v. East Tenn., V. & G. R. Co.*, 42 Am. & Eng. R. Cas. 44, 88 Tenn. 119, 12 S. W. Rep. 428. FOLLOWED IN *Chicago, St. L. & N. O. R. Co. v. Pounds*, 11 Lea (Tenn.) 127.

70. Texas.—Rev. St. art. 1882 has no application to any matter which does not properly and strictly pertain to the estate of the decedent. Hence, any money which might be recovered from a railway company for the benefit of the parent of one who had been killed by its negligence, could in no event be paid to creditors or distributed generally to heirs under the statute of descents and distribution, and hence could form no part of the estate. This construc-

tion of the statute is not affected by the fact that the law confers power on the administrator or executor to prosecute the action, if suit be not brought within three months after the death of the deceased by the parties entitled to the benefit of the action. *Houston & T. C. R. Co. v. Hook*, 60 Tex. 403.

Suit was prosecuted against a railroad company for killing a man, for the benefit of the widow and a child. The jury found damages and apportioned them between the widow and child. It appeared that both parents of the man were living, and the company moved for a new trial on the ground that the suit should have been prosecuted for the benefit of them also, whereupon plaintiffs tendered a release by the parents of all claims for damages. *Held*, that the error was not cured, as it could not be assumed that the verdict was for the same amount of damages that it would have been if the release had been executed before verdict. *Fl. Worth & D. C. R. Co. v. Wilson*, 85 Tex. 516, 22 S. W. Rep. 578.

71. England.—Where a company, sued for causing the death of a person, pays money into court, the widow of the deceased takes one third of it and the children the remaining two thirds. *Sanderson v. Sanderson*, 36 L. T. 847.

Where a railway company pays money to the executors of a person killed by it, the chancery division, in an action brought by the executors asking for a declaration as to the persons entitled to the money, may distribute the fund amongst such relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under Lord Campbell's Act. *Bulmer v. Bulmer*, L. R. 25 Ch. D. 409, 53 L. J. Ch. D. 402, 32 W. R. 380.

IV. THE WRONGFUL ACT, NEGLIGENCE, OR DEFAULT.

1. In General.

72. Rule of strict liability.—The law holds railroad companies liable for the slightest negligence, and compels them to repel, by satisfactory proof, every imputation of such negligence; and therefore, where the death of a passenger on a railroad is caused by the slightest neglect, against which human prudence and fore-

sight could have guarded, the company is liable in damages for such death. *Baltimore & O. R. Co. v. Noell*, 32 *Gratt. (Va.)* 394.—QUOTED IN *Richmond & D. R. Co. v. Medley*, 75 *Va.* 499.—*Baltimore & O. R. Co. v. Wightman*, 29 *Gratt. (Va.)* 431, 17 *Am. Ry. Rep.* 351.

73. Neglect or default of servants.—Under Iowa Rev. St. of 1860, § 4111, providing for the recovery of damages for death produced by the wrongful act of the defendant, a corporation is liable in a civil action for the wrongful acts of its servants producing death while in its employment. *Donaldson v. Mississippi & M. R. Co.*, 18 *Iowa* 280.—EXPLAINED IN *Sherman v. Western Stage Co.*, 24 *Iowa* 515. FOLLOWED IN *Philo v. Illinois C. R. Co.*, 33 *Iowa* 47.

The action is not confined to criminal acts. *Donaldson v. Mississippi & M. R. Co.*, 18 *Iowa* 280. *Central R. & B. Co. v. Roach*, 70 *Ga.* 434.—DISTINGUISHING *McDonald v. Eagle & P. Mfg. Co.*, 68 *Ga.* 839. NOT FOLLOWING *Daly v. Stoddard*, 66 *Ga.* 145; *McDonald v. Eagle & P. Mfg. Co.*, 67 *Ga.* 761.

74. Proximate cause of death must be act or default of defendant.—The wrongful act of a carrier in leaving its injured passenger on the track exposed to great and known peril, without mind enough to care for himself, is the proximate cause of his death. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 *Ind.* 469, 22 *N. E. Rep.* 340, 6 *L. R. A.* 241.

Where an injury to a passenger, caused by the negligence of the carrier, is such as to render the system of the injured man liable to take on disease, and to so enfeeble the system as to make it less likely to resist the inroads of the disease when it does set in, and death results, the death is, in legal contemplation, attributable to the negligence of the carrier. *Terre Haute & I. R. Co. v. Buck*, 18 *Am. & Eng. R. Cas.* 234, 96 *Ind.* 346, 49 *Am. Rep.* 168.—FOLLOWING *Brown v. Chicago, M. & St. P. R. Co.*, 54 *Wis.* 342, 41 *Am. Rep.* 41.—APPROVED IN *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242.

Where, through the negligence of a company in not keeping its engine in proper repair, a dwelling house was set on fire, and a child asleep therein burned to death, such death is not too remote from the neglect causing such fire to relieve the railroad

company from liability. *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 *Mich.* 20, 41 *N. W. Rep.* 847.

Where it appears that the intestate was not in danger by reason of the proximity of a fire, but that she voluntarily advanced towards it, going a distance of about fifty rods, and attempted to extinguish it, and it also appears that the intestate had no interest in the property which was on fire, the proximate cause of her death was her voluntary act in attempting to extinguish the fire, and there can be no recovery. *Pike v. Grand Trunk R. Co.*, 38 *Am. & Eng. R. Cas.* 336, 39 *Fed. Rep.* 255.—DISTINGUISHING *Page v. Bucksport*, 64 *Me.* 51; *Stickney v. Maidstone*, 30 *Vt.* 738. QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469.—*Seale v. Gulf, C. & S. F. R. Co.*, 65 *Tex.* 274, 57 *Am. Rep.* 602.—EXPLAINED IN *Liming v. Illinois C. R. Co.*, 81 *Iowa* 246.

75. Accidents to passengers.—Where a passenger, by reason of the failure of the train employés to call the stations, attempts to alight at a station called by a fellow passenger, not his destination, and is thrown from the platform to the track by the sudden starting of the train, and afterwards, while upon the track between the station and his destination, in a partially unconscious condition from his fall, is negligently run down and killed by a passenger train in charge of employés having knowledge of his fall and condition of mind, the company is liable because of its duty, having knowledge of his fall and mental condition, to use care to protect him from its trains. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 *Ind.* 469, 22 *N. E. Rep.* 340, 6 *L. R. A.* 241.

In such a case the company is chargeable with knowledge of the running of trains upon its road, and to render the company liable it is sufficient that the accident, without being foreseen, was such as might naturally result. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 *Ind.* 469, 22 *N. E. Rep.* 340, 6 *L. R. A.* 241.

A railroad company which was in the hands of a receiver gave permission to another company to approach a station over its track. Such company notified the yardmaster that it would run an extra train on a certain day, who in turn communicated the intelligence to the foremen of the different switch-engines; but one of these failed to notify his engineer, who ran his

engine into a train and killed a passenger. The train was behind time, and under a rule of the company the engineer had a right to occupy the track with his engine. *Held*, that the receivers were liable, as it appeared that the want of notice prevented the engineer from keeping a proper lookout for the train. *Eddy v. Letcher*, 57 *Fed. Rep.* 115.

76. Injuries received in loading and unloading cars.—In loading lumber on cars the company placed it in separate piles which were held in place by stakes on either side and fastened on the top by cross-pieces. The lumber was safely carried to the place of destination, and plaintiff's intestate and another sent to unload it, and upon removing the cross-pieces the lumber fell on plaintiff's intestate and killed him. *Held*, that the company was not liable, as it was not bound to so load its cars that no accident could happen in unloading them. *Hulse v. New York, O. & W. R. Co.*, 71 *Hun (N. Y.)* 40.

N. was unloading defendant's car at the place on a side track, where, by agreement with the owners of the freight, they had been left for unloading, and at the very point designated by defendant's agent, using his team for that purpose as the parties contemplated when the arrangement was made. While thus engaged a locomotive approached on the main track, and his horses becoming frightened, he received an injury resulting in death. There were other tracks which might have been used at the time. *Held*, that it was a part of the agreement between the owners of the freight and the railroad that the person going for the freight should not be molested in his person or property by any act of the company; and that running its engine over that track was a clear act of negligence and breach of duty on part of the company toward N., for which a recovery might be had by N.'s personal representatives. *Newson v. New York C. R. Co.*, 29 *N. Y.* 383.

Plaintiff's intestate was killed while engaged in loading a car on a side track, by an engine which had been sent on the side track to pick up other cars. It appeared that the engine was driven at a reckless rate of speed against the car. *Held*, that it was the engineer's business to know what cars he was to remove, and to anticipate that some one might be at those not to be moved, and to run his engine accordingly;

and a failure to do so was negligence rendering the company liable. *Jacobson v. St. Paul & D. R. Co.*, 41 *Minn.* 206, 42 *N. W. Rep.* 932.

77. Killing intoxicated persons.—The fact that a passenger is intoxicated will not relieve a carrier from liability for leaving him on the track, where his being thrown from the train to the track is caused by the negligence of the company. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 *Ind.* 469, 22 *N. E. Rep.* 340, 6 *L. R. A.* 241.

A conductor requiring an intoxicated man to leave the train for non payment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. *Roseman v. Carolina C. R. Co.*, 112 *N. Car.* 709, 16 *S. E. Rep.* 766.

A drunken passenger upon a train was, owing solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare or to get off the train, he was removed lawfully from the train and placed a short distance from the track. Subsequently he wandered upon the track, where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident. *Held*, that the company was not liable for his death, and was not chargeable with notice of his condition or whereabouts. *McClelland v. Louisville, N. A. & C. R. Co.*, 18 *Am. & Eng. R. Cas.* 260, 94 *Ind.* 276.

A person was killed by a locomotive colliding with his wagon and team while in the act of crossing a railroad track at a public crossing in the night-time. The proofs showed that the night was very calm, still, and dark; that the train was lighted up, and there was a bright headlight, and nothing to obstruct its view from the deceased, as it was approaching, for some distance; that he must have heard the noise; that he was addicted to hard drinking, and was probably under the influence of liquor; and that his team came upon the crossing in a run, so as not to be seen by those in charge of the train until it was upon the track. *Held*, that, owing to the negligence of the deceased, no recovery

could be had by his personal representative against the company for causing his death and injury to his team and wagon. *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102.—QUOTED IN *Chicago & N. W. R. Co. v. Gertsen*, 15 Ill. App. 614.

78. Killing persons assisting employees.—Plaintiff's intestate went upon the company's unfenced premises voluntarily to assist in turning a turntable and was killed by an engineer pushing cars against one which stood near the turntable, and which, in turn, struck the intestate. *Held*, that it was not negligence for the company to fail to ascertain whether any person was behind the car. *Lehey v. Hudson River R. Co.*, 4 Robt. (N. Y.) 204.—APPLYING *Degg v. Midland R. Co.*, 1 H. & N. 773. DISTINGUISHING *Tuff v. Warman*, 15 C. B. N. S. 573, 27 L. J. C. P. 322; *Carroll v. New Haven R. Co.*, 1 Duer (N. Y.) 574; *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120.

79. Running over persons on track.—Where a train of cars was moving backwards, within the limits of an incorporated town, while the deceased was walking on the track in the direction in which the train was moving, and no person was stationed to keep a lookout, and the cars ran over and killed the deceased, the company was guilty of negligence. *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.—DISTINGUISHED IN *East Tenn., V. & G. R. Co. v. King*, 81 Ala. 177; *Memphis & C. R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618.

Where a caboose and two cars, a half mile or more from the point where they became detached from the remainder of the train, ran over and killed the plaintiff's intestate—*held*, that the conductor and brakeman, who were in the cupola of the caboose, were negligent in not sooner discovering the fact that they were detached, and in not being upon the tops of the cars where they could control their motions and give warning of danger. *Farley v. Chicago, R. I. & P. R. Co.*, 2 Am. & Eng. R. Cas. 108, 56 Iowa 337, 9 N. W. Rep. 230.—FOLLOWED IN *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 38 N. W. Rep. 520.

It is wilful negligence in a railroad company to permit either a train of cars or a single car to move on its track in a city or town without some servant in position, both to give warning of its approach and to control its movements. And where, by reason

of such negligence, a servant of the company who is on the track in discharge of his duty is struck and killed by a moving train or car, his administrator may recover of the company under the statute. *Louisville & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. Rep. 185.—FOLLOWING AND QUOTING *Shelby v. New Orleans & T. P. R. Co.*, 85 Ky. 224; *Conley v. New Orleans & T. P. R. Co.*, 89 Ky. 402.

80. Felonious killing.—No action can be maintained, either at common law or under the Kentucky statute, by the personal representative for the destruction of his intestate's life, where the injury from which death resulted was wilfully and intentionally inflicted. *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

The action may be maintained, notwithstanding that the act causing the death is a felony, and the wrong-doer has not yet been tried therefor. *Wise v. Teerpenning*, 2 Edm. Sel. Cas. (N. Y.) 112.

The widow of a passenger killed on a railroad, in order to recover damages, must either prosecute for the felony as prescribed by Georgia Code, § 2970, or make it appear that there is a good excuse for her failure to do so; but the non-residence of the widow, her poverty, and her ignorance of who the real felon is, will not avail her as an excuse. *Sawtell v. Western & A. R. Co.*, 61 Ga. 567.

In an action for damages for killing, etc., a homicide resulting from a collision of trains is, *prima facie*, felonious, within the scope of Ga. Code, § 2970, declaring that if the injury amounts to a felony the person injured must concurrently or previously prosecute therefor, or allege a good excuse for failure to prosecute. *Western & A. R. Co. v. Sawtell*, 65 Ga. 235.

2. Instantaneous Death.

81. The general rule.—An administrator of a person killed by a collision on a railway cannot maintain an action for such injury under Mass. St. 1842, ch. 81, § 1, where the death of the intestate was instantaneous with the collision. *Kearney v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 108.—FOLLOWING *Curey v. Berkshire R. Co.*, 1 Cush. 475.

That statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced

the action and subsequently died, or being entitled to bring it, to have died before exercising that right. *Kearney v. Boston & W. R. Corp.*, 9 *Cush. (Mass.)* 108.—DISTINGUISHED IN *Roach v. Consolidated Imperial Min. Co.*, 7 *Sawy. (U. S.)* 224. FOLLOWED IN *Hollenbeck v. Berkshire R. Co.*, 9 *Cush. (Mass.)* 478. NOT FOLLOWED IN *Clark v. Manchester*, 62 *N. H.* 577. REVIEWED IN *Bancroft v. Boston & W. R. Corp.*, 11 *Allen (Mass.)* 34.

An action for personal injuries caused by falling a distance of forty feet, and resulting in instant death on reaching the ground, cannot be maintained. *Moran v. Hollings*, 125 *Mass.* 93.

A husband cannot maintain an action for the loss of his wife's services where it appears that she was killed instantly. *Grosso v. Delaware, L. & W. R. Co.*, 50 *N. J. L.* 317, 11 *Cent. Rep.* 574, 13 *Atl. Rep.* 233. *Lucas v. New York C. R. Co.*, 21 *Barb. (N. Y.)* 245.—REVIEWED IN *Green v. Hudson River R. Co.*, 16 *How. Pr. (N. Y.)* 263.

Under the Tenn. Code in force in 1865 the killing of a man is not of itself a cause of civil action. The damages recoverable are for what was incurred or suffered while the person lived. If the killing be absolutely instantaneous, damages are not recoverable, for that would be giving damages for the mere act of killing. *Louisville & N. R. Co. v. Burke*, 6 *Coldw. (Tenn.)* 45.—FOLLOWED IN *Louisville & N. R. Co. v. Connor*, 2 *Baxt. (Tenn.)* 382. NOT FOLLOWED IN *Clark v. Manchester*, 62 *N. H.* 577. OVERRULED IN *Nashville & C. R. Co. v. Prince*, 2 *Heisk. (Tenn.)* 580; *East Tenn., V. & G. R. Co. v. Mitchell*, 11 *Heisk.* 400. REVIEWED IN *Louisville & N. R. Co. v. Gower*, 31 *Am. & Eng. R. Cas.* 168, 85 *Tenn.* 465.

82. Its scope and extent.—Where an action is not by a relative of the deceased for his death, under section 1510 of the Miss. Code, but is by the personal representative for injury to the deceased, there can be no recovery, if it appears that there was no appreciable length of time after the injury before death ensued. *Illinois C. R. Co. v. Pendergrass*, 69 *Miss.* 425, 12 *So. Rep.* 954.

In determining whether a cause of action accrued to a party who was fatally injured by the negligence of another, the test is whether he lived after the injury, and not the length of time he lived thereafter. *Kel-*

low v. Central Iowa R. Co., 21 *Am. & Eng. R. Cas.* 485, 68 *Iowa* 470, 23 *N. W. Rep.* 740, 27 *N. W. Rep.* 466.

The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which to determine whether a cause of action survives. So where a passenger lived 15 minutes after the accident, but was unconscious during the time, the action is maintainable. *Bancroft v. Boston & W. R. Corp.*, 11 *Allen (Mass.)* 34.—FOLLOWING *Hollenbeck v. Berkshire R. Co.*, 9 *Cush. (Mass.)* 478. REVIEWING *Kearney v. Boston & W. R. Corp.*, 9 *Cush.* 108.—*Hollenbeck v. Berkshire R. Co.*, 9 *Cush.* 478.—FOLLOWING *Kearney v. Boston & W. R. Corp.*, 9 *Cush.* 108.—FOLLOWED IN *Bancroft v. Boston & W. R. Corp.*, 11 *Allen* 34.

Deceased, somewhat intoxicated, was last seen alive walking on defendant's railroad track, in the town of Coffeetown, about twelve o'clock at night. Shortly afterwards a train passed, running about forty miles an hour, and after that another train, running slowly; and the next morning his mutilated remains were found scattered along the track about ninety yards, it being evident that he was run over by a swiftly moving train. Defendant's employes knew nothing of the occurrence at the time. In an action by the personal representatives for injuries to the decedent—held, that plaintiff could not recover, since the jury would not be warranted in finding that deceased survived the injury for any appreciable space of time. *Illinois C. R. Co. v. Pendergrass*, 69 *Miss.* 425, 12 *So. Rep.* 954.

83. Under Massachusetts "Employers' Liability Act."—Under the Statute of 1887, ch. 270, § 3, as amended by the Statute of 1888, ch. 155, the notice required to be given to an employer upon the instantaneous death of an employe may be given by his widow. *Gustafsen v. Washburn & M. Mfg. Co.*, 153 *Mass.* 468, 27 *N. E. Rep.* 179.

Such notice may be given by some one in his behalf within thirty days from the occurrence of the accident, or by the executor or administrator within thirty days after his appointment. *Daly v. New Jersey S. & I. Co.*, 155 *Mass.* 1, 29 *N. E. Rep.* 507.—QUOTED IN *Jones v. Boston & A. R. Co.*, 157 *Mass.* 51.

In an action under the St. of 1887, ch. 270, for causing the death of a brakeman, who,

no one having seen the accident, was apparently killed by reason of his head coming in contact with a bridge while riding on the top of a tall refrigerator car attached to the rear end of the caboose of a freight train, the facts that the speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death, but the men in the caboose, although very near him, heard no outcry, and that the defendant's workmen upon another train, who picked up the dead body, were not called as witnesses, justify the inference that he died instantly or without conscious suffering. *Maher v. Boston & A. R. Co.*, 158 Mass. 36, 32 N. E. Rep. 950.—REVIEWING *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507; *Riley v. Connecticut River R. Co.*, 135 Mass. 292.

Leaving to conjecture the question whether an employé of a railroad, who was injured at a certain time, regained consciousness before his death on the same day, is not a sufficient compliance with the provisions of the St. of 1887, ch. 270, § 2. *Hodnett v. Boston & A. R. Co.*, 156 Mass. 86, 30 N. E. Rep. 224.

84. Effect of statutes providing for survival of the cause of action.—Under Conn. Rev. St. tit. 1, § 83, an action can be maintained where the death is instantaneous. *Murphy v. New York & N. H. R. Co.*, 30 Conn. 184.

Under Miss. Code 1880, §§ 2078, 2079, by which the right to maintain all personal actions survives to the personal representatives of a decedent, an action cannot be maintained by an administrator for injuries causing the death of his intestate, if the death was instantaneous. *Illinois C. R. Co. v. Pendergrass*, 69 Miss. 425, 12 So. Rep. 954.—FOLLOWING *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693. QUOTING *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.

At common law a right of action for a tort died with the person injured, but under So. Car. Gen. St. §§ 2183-2186 a right of action and recovery for a personal injury resulting in death is given to the legal representative of the deceased for the benefit of certain dependent kindred against the party whose wrongful act caused such death, wherever the party injured, if he were still alive, could recover for such injury. Therefore, the right of action by the administrator is not defeated by the fact that the intestate had died instantly from

the injury. *Reed v. Northeastern R. Co.*, 37 So. Car. 42.

When the death is alleged in the complaint to have been instantaneous with the accident causing it, no right of action could have accrued to the deceased, because the life closed with the accident, and none could therefore accrue to his personal representative. The complaint, therefore, is fatally defective. *Belding v. Black Hills & Ft. P. R. Co.*, (S. Dak.) 52 Am. & Eng. R. Cas. 624, 53 N. W. Rep. 750.

The Tennessee statute makes no distinction between the cases where the injured party lives a time and where death is instantaneous. The cause of action accrues at the date of the injury, and is the same, whether brought by him during life or by his personal representative after death. *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. (Tenn.) 829.—DISAPPROVING *Whitford v. Panama R. Co.*, 23 N. Y. 465.—*Nashville & C. R. Co. v. Prince*, 2 Heisk. 580.—APPROVED IN *Roach v. Consolidated Imperial Min. Co.*, 7 Sawy. (U. S.) 224.

The purpose of the statute was simply to repeal the common law rule, that actions for personal injuries die with the person, when death results from the injury. *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. (Tenn.) 829.

85. When action lies notwithstanding death was instantaneous.

—If the conductor of a train ejected a passenger so that he was run over and disabled by such train, and another train of the same road passing shortly afterwards extinguished what life was left, a right of action arose whether the actual death was caused by the first or second train. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

Under Nev. Comp. L. p. 39, § 115, providing a recovery for injuries causing death, it is immaterial whether the death of the person injured is immediate or consequential. *Roach v. Consolidated Imperial Min. Co.*, 7 Sawy. (U. S.) 224.—APPROVING *Nashville & C. R. Co. v. Prince*, 2 Heisk. (Tenn.) 580; *Fowlkes v. Nashville & D. R. Co.*, 5 Baxt. (Tenn.) 663; *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.

Under the New York Act of 1847, an action may be maintained for causing death by wrongful act, whether it is instantaneous or not. *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.—APPROVED IN *Roach v. Consolidated Imperial Min. Co.*, 7 Sawy.

(U. S.) 224. QUOTED IN *Illinois C. R. Co. v. Pendergrass*, 69 Miss. 425.

Under Tex. Rev. St. arts. 2899, 2900, an action for actual damages lies in favor of the parent, etc., for damages against a corporation for negligently causing death, whether an action ever accrued in favor of the deceased or not. Such action lies in case of the instantaneous death. *International & G. N. R. Co. v. Kindred*, 11 Am. & Eng. R. Cas. 649, 57 Tex. 491.

V. WHO MAY SUE. PARTIES.

1. In General.

86. Only persons named in statute can sue.*—Where a statute gives the cause of action and designates the persons who may sue, they alone can sue and must do so within the time prescribed by the statute. *Oates v. Union Pac. R. Co.*, 104 Mo. 514, 16 S. W. Rep. 487.

Under Ind. Code, § 27, an action for damages for causing the death of a child must be brought by the father, or in case of his death or desertion of his family, by the mother, or by the guardian for his ward. *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513.

Under a statute of Missouri authorizing an action to recover damages for injuries to a person, resulting in death, the right of action is in the husband or wife of the deceased for six months after the death, after which time the right vests absolutely in the surviving minor children, if there are any. The right thus conferred is a conditional one, and the plaintiffs in such action must bring themselves clearly within the prescribed conditions necessary to confer the right of action. *Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56, 18 Pac. Rep. 57.

Under Ky. Gen. St. ch. 57, § 3, providing that the widow, heir, or personal representative of one who is killed by wilful neglect, may maintain an action therefor, there can be no action maintained by any person other than a widow, child, or personal representative. *Cincinnati, N. O. & T. P. R. Co. v. Adam*, (Ky.) 13 S. W. Rep. 428.

Under Tex. Const. art. 16, § 26, a parent cannot maintain an action to recover exemplary damages for the death of one by

* Who may bring action for death, see note, 25 AM. & ENG. R. CAS. 337.

Who may sue for negligently causing death under Ky. Gen. St. ch. 57, § 3, see 44 AM. & ENG. R. CAS. 458, *abstr.*

3 D. R. D.—49.

gross negligence. The right of action is limited to the "surviving husband, widow, or heirs of his or her body." *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 11 S. W. Rep. 907.

87. Parents, generally.—Infants have legal rights, distinct from their parents, which can be judicially ascertained in suits in their behalf. After death the right of compensatory damages survives in the parent, who can bring suit to recover. *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 La. Ann. 824, 8 So. Rep. 586.

An action for the loss of a child, killed by the negligence or misconduct of a railroad company, is properly brought in the name of both parents, and the mother is properly joined. *Pennsylvania R. Co. v. Zebe*, 37 Pa. St. 420.

Parents are only entitled to recover damages for the death of a child where the family relation exists at the time of the accident. If the child be free, either by age or emancipation, and be living apart from his parents, and in no way contributing to their support, they cannot maintain such an action. *Lehigh Iron Co. v. Rupp*, 7 Am. & Eng. R. Cas. 25, 100 Pa. St. 95, 12 W. N. C. 47.

Under Colo. Gen. St. of 1883, §§ 1030-1032, giving a right of action for personal injuries causing death, and sections 2529 and 2530, rendering children liable for the support of indigent parents, the parents of an unmarried adult are entitled to recover their pecuniary loss resulting from his death from the negligence of another. *Denver, S. P. & P. R. Co. v. Wilson*, 12 Colo. 20, 20 Pac. Rep. 340.

88. Father.—Under Ind. Prac. Act, § 784, a father may maintain an action for the wrongful death of his minor child; but § 353 prohibits the granting of a new trial on account of the smallness of the damages assessed. *Gann v. Worman*, 69 Ind. 458.

A father cannot maintain an action as administrator of his deceased minor son to recover damages for the alleged negligent killing of his intestate unless there has been an emancipation of the infant. An averment in the complaint that at the time of his death said decedent was not, and for two months theretofore had not been, in the service of his parents, or either of them, is not sufficient to show such an emancipation. *Berry v. Louisville, E. & St. L. R. Co.*, 128 Ind. 484, 28 N. E. Rep. 182.

A father cannot maintain an action as the heir of his son who is killed through the wilful neglect of a railroad company, under Ky. Gen. St. ch. 57, § 3, giving a right of action to the widow, heir, or personal representative of a person so killed. *Kentucky C. R. Co. v. McGinty*, (Ky.) 14 S. W. Rep. 601.

Under La. Act of March 15, 1855, a father may sue to recover damages for an injury caused to his deceased minor son, through the negligence of the employés of a railroad company, which resulted in his death. *Frank v. New Orleans & C. R. Co.*, 20 La. Ann. 25.

There can be no recovery, under Mo. Rev. St. § 2122, of damages for the death of the plaintiff's minor son, unless it is shown that the deceased left no widow or surviving children. *Sparks v. Kansas City, S. & M. R. Co.*, 31 Mo. App. 111.

Under Tex. Const. 1869, § 24, the father and mother of a deceased person killed upon a railroad, having lived together from 1844 to 1854, the date of the death of the wife, during which the deceased child was born, the father could maintain a suit against the railroad for damages. *Houston & T. C. R. Co. v. Baker*, 11 Am. & Eng. R. Cas. 667, 57 Tex. 419.—QUOTING *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 203.

A father cannot maintain a suit for exemplary damages for the killing of his son, he not being an "heir of the body." *Houston & T. C. R. Co. v. Baker*, 11 Am. & Eng. R. Cas. 667, 57 Tex. 419.

A father could recover such actual damages as might be proven to have been caused by such death, under Pas. Dig. art. 15, § 15. *Houston & T. C. R. Co. v. Baker*, 11 Am. & Eng. R. Cas. 667, 57 Tex. 419.

A father may maintain an action for the death of his child under Wash. Code, 1881, § 9, although the administrator of the child's estate may have, theretofore, recovered judgment against the same defendant for causing the child's death by wrongful act or neglect. *Hedrick v. Ilwaco R. & N. Co.*, 54 Am. & Eng. R. Cas. 45, 4 Wash. 400, 30 Pac. Rep. 714.—APPROVING *Durkee v. Central Pac. R. Co.*, 56 Cal. 388; *Walters v. Chicago, R. I. & P. R. Co.*, 36 Iowa 458; *Mayhew v. Burns*, 103 Ind. 328; *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111.

A father is not entitled to sue under 9 &

10 Vict. c. 93, for the death of his son, unless he has thereby suffered a pecuniary loss. *Sykes v. North Eastern R. Co.*, 44 L. J. C. P. 191, 32 L. T. 199, 23 W. R. 473. Compare *Duckworth v. Johnson*, 4 H. & N. 653, 5 Jur. N. S. 630, 29 L. J. Ex. 25.

If a father has a reasonable expectation of pecuniary benefit from the continuance of the life of his son, he may maintain an action for the death of such son. *Franklin v. South Eastern R. Co.*, 3 H. & N. 211, 4 Jur. N. S. 565, 29 L. J. Ex. 25.—DISTINGUISHED IN *Sykes v. North Eastern R. Co.*, 32 L. T. 199, 44 L. J. C. P. 191, 23 W. R. 473.

80. Mother.—In Georgia the fact that the mother of the person killed was living apart from her husband and was supported by the deceased, her minor son, will not preclude her from bringing an action against the railroad company to recover for her son's death, where the action is not only in the name of the mother, but in the name of the father for her use. *East Tenn., V. & G. R. Co. v. Maloy*, 31 Am. & Eng. R. Cas. 352, 77 Ga. 237, 2 S. E. Rep. 941.

In Indiana, an infant, without an appointed guardian or an estate of inheritance, living in the family of his mother, a widow, is subject to her control as his natural guardian, and she has a right to his wages; and she may sue for damages in her own name a railroad company by whose negligence he has been killed. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366.

Miss. Code of 1880, § 1510, provides that "whenever the death of any person shall be caused by any such wrongful act or omission as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband or father, the person or corporation, or both, that would have been liable if death had not ensued, and the representatives of such person, shall be liable for damages, notwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent." *Held*, that a mother (though sole parent) has no right of action for the wrongful killing of her minor child. The use of the

word "parent" in the statute has reference to the father. *Amos v. Mobile & O. R. Co.*, 63 Miss. 509.—DISTINGUISHING *Natchez, J. & C. R. Co. v. Cook*, 63 Miss. 38.

Mo. Rev. St. 1889, § 4425, provides that if the deceased be a minor and unmarried, whether he be a natural born or adopted child, then the father and mother may join in a suit for his death, the two to share the damages jointly. *Held*, that the statute only applies to a natural born legitimate child; and therefore a mother cannot sue for the death of her illegitimate child. *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269.

In New York a widowed mother is charged with the support of her minor child, and is therefore entitled to its services, and may consequently maintain an action for the loss of such services due to the child being negligently injured. *Kennedy v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 186.

In Pennsylvania an action by a mother for negligence in causing the death of her son above age can be maintained if the family relation existed between them at the time of his death and there were reasonable grounds to expect pecuniary advantage from the continuance of the relation. *Pennsylvania R. Co. v. Keller*, 67 Pa. St. 300.

90. Widow.—Where the right of action for the homicide of a husband and father is given by law to the personal representative for the use of the wife and children, the wife cannot sue alone and in her own name. *Western & A. R. Co. v. Strong*, 52 Ga. 461, 8 Am. Ry. Rep. 13.

The judgment of a Nebraska county court granting letters of administration to a widow, where the sole assets of the estate consist of a claim against a railroad company for causing the death of the intestate, may be upheld as *coram judice*. *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 2 L. R. A. 67, 40 N. W. Rep. 401.

Under the Pennsylvania Act of 1855, prescribing the manner of suing for death caused by negligence, a widow may bring the action, but the damages recovered must be distributed to the several persons named in the statute as being entitled to share therein; but such distributees need not be named as plaintiffs. *Huntingdon & B. T. R. & C. Co. v. Decker*, 84 Pa. St. 419.—REVIEWED IN *Beard v. Skeldon*, 13 Ill. App. 54.

Where a person has been killed in a railroad accident in another state, the widow cannot maintain an action in Pennsylvania in her own name, under a statute of such state which confers a right of action upon the administrator, though for the ultimate benefit of the widow and next of kin. The fact that a similar statute of Pennsylvania gives the right to sue expressly and exclusively to the widow, if there be one, for the benefit of herself and her children does not confer any right upon the widow to maintain the action. *Usher v. West Jersey R. Co.*, 41 Am. & Eng. R. Cas. 508, 126 Pa. St. 206, 17 Atl. Rep. 597.

It appearing from the complaint in this action that the deceased left a widow and children surviving him, no action can be maintained by the personal representative, as the right to institute such action belongs first to the widow. *Belding v. Black Hills & Ft. P. R. Co.*, (S. Dak.) 52 Am. & Eng. R. Cas. 624, 53 N. W. Rep. 750.

A party was killed more than two months before the passage of the Tenn. Act of 1871, ch. 78, which vests the right in the widow to sue for wrongfully causing the death of her husband, but no administrator had been appointed up to the time of the passage of the act. *Held*, that the right of action between the time of the killing and the passage of the act was in abeyance and vested in the widow exclusively on the passage of the act. *Collins v. East Tenn., V. & G. R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46.

Under the Tenn. statutes the widow has a preference of the right to sue for the death of her husband, but she may forfeit this right in favor of an administrator. *Webb v. East Tenn., V. & G. R. Co.*, 42 Am. & Eng. R. Cas. 44, 88 Tenn. 119, 12 S. W. Rep. 428.—DISTINGUISHING *Flatley v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 230; *Greenlee v. East Tenn., V. & G. R. Co.*, 5 Lea (Tenn.) 418; *Trafford v. Adams Exp. Co.*, 8 Lea 99.

The fact that a wife has been living separate from her husband will not in itself deprive her of the recovery of damages for his homicide, so long as the conjugal relation exists and she has done nothing to forfeit her right by her own wrong. *Dallas & W. R. Co. v. Spicker*, 21 Am. & Eng. R. Cas. 160, 61 Tex. 427, 48 Am. Rep. 297.

A suit under the Texas statute to recover for wrongful killing of a man who leaves a

surviving wife and children is for the benefit of the children, and it is not necessary that they should be parties; so it is not error to allow the widow to sue as the next friend of the children, as the recovery under the statute is for their benefit. *Houston & T. C. R. Co. v. Shaw*, 2 *Tex. Unrep. Cas.* 553.

Where a wife is living in a state of prostitution, separate and apart from her husband, having forfeited the right to support from him, she forfeits also her right to recover damages from a railroad company for negligently killing her husband. *Fl. Worth & D. C. R. Co. v. Floyd*, (*Tex. Civ. App.*) 21 *S. W. Rep.* 544.

91. Widower.—A widower is not the next of kin to his deceased wife within the meaning of Kan. Gen. St. 1889, par. 4519, providing that, in the absence of a personal representative, the action may be brought by the widow or the next of kin. *Western Union Tel. Co. v. McGill*, 57 *Fed. Rep.* 699.

92. Heirs.—Under Mansf. Ark. Dig. §§ 5225, 5226, providing that if there is no personal representative the right of action for wrongfully causing the death of another shall vest in the heirs at law, the widow and all persons entitled to share in the estate of an intestate are heirs at law. *St. Louis, I. M. & S. R. Co. v. Needham*, 54 *Am. & Eng. R. Cas.* 88, 52 *Fed. Rep.* 371, 10 *U. S. App.* 339, 3 *C. C. A.* 129.

Under Ga. Code, § 2071—that a widow or child “may recover for the homicide of the husband or parent”—minor children may recover for the homicide of the mother. *Atlanta & W. P. R. Co. v. Venable*, 7 *Am. & Eng. R. Cas.* 35, 65 *Ga.* 55.

The intention of the legislature in the passage of S. Dak. Comp. L. § 5498, manifestly was to give to the widow the prior and exclusive right to institute the action and recover the damages under this section in case the deceased left a widow. If none, then that the heirs should have the prior and exclusive right to institute the action and recover the damages. *Belding v. Black Hills & Ft. P. R. Co.*, (*S. Dak.*) 52 *Am. & Eng. R. Cas.* 624, 53 *N. W. Rep.* 750.

93. Guardian.—Under Ind. Rev. St. 1881, § 266, a guardian has no right of action for the wrongful death of his infant ward, except to reimburse the ward's estate for expenditures made for medical and funeral expenses and for care and attention.

The right of action for loss of services is in the father or mother. *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 *Ind.* 111, 42 *Am. & Eng. R. Cas.* 40, 21 *N. E. Rep.* 472.—APPROVED IN *Hedrick v. Ilwaco R. & N. Co.*, 4 *Wash.* 400.

An action for negligently causing the death of a person may be brought by the guardian of the minor child, either as guardian or in the name of the child by him as guardian; but a mother cannot sue as the natural guardian of the child, but may maintain a separate action in her own right. *Houston & T. C. R. Co. v. Bradley*, 45 *Tex.* 171, 13 *Am. Ry. Rep.* 213.—QUOTING *Coover v. Moore*, 31 *Mo.* 574. REVIEWING *Kramer v. San Francisco M. St. R. Co.*, 25 *Cal.* 434; *Selma, R. & D. Co. v. Lacey*, 49 *Ga.* 106.—FOLLOWED IN *March v. Walker*, 48 *Tex.* 372; *Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31.

A stepfather may represent his wife's minor children as next friend, in a suit for damages for causing the death of their father. *International & G. N. R. Co. v. Kuehn*, 35 *Am. & Eng. R. Cas.* 421, 70 *Tex.* 582, 8 *S. W. Rep.* 484.

94. Joinder of parties plaintiff.—Where a widow brings an action under Mansf. Ark. Dig. §§ 5225, 5226, for causing the death of another by wrongful act, she must join all persons having an interest, under the statute, in the damages recoverable which includes a half-brother who is entitled to share in the damages, though he has suffered no pecuniary loss; and this is so, notwithstanding § 4933, providing that all actions must be in the name of the real parties in interest. *St. Louis, I. M. & S. R. Co. v. Needham*, 54 *Am. & Eng. R. Cas.* 88, 52 *Fed. Rep.* 371, 10 *U. S. App.* 339, 3 *C. C. A.* 129.

In Pennsylvania, an action for the death of a father is properly brought in the name of all the children; the recovery is for the benefit of all, the amount to be distributed as in case of intestacy. *North Pa. R. Co. v. Robinson*, 44 *Pa. St.* 175.

Under the Pa. Act of April 26, 1855, P. L. p. 309, an action brought to recover damages for an injury causing death should be brought by the widow without joining the minor children of the deceased; but when they are joined, and no objection is made to this in the court below, the supreme court will not reverse for this reason, after verdict and judgment. *Philadelphia, W.*

B. R. Co. v. Conway, 112 Pa. St. 511, 4 Atl. Rep. 362.—FOLLOWING Borough of South Easton *v. Reinhart*, 13 W. N. C. 389.

The children are not necessary parties to an action by the widow under the Tenn. statute. The recovery enures to the benefit of the widow and children, and will be distributed as personal property. *Collins v. East Tenn., V. & G. R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46.

Where the action is under the Texas statute it is necessary, in order to maintain the action, to make all the persons who are entitled to share in the damages recovered, parties. *Dallas & W. R. Co. v. Spiker*, 59 Tex. 435.—DISTINGUISHING *March v. Walker*, 48 Tex. 373. QUOTING *Houston & T. C. R. Co. v. Moore*, 49 Tex. 46. REVIEWING *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 198.—FOLLOWED IN *Ft. Worth & D. C. R. Co. v. Wilson*, 85 Tex. 516.

If the want of any such party is made known to the court during the trial, it should be suspended until he is made a party. *East Line & R. R. Co. v. Culbertson*, 68 Tex. 664, 5 S. W. Rep. 820.

One having a right of action should not be concluded by a judgment rendered in a suit brought by another having the same right of action, and to which he was not made a party. The defendant in the first suit may by proper plea cause all persons having an interest to be made parties. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. Rep. 127. *Galveston, H. & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cas. 470, 76 Tex. 473, 13 S. W. Rep. 327.

Under the Texas statute providing that the action must be brought within 12 months, where the action is brought within the time, but the complaint is amended after the running of the 12 months so as to admit a new party, a new cause of action is not set up so as to make the statute of limitations a defense, except as to the new party. *East Line & R. R. Co. v. Culbertson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.—DISTINGUISHED IN *Becker v. Gulf City St. R. & R. E. Co.*, 80 Tex. 475.

It is no answer to an objection, made for want of proper parties plaintiff, to reply that the claim of the unjoined beneficiaries is barred by the statute of limitations. *Ft. Worth & D. C. R. Co. v. Wilson*, 85 Tex.

516, 22 S. W. Rep. 578.—FOLLOWING *Dallas & W. R. Co. v. Spiker*, 59 Tex. 437.

Pending a suit for damages for her son's death, the mother, a widow, married a second time. The husband is a proper party, and should be made party on suggestion of the marriage. *San Antonio St. R. Co. v. Cailloutte*, 79 Tex. 341, 15 S. W. Rep. 390.

The statute gives damages to both father and mother for their son's death. The statute (Rev. St. art. 2904) provides that "the action may be brought by all the parties entitled thereto," etc. Both may join as plaintiffs. *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. Rep. 121.

In an action by an administrator under Va. Code 1873, ch. 145, for the benefit of the widow and children, if any, and otherwise for the benefit of the estate of one who has been negligently killed, the beneficiary, or persons entitled to the damages, need not be made parties. *Harper v. Norfolk & W. R. Co.*, 36 Fed. Rep. 102.—FOLLOWING *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431.

2. Personal Representatives.

95. General rule that action must be in name of personal representative.—An action for causing the death of a human being must be brought by the representatives of the deceased. *Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. Rep. 411. *Stewart v. Louisville & N. R. Co.*, 83 Ala. 493, 4 So. Rep. 373.—FOLLOWED IN *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764.—*Little Rock & Ft. S. R. Co. v. Townsend*, 41 Ark. 382, 21 Am. & Eng. R. Cas. 619. *Kramer v. San Francisco M. St. R. Co.*, 25 Cal. 434.—REVIEWED IN *Houston & T. C. R. Co. v. Bradley*, 45 Tex. 171.—*Boutiller v. Steamboat Milwaukee*, 8 Minn. 97 (Gil. 72). *Illinois C. R. Co. v. Hunter*, 70 Miss. 471, 12 So. Rep. 482. *Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. Rep. 411.—CRITICISING *Sullivan v. Union Pac. R. Co.*, 3 Dill. (U. S.) 335.—*Ryall v. Kennedy*, 8 J. & S. (N. Y.) 347. *Weidner v. Rankin*, 26 Ohio St. 522. *Whiton v. Chicago & N. W. R. Co.*, 21 Wis. 305.

And when the person killed was a married woman the law does not require the suit to be brought by the husband. *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272.—REVIEWING *Savannah & M. R. Co. v.*

Shearer, 58 Ala. 672.—QUOTED IN *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32.

Where, by the law of Alabama, the personal representative of a party who is killed by the wrongful act or negligence of another is entitled to an action for damages therefor, no other person but such personal representative can bring such action in the courts of Georgia when the killing occurred in Alabama. *Selma, R. & D. R. Co. v. Lacey*, 49 Ga. 106.—REVIEWED IN *Houston & T. C. R. Co. v. Bradley*, 45 Tex. 171.

A father cannot maintain an action for the negligent killing of his infant child. Under the statute suit must be brought by the executor or administrator. *Scheffler v. Minneapolis & St. L. R. Co.*, 32 Minn. 125, 19 N. W. Rep. 656.

96. How applied in various states.

—(1) *Colorado*.—The administrator is a mere nominal plaintiff, suing for the benefit of the surviving widow or children. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

(2) *Connecticut*.—Under the act relating to civil actions an administrator may sue for an injury which results in the death of his intestate. *Soule v. New York & N. H. R. Co.*, 24 Conn. 575.

(3) *Georgia*.—The temporary administrator is, for the time being, the "personal representative" of the intestate for the purpose of collecting assets, and so continues until permanent letters are granted. He can maintain an action for homicide of his intestate, the right to which is conferred by statute upon the "personal representative," under the code, § 2591. *Louisville & N. R. Co. v. Chaffin*, 84 Ga. 519, 11 S. E. Rep. 891.

(4) *Illinois*.—The term "personal representative," as used in the statute, providing that the personal representative of one whose death is caused by wrongful act shall have a right of action, means either the executor or administrator, and therefore a widow cannot sue in her own name, though she be the sole beneficiary. *Hagen v. Kean*, 3 Dill. (U. S.) 124.

(5) *Indiana*.—Where an injured party brought suit and recovered damages in his lifetime, including damages for a disease superinduced by reason of his injuries, and the judgment was paid and received by him, and his death afterwards resulted from the injury, his personal representatives cannot maintain an action. Under Rev. St. 1881, §§ 282 and 284, an action may only be main-

tained by the personal representatives of the deceased for the wrongful act or omission of another, if the deceased might have maintained an action, had he lived, for such wrongful act or omission. An action for a cause of action liquidated and satisfied cannot survive in favor of any person. *Hecht v. Ohio & M. R. Co.*, 54 Am. & Eng. R. Cas. 75, 132 Ind. 507, 32 N. E. Rep. 302.

In the action brought after the death of the injured party, the parties are the same as in the action instituted in his lifetime, except that the injured party is represented by his personal representatives. The cause of action is the same, and while in minor particulars the measure of damages differs, this does not cause the action to survive. Although some items of evidence may be competent or even necessary in one case that are not in the other, and the method of proof may differ, still the action in either case is based on the negligence of the defendant in causing the same and identical injury, and the damages sustained in either case grow out of the injury caused by such negligence. *Hecht v. Ohio & M. R. Co.*, 54 Am. & Eng. R. Cas. 75, 132 Ind. 507, 32 N. E. Rep. 302.—FOLLOWING *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169.

The relation of the administrator to the fund when recovered is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and if no such person existed it could not be maintained. *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

(6) *Iowa*.—Under the statute an administrator may maintain an action for injury to his intestate resulting in immediate death. *Worden v. Humeston & S. R. Co.*, 72 Iowa 201, 33 N. W. Rep. 629.

(7) *Kentucky*.—Where the life of any person not in the employment of a railroad company is lost by the negligence of any railroad company, his personal representative may maintain an action against the company, and recover damages therefor, under section 1 of chapter 57, General Statutes. *Givens v. Kentucky C. R. Co.*, 89 Ky. 231, 12 S. W. Rep. 257.—DISTINGUISHING *Henderson v. Kentucky C. R. Co.*, 86 Ky. 389; *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 Ky. 40.

The recovery under that section of the statute is limited to compensation, and neither the widow nor the child can main-

tain the action. It must be brought by the personal representative, and if a recovery is had the plaintiff will hold the fund like other assets left by the intestate. *Givens v. Kentucky C. R. Co.*, 89 Ky. 231, 12 S. W. Rep. 257.—FOLLOWED IN Louisville, C. & L. R. Co. v. Case, 9 Bush (Ky.) 728; Kentucky C. R. Co. v. Gastineau, 83 Ky. 119.

The degree of neglect alleged determines the question as to whether a recovery is sought under section 1 or section 3 of chapter 57, General Statutes. If "ordinary negligence," or "negligence" simply, is alleged, the action will be regarded as under the first section. *Givens v. Kentucky C. R. Co.*, 89 Ky. 231, 12 S. W. Rep. 257.

Gen. St. ch. 57, § 1, providing that a personal representative of a person not in the employ of a railroad, who is killed through negligence, may recover damages for such death, gives no right of action to the personal representative of the employé of a company to recover damages for his death, though the employé lives two days after the accident which caused his death. *Cincinnati, N. O. & T. P. R. Co. v. Adam*, (Ky.) 13 S. W. Rep. 428.

Where an employé of a railroad company is injured by the neglect of the company, and there is an appreciable interval of suffering between the time of injury and death, he may recover for the suffering; and upon his death the right of action, by virtue of chapter 10 of the Gen. St., survives to his personal representative, although he may have left neither widow nor child. *Newport News & M. V. Co. v. Dentzel*, 91 Ky. 42, 14 S. W. Rep. 958.

(8) *Michigan*.—Where damages for the negligent killing of a child are, by the statute, distributable equally between the father and mother, the mother has an equal interest in administration with the father, and may be appointed administratrix of the estate of the child. *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 20, 41 N. W. Rep. 847.

(9) *Minnesota*.—Under the statute (Gen. St. ch. 77, § 2) a father cannot recover damages for the death of his son unless he is also his son's personal representative. *Nash v. Tousley*, 28 Minn. 5, 8 N. W. Rep. 875.

(10) *Mississippi*.—Under the code, 1880, § 2078, authorizing a personal representative to prosecute any personal action which the decedent might have commenced and prosecuted, he may recover damages for an in-

jury which results in the death of the decedent. *Vicksburg & M. R. Co. v. Phillips*, 30 Am. & Eng. R. Cas. 587, 64 Miss. 693, 2 So. Rep. 537.—FOLLOWED IN Illinois C. R. Co. v. Pendergrass, 69 Miss. 425.

The right of the administrator to bring such action under § 2078 is not impaired by § 2079 of the code, which specifically authorizes an action by an administrator or executor of any trespass done to the person or property, real or personal, of the decedent. *Vicksburg & M. R. Co. v. Phillips*, 30 Am. & Eng. R. Cas. 587, 64 Miss. 693, 2 So. Rep. 537.

(11) *Missouri*.—Under the damage act, if an injured party would have had a cause of action had death not ensued, his personal representatives may sue. *Crumpley v. Hannibal & St. J. R. Co.*, 37 Am. & Eng. R. Cas. 357, 98 Mo. 34, 11 S. W. Rep. 244.

(12) *New York*.—Although a non-resident may be appointed administrator, he does not, by the appointment, become in any sense a resident, and therefore cannot maintain an action, under Code of Civ. Pro. § 1780, against a foreign corporation to recover damages for a death caused by defendant's negligence in another state. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 16 Civ. Pro. 255, 19 N. E. Rep. 625, 20 N. Y. S. R. 741; *affirming* 15 Civ. Pro. 88, 24 J. & S. 108.—DISTINGUISHING *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 303.

(13) *Ohio*.—Under the statute of March 25, 1851, entitled "An act requiring compensation for causing death by wrongful act, neglect, or default," an action may be maintained by the administrator of the estate of a deceased person, for the benefit of the next of kin of the deceased, though he leave no widow or children, and though the petition do not contain a statement of special circumstances rendering the death a pecuniary injury to them. Such special circumstances can affect only the amount of the recovery. *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 336.—FOLLOWED IN *Groff v. Cincinnati & I. R. Co.*, 1 Cin. Super. Ct. 264.

(14) *South Carolina*.—Where an engineer is killed, caused by the gross negligence of the company in the construction of its road, his personal representatives may sue the company and recover damages. *Brickman v. South Carolina R. Co.*, 8 So. Car. 173.—

APPLIED IN *Bowen v. Atlantic & F. B. V. R. Co.*, 14 Am. & Eng. R. Cas. 332, 17 So. Car. 574.

(15) *Tennessee*.—Under section 2291 of the code, a personal representative can maintain an action against a wrong-doer for killing an infant. *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368.—REVIEWED IN *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491.

Under the code, § 2291, which provides that the right of action which a person who dies from injuries received would have had had death not ensued, shall pass to his personal representative, the right of action with all its incidents passes to the personal representative, and must be treated as if the injured party had brought it. *Haley v. Mobile & O. R. Co.*, 8 Am. & Eng. R. Cas. 541, 7 Baxt. (Tenn.) 239.

A provision of the code, § 392, allowing a suit *in forma pauperis*, is confined to suits that are purely personal, and does not authorize an administrator to sue a railroad company for the death of his intestate, though the estate is insolvent. *Smith v. Louisville & N. R. Co.*, 89 Tenn. 664, 15 S. W. Rep. 842.

(16) *Texas*.—The proviso to Rev. St. art. 1044 does not affect the rights of the personal representative of a deceased plaintiff who, while living, had sued for a personal injury and recovered judgment therefor in the district court; his rights remain as they existed before the enactment. The cause of action is merged in the judgment of the district court, which survives, and is not vacated or opened by writ of error or appeal, but remains valid and subsisting until set aside, and constitutes, in favor of the administrator, a cause of action. *Galveston City R. Co. v. Nolan*, 3 Am. & Eng. R. Cas. 387, 53 Tex. 139.—REVIEWING *Gibbs v. Belcher*, 30 Tex. 79.

(17) *West Virginia*.—Where a married woman is killed by the negligence of a railway corporation her husband as her executor may, under the code, ch. 103, § 6, maintain an action for causing such death. *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32.—QUOTING *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272. REVIEWING *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260; *Dickens v. New York C. R. Co.*, 28 Barb. (N. Y.) 41; *Green v. Hudson River R. Co.*, 31 Barb. 260.

97. Rule in the federal courts.—

Where a statute of one state confers a right of action for an injury resulting in death, the action may be maintained in a federal court sitting in another state, if the statute is not inconsistent with the statutes or policy of the state where the suit is brought. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

The right of action given by the Oreg. Civ. Code, § 367, to an administrator to recover for the homicide of his intestate, may be enforced in the federal courts where there is a difference of citizenship. *Holmes v. Oregon & C. R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 75.—QUOTING *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (U. S.) 270.

An action accruing under the Va. Code, 1873, ch. 145, conferring a right of action on the administrator for the homicide of his intestate, for the benefit of the widow and children of the intestate, if any, otherwise for the benefit of the estate, may be brought in a federal court, though the intestate was a citizen of the same state with the defendant and his wife and children still reside there. *Harper v. Norfolk & W. R. Co.*, 36 Fed. Rep. 102.—DISTINGUISHING *Browne v. Strode*, 5 Cranch (U. S.) 303; *McNutt v. Bland*, 2 How. (U. S.) 9. QUOTING *Bonnanfee v. Williams*, 3 How. (U. S.) 574; *Susquehanna & W. V. R. & C. Co. v. Blatchford*, 11 Wall. (U. S.) 172.

The provision of Mo. Rev. St. 1889, § 4425, providing for the recovery of a penalty of \$5000, where death is caused by the negligence, unskillfulness, or criminal intent of another, the statute being in its nature penal, is confined in its operation to the jurisdiction of the state; and a federal court sitting in another state will not enforce it. *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269.—APPLYING *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110. QUOTING *Philpott v. Missouri Pac. R. Co.*, 85 Mo. 164.

98. Foreign administrators.—

The homicide of a person in another state, on a line of railroad purchased and operated by a railroad company of Georgia, is actionable in Georgia, if the action be brought by a person entitled to recover—i. e., an administrator of such other state who has had his appointment ratified in Georgia, but not otherwise. *Central R. Co. v. Swint*, 26 Am. & Eng. R. Cas. 482, 73 Ga. 651.—FOLLOWING *South Carolina R. Co. v. Nix*, 68 Ga. 572.

In Illinois a foreign administrator may sue for the death of his decedent. *Wabash, St. L. & P. R. Co. v. Shacklet*, 12 Am. & Eng. R. Cas. 166, 105 Ill. 364; *affirming* 10 Ill. App. 404.

So also in Kansas. *Kansas Pac. R. Co. v. Cutter*, 16 Kan. 568.—DISTINGUISHED IN *Limekiller v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 184, 33 Kan. 83.

But not where he is prohibited from prosecuting the same action in the state of his appointment. *Limekiller v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 184, 33 Kan. 83, 5 Pac. Rep. 401.—COMMENTING ON *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420. DISTINGUISHING *Kansas Pac. R. Co. v. Cutter*, 16 Kan. 568.—*Taylor v. Pennsylvania Co.*, 7 Am. & Eng. R. Cas. 23, 78 Ky. 348.—QUOTING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121.—DISTINGUISHED IN *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169. QUOTED IN *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105.

A foreign administrator can maintain an action in Indiana against a defendant for having wrongfully caused the death of a person. The administrator will hold the money recovered in trust for the benefit of the widow and children of the deceased. (Osborn, J., dissenting.) *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48.

A New York administrator cannot sue for an injury resulting in death in New Jersey and recover damages which a personal representative is authorized to sue for and recover for the benefit of the widow and next of kin by the statutes of New Jersey, but not authorized by the statutes of New York. *Mackay v. Central R. Co.*, 14 Blatchf. (U. S.) 65, 4 Fed. Rep. 617.—APPROVING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121. REVIEWING *Richardson v. New York C. R. Co.*, 98 Mass. 85.

99. Ancillary administration.—Where a statute gives an administrator the right to sue for the homicide of his intestate, for the benefit of the next of kin, an administrator appointed in another state may take out ancillary letters of administration in Connecticut, where the accident occurs, and sue there. *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213.

The New York Code of Civ. Pro. § 1902, giving a right of action to the executor or administrator of a person who has been wrongfully killed, applies to an action

by an ancillary executor who sues to recover for the death of a person killed in New York, but who had his residence in another state. *Lang v. Houston, W. St. & P. F. R. Co.*, 75 Hun 151, 27 N. Y. Supp. 90.

VI. LIMITATIONS OF TIME TO SUE.

100. What statute governs.—

Where an injury causing death occurs in another state than that in which suit is brought, the statute of limitations of the forum applies, unless the foreign statute where the accident occurred prescribes a limitation. *Munos v. Southern Pac. Co.*, 51 Fed. Rep. 188, 2 C. C. A. 163.

The courts of one state will not enforce a remedy against a railroad for the wrongful killing of plaintiff's husband in another state, under whose law the action is barred by lapse of the prescribed time. *Selma, R. & D. R. Co. v. Lucey*, 49 Ga. 106.

On the 10th of May, 1879, C. was seated in a car of the C. V. R. Co., standing on the railway of that company, when an engine of the defendants ran upon the railway of the C. V. R. Co., through gross negligence as alleged, and collided with the car in which C. was. He was injured in the collision, and died on the 11th of August, 1885, as alleged, from the injuries thus received. On August 4, 1886, his executrix brought an action therefor. *Held*, on demurrer, that the action was for injury sustained "by reason of the railway;" and that the limitation of six months, provided by section 83 of C. S. C. c. 66, section 27 of 42 Vict. c. 9, D., applied and prevailed over the limitation of twelve months, provided for by section 5 of R. S. O. c. 128, and therefore the action was barred. *Conger v. Grand Trunk R. Co.*, 13 Ont. 160.

The plaintiff's father was killed on February 10, 1891, by a fall from a bridge, part of a highway which crossed the defendants' line and had been negligently allowed by them to be out of repair. The action was begun on the 14th of November, 1891, more than six months after the accident, no letters of administration having been taken out. *Held*, that this was not "damage sustained by reason of the railway" and that the limitation clauses of the railway act did not apply. *Zimmer v. Grand Trunk R. Co.*, 19 Ont. App. 693.—APPROVING *North Shore R. Co. v. McWillie*, 17 Can. Sup. Ct. 511. DISTINGUISHING *Can-*

dian Pac. R. Co. v. Robinson, 14 Can. Sup. Ct. 105, 19 Can. Sup. Ct. 292. REVIEWING *McCallum v. Grand Trunk R. Co.*, 31 U. C. Q. B. 527; *Brown v. Grand Trunk R. Co.*, 24 U. C. Q. B. 350.

The provisions of the R. S. O. c. 135 (Lord Campbell's Act) are not affected by special railway legislation of this kind, so that in that view also the action was begun in time. *Zimmer v. Grand Trunk R. Co.*, 19 Ont. App. 693.

101. When the statute begins to run.—Under Conn. Act of 1853, giving a right of action to the personal representative of one whose death is caused by wrongful act, and requiring it to be brought within one year after the cause of action has accrued, the limitation has not run until one year from the appointment of the personal representative. *Andrews v. Hartford & N. H. R. Co.*, 34 Conn. 57.

The two years in which an action may be brought for wrongfully causing death under the Ind. Rev. St. § 284, begin to run when death occurs, whether that be before or after a year and a day from the date of the accident. *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. Rep. 579.—QUOTING *Jeffersonville R. Co. v. Swift*, 26 Ind. 459; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Hecht v. Ohio & M. R. Co.*, 132 Ind. 507.—*Hanna v. Jeffersonville R. Co.*, 32 Ind. 113.

Under the New York Code, as well as under the act of September 1, 1880, the time between death and the issuing of letters of administration is to be reckoned as part of the time in which the action must be brought for an injury causing death. The above statutes repeal 3 N. Y. Rev. St. 733, § 9. *Greene v. New York C. & H. R. R. Co.*, 16 J. & S. (N. Y.) 333, 2 Civ. Pro. 427.

Under the Tenn. Code, § 2772, the limitation of one year begins to run from the moment of the injury, and the time between death and the qualification of a personal representative is not excluded. *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. (Tenn.) 829.

* Statute of limitations only begins to run against actions for causing death of a minor from time of death and not from time of injury, see 44 AM. & ENG. R. CAS. 697, *abstr.*

The statute of limitations begins to run only from the time of death and not from the time of the injury. So an action in Washington, brought within one year from the death of the intestate, is not barred, though the injury was received more than three years before the action was commenced. *Nestelle v. Northern Pac. R. Co.*, 56 Fed. Rep. 261.

Under a statute providing that a person who would have been liable to one injured through his wrongful act shall be liable to an action for damages, notwithstanding the death of the person injured, the right of action of a widow for the death of her husband is barred where the cause of action of the injured person was barred by the statute of limitations at his death. *Canadian Pac. R. Co. v. Robinson*, 54 Am. & Eng. R. Cas. 49, 19 Can. Sup. Ct. 292; reversing 6 Montr. L. R. 118, which affirmed 5 Mont. Super. 225.

102. What lapse of time creates a bar.—In Kentucky, an action to recover damages for negligently causing death, brought by the administrator more than one year after he qualified, is barred by the statute of limitations. The act of February 17, 1866 (Myers's Supp. p. 724), does not apply to such actions. *Fleming v. Ernst*, 2 Bush (Ky.) 128.

Where the action is under the New York Act of 1847, ch. 450, as amended in 1849, ch. 256, and in 1870, ch. 78, to recover for death by wrongful act, it must be brought within two years from the time of the death. *Bonnell v. Jewett*, 24 Hun (N. Y.) 524.

The fact that a party is mortally injured, but does not die within a year and a day from the time of the injury, does not prevent an action under the statute to recover damages for the wrongful killing. *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626.

The action given by N. Car. Code, § 1498, must be brought within one year after the death of the injured person. *Taylor v. Cranberry I. & C. Co.*, 94 N. Car. 525.

The provision of this statute, limiting the time within which the action must be brought, is not a statute of limitations. The statute confers a right of action which did not exist before, and it must be strictly complied with. As there is no saving clause as to the time of bringing the action, no explanation as to why it was not brought will avail. *Taylor v. Cranberry I. & C. Co.*, 94 N. Car. 525.

Under the Ohio "Act requiring compensation" for causing death by wrongful act, neglect, or default (S. & C. 1139, 1140), which gave a right of action, provided such action should be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action, and not a mere limitation on the remedy, and the amendment and repeal of the section containing the proviso during the existence of the right of action, and the omission of the proviso in the section as amended, did not have the effect of extending the time within which the action should have been brought. *Pittsburg, C. & St. L., R. Co. v. Hine*, 25 *Ohio St.* 629, 10 *Am. Ry. Rep.* 157.

Under Tenn. Code, §§ 2291-2293, there is no distinction made between cases where the injured party lives a time and suit is brought in his lifetime and where the death is instantaneous. Both are put upon the same footing, and the cause of action is governed by the same laws as to the time in which suit may be brought—i. e., within one year from the time of the injury. *Fowlkes v. N. & D. R. Co.*, 5 *Baxt. (Tenn.)* 663.—CRITICISING *Whitford v. Panama R. Co.*, 23 *N. Y.* 465.

In Wisconsin actions to recover damages for injuries from negligence, etc., causing death will not lie unless brought within the time limited by the statute which gives the right of action—viz., two years from the death of the person injured. *George v. Chicago, M. & St. P. R. Co.*, 51 *Wis.* 603, 8 *N. W. Rep.* 374.

103. What will stop the running of the statute — Amendments.* — Where a widow has instituted suit for damages for the killing of her husband within the time allowed by statute, and has suffered nonsuit, she may begin anew, although more than six months have elapsed since the killing. *Shepard v. St. Louis, I. M. & S. R. Co.*, 3 *Mo. App.* 550.—APPROVED IN *McNamara v. Slavens*, 76 *Mo.* 329.

In an action for the wrongful death of a brakeman the original complaint charged that it was caused by the defective condition of the roadbed, while an amended complaint charged that it was caused by the defective condition of the roadbed and a coupling-pin. *Held*, that a new cause of action was not set up so as to allow the

running of the statute of limitations after the original complaint was filed. *Texas & P. R. Co. v. Cox*, 145 *U. S.* 593, 12 *Sup. Ct. Rep.* 905.

In an action by a personal representative against a railway company for causing the death of the intestate, the plaintiff, more than two years after the injury, by leave of court amended his declaration by adding a new count, which, however, was a mere restatement of the cause of action set up in the original counts. The defendant pleaded the two years' statute of limitations to the new count, which the court held good on demurrer. *Held*, that the court erred in so holding. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 *Ill.* 416, 18 *N. E. Rep.* 799; *affirming* 27 *Ill. App.* 22.

A suit was brought within the time limited by statute for causing death by negligence, but after the lapse of time an amendment was allowed showing that the deceased left a surviving widow and children. *Held*, that no new cause of action was set up by the amendment, and therefore it was not barred. *Haynie v. Chicago & A. R. Co.*, 9 *Ill. App.* 105.

In an action by an administrator to recover for the destruction of his intestate's life by the alleged wilful neglect of the defendant, the defendant was by mistake named in the caption of the petition and in the summons as the "Louisville, Cincinnati & Lexington R. Co.," instead of the "Louisville & Nashville R. Co.," but summons was, in fact, served on the latter company. An answer was filed having the same caption as the petition and containing simply a traverse by "the defendant." After the expiration of more than one year from the killing an amended petition was filed alleging the mistake in the original petition and asking judgment against the Louisville & Nashville R. Co. That company then filed an answer to the amended petition, relying upon the limitation of one year in bar of the action. *Held*, that it is evident from all the circumstances that the answer to the original petition was filed in behalf of the Louisville & Nashville R. Co., and had the effect to enter the appearance of that company, and having been filed within one year after the killing occurred, the action is not barred by limitation. *Heckman v. Louisville & N. R. Co.*, 85 *Ky.* 631, 4 *S. W. Rep.* 342.—QUOTING *Louisville & N. R. Co. v. Hall*, 12 *Bush (Ky.)* 131.

* See also *post*, 151.

Suit was brought within the one year prescribed by statute for the killing of a brakeman. After the one year had completely run an amended declaration was filed showing that the killing occurred in an adjoining state, and setting out the statute of that state; and an additional averment was added that the killing was caused by the company employing unskilful agents. *Held*, that the amendments did not set out a new cause of action, and therefore the statute of limitations only ran to the beginning of the action, and not to the time of the amendments. *Nashville, C. & St. L. R. Co. v. Foster*, 11 *Am. & Eng. R. Cas.* 180, 10 *Lea (Tenn.)* 351.—DISTINGUISHING *Flatley v. Memphis & C. R. Co.*, 9 *Heisk. (Tenn.)* 230.

Under the Texas statute all the beneficiaries must be made parties to an action to recover for an injury causing death. An action was commenced within the time limited, but after it had fully run an additional plaintiff was added. *Held*, that the amendment did not create a new cause of action, and therefore the action was not barred as to the original plaintiffs, but was as to the added plaintiff. *East Line & R. R. Co. v. Culbertson*, 38 *Am. & Eng. R. Cas.* 225, 72 *Tex.* 375, 3 *L. R. A.* 567, 10 *S. W. Rep.* 706.

104. Disability of infancy.—An action under section 3 of chapter 57, Ky. Gen. St., by the heir of one whose life has been lost by the wilful neglect of another, to recover therefor is barred after the lapse of one year, although the plaintiff be an infant, if there was either a widow or personal representative of the deceased who might have brought the action.

The saving of the statute in behalf of the infant is only intended to apply where there is no other person in being who has power to sue. *Louisville & N. R. Co. v. ...*, 86 *Ky.* 259, 5 *S. W. Rep.* 563.

Where a minor, through defendant's negligence, received injuries from which he died about two hours afterwards—*held*, that a cause of action arose in his favor during his life, immediately upon receiving the injury, and that the limit of two years prescribed by the statute of limitations (code, § 2529) began at once to run against his right of action, and that an action begun by his administrator later than two years after the injury was received was barred by the statute. Section 2535 of the code does not have the effect to suspend the running

of the statute in such a case until the appointment of the administrator. (See code, § 2527.) *Murphy v. Chicago, M. & St. P. R. Co.*, 80 *Iowa* 26, 45 *N. W. Rep.* 392.

Mo. Rev. St. 1879, § 2121, provides that the damages allowed for wrongfully causing the death of a person "may be sued for and recovered, first, by the husband or the wife of the deceased; and second, if there be no husband or wife, or if he or she fail to sue within six months after such death, then by the minor child or children of the deceased." Section 2125 provides that the action shall be brought within a year from the time of death. *Held*, that the word "minor" in section 2121 was not intended to limit the time to bring suit to the period of minority where a child, under age at the time death ensued, attains his majority within a year from that time, and brings suit after becoming of age and within the year. *Rutter v. Missouri Pac. R. Co.*, 21 *Am. & Eng. R. Cas.* 212, 81 *Mo.* 169.

VII. JURISDICTION. LAW OF PLACE.

1. Jurisdiction of State Courts, Generally.

105. Venue—County where killing was done.*—Under the provisions of the Louisiana Practice Code, an action against a railway company to recover damages for wrongful killing may be brought in the parish where the damage was done. *Houston v. Vicksburg, S. & P. R. Co.*, 34 *Am. & Eng. R. Cas.* 76, 39 *La. Ann.* 796, 2 *So. Rep.* 562.

An action by a widow for the homicide of her husband may, under section 3406 of the Georgia Code, be tried in the county where the killing was done, although such county is not that in which, by the charter, the principal place of business of the company is located. *Georgia R. & B. Co. v. Oaks*, 52 *Ga.* 410, 7 *Am. Ry. Rep.* 143.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 *Fed. Rep.* 608.

No matter where the contract of employment by the company with the deceased agent was made, the homicide being committed at the place where the agent was assigned to duty, and where he was serving the company at the time of the wrongful act, the cause of action originated at that place, and the superior court of that county

* Venue of action for death, see note, 15 *AM. & ENG. R. CAS.* 506.

has jurisdiction. *Christian v. Columbus & R. R. Co.*, 38 Am. & Eng. R. Cas. 261, 79 Ga. 460, 7 S. E. Rep. 216.

106. — where defendant's principal place of business is situated.—Under Ga. Act of 1850, giving an action for a death caused by a railroad, such action must be brought in the county where the principal business of the corporation is situated. Nor is this act affected by act of 1856. *South Western R. Co. v. Paulk*, 24 Ga. 356.

107. Action is both local and transitory.—An action for death is both a local and a transitory action; it is transitory because it may be instituted in another county than that in which the tort was committed, as provided by section 72 of the code, and its chief officer or agent may be served in any county where he may be found; and it is made local merely at the option of the plaintiff. *Chesapeake, O. & S. W. R. Co. v. Heath*, 87 Ky. 651, 9 S. W. Rep. 832.

108. Directing administration by probate court.—The probate court has jurisdiction to direct administration for the purpose of enforcing a cause of action arising under the statutes of Minnesota for the death of a person caused by the wrongful act or omission of another, although the deceased was not an inhabitant of that state, and left no property therein. *Hutchins v. St. Paul, M. & M. R. Co.*, 44 Minn. 5, 46 N. W. Rep. 79.

2. Where Injury was Inflicted or Death Occurred Out of the State.*

109. Similar remedy must exist in the foreign state.—A person cannot recover in the courts of one state for a wrongful killing by a railroad where the act was done in another state under whose laws the plaintiff could not have recovered. *Selma, R. & D. R. Co. v. Lacey*, 49 Ga. 106. *Willis v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 379, 61 Tex. 432.—REVIEWING *McDonald v. Mallory*, 77 N. Y. 546.—FOL-

* Remedy for causing death where injury is inflicted in another state, see note, 4 L. R. A. 261. Rights of action for causing death accruing under foreign statutes, see note, 15 L. R. A. 583.

Suing in one state for wrongfully causing death in another. Jurisdiction of courts; see 38 AM. & ENG. R. CAS. 172, *abstr.*

Action for death purely local; actions in other states, see note, 19 AM. & ENG. R. CAS. 191.

LOWED IN *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660. QUOTED IN *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608. *De Ham v. Mexican Nat. R. Co.*, (Tex. Civ. App.) 22 S. W. Rep. 249.

Such a right of action may be prosecuted in another state only when the two states have substantially similar statutes on the subject. *O'Reilly v. New York & N. E. R. Co.*, 42 Am. & Eng. R. Cas. 50, 16 R. I. 388, 29 Cent. L. J. 210, 6 L. R. A. 719, 17 Atl. Rep. 906.

And it must be alleged and proved that an action would lie under the laws of the state where the injury occurred. *Vandeventer v. New York & N. H. R. Co.*, 27 Barb. (N. Y.) 244, 6 Abb. Pr. (N. Y.) 239.—DISAPPROVED IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503.—*Hyde v. Wabash, St. L. & P. R. Co.*, 15 Am. & Eng. R. Cas. 503, 61 Iowa 441, 47 Am. Rep. 820, 16 N. W. Rep. 351.—DISTINGUISHED IN *Morris v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 180, 65 Iowa 727, 54 Am. Rep. 39; *Boyce v. Wabash R. Co.*, 23 Am. & Eng. R. Cas. 172, 63 Iowa 70, 50 Am. Rep. 730.—*Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56, 18 Pac. Rep. 57.

A complaint by a widow for the wrongful killing of her husband by a railroad in another state, where such action could not be maintained by her, sets forth no cause of action and cannot be amended. *Selma, R. & D. R. Co. v. Lacey*, 49 Ga. 106.

In order to recover in such action the wrong causing the death must be actionable under the laws of the state where it occurs, and also where the suit is brought. *Burns v. Grand Rapids & I. R. Co.*, 12 West. Rep. 688, 113 Ind. 169, 15 N. E. Rep. 230.—DISTINGUISHING *Richardson v. New York C. R. Co.*, 98 Mass. 85; *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 321; *Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323; *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244. MODIFYING *Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156.

Where an injury causing death occurs in Massachusetts, where a penal statute exists allowing the recovery of a fine against the party inflicting the injury, an action cannot be maintained in Rhode Island, where the statutes do not contain such penal features. *O'Reilly v. New York & N. E. R. Co.*, 42

Am. & Eng. R. Cas. 50, 16 *R. I.* 388, 29 *Cent. L. J.* 210, 6 *L. R. A.* 719, 17 *Atl. Rep.* 906.—QUOTING *Needham v. Grand Trunk R. Co.*, 38 *Vt.* 294.—DISTINGUISHED IN *Gardner v. New York & N. E. R. Co.*, 17 *R. I.* 790.

Where a citizen of Vermont is injured in another state and returns to the former state before death ensues, an action cannot be maintained there under the statutes of 1847 or 1849, where it appears that the right of action would not survive under the laws of the state where the injury occurred. *Needham v. Grand Trunk R. Co.*, 38 *Vt.* 294.—QUOTING *Crowley v. Panama R. Co.*, 30 *Barb.* (N. Y.) 99; *Whitford v. Panama R. Co.*, 3 *Bosw.* (N. Y.) 67; *Beach v. Bay State Steamboat Co.*, 30 *Barb.* 433.—APPROVED IN *Davis v. New York & N. E. R. Co.*, 28 *Am. & Eng. R. Cas.* 223, 143 *Mass.* 301, 58 *Am. Rep.* 138. DISTINGUISHED IN *Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.* 48. QUOTED IN *O'Reilly v. New York & N. E. R. Co.*, 16 *R. I.* 388.

Defendant is a corporation operating a road both in Massachusetts and Connecticut under the laws of each state, and was sued for the homicide of a citizen of Massachusetts in Connecticut. It appeared that by the laws of the latter state the cause of action did not survive death, but that the personal representative might bring a penal action for the benefit of the estate. *Held*, that a common law action could not be maintained in Massachusetts under Pub. St. ch. 165, § 1. *Davis v. New York & N. E. R. Co.*, 28 *Am. & Eng. R. Cas.* 223, 143 *Mass.* 301, 58 *Am. Rep.* 138, 9 *N. E. Rep.* 815.—APPROVING *Needham v. Grand Trunk R. Co.*, 38 *Vt.* 294; *State v. Pittsburgh & C. R. Co.*, 45 *Md.* 41.—DISTINGUISHED IN *Higgins v. Central N. Eng. & W. R. Co.*, 155 *Mass.* 176. REVIEWED IN *Ash v. Baltimore & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 676, 72 *Md.* 144; *O'Reilly v. New York & N. E. R. Co.*, 16 *R. I.* 388.

110. If similar remedy exists, personal representative may sue.—The right of action to recover damages for the death of a human being given by the statute of one state may be asserted in the courts of another where there is a coincidence of the statutes of the two states on this point. *Chicago, St. L. & N. O. R. Co. v. Doyle*, 8 *Am. & Eng. R. Cas.* 171, 60 *Miss.* 977. *Burns v. Grand Rapids & I. R. Co.*, 12 *West. Rep.* 688, 113 *Ind.* 169, 15 *N. E.*

Rep. 230.—FOLLOWED IN *Cincinnati, H. & D. R. Co. v. McMullen*, 38 *Am. & Eng. R. Cas.* 165, 117 *Ind.* 439, 20 *N. E. Rep.* 287; *Hecht v. Ohio & M. R. Co.*, 132 *Ind.* 507.—*Wintuska v. Louisville & N. R. Co.*, (Ky.) 20 *S. W. Rep.* 819.—FOLLOWING *Dennick v. Central R. Co.*, 103 *U. S.* 11; *Bruce v. Cincinnati R. Co.*, 83 *Ky.* 174.—*Louisville & N. R. Co. v. Shively*, (Ky.) 18 *S. W. Rep.* 944. *Missouri Pac. R. Co. v. Lewis*, 24 *Neb.* 848, 40 *N. W. Rep.* 401, 2 *L. R. A.* 67.—FOLLOWING *Dennick v. Central R. Co.*, 103 *U. S.* 11; *Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.* 48; *Morris v. Chicago, R. I. & P. R. Co.*, 23 *N. W. Rep.* 143; *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503. NOT FOLLOWING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 *Ohio St.* 121; *Armstrong v. Beadle*, 5 *Sawy.* (U. S.) 484; *Anderson v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 321.—*Dennick v. Central R. Co.*, 1 *Am. & Eng. R. Cas.* 309, 103 *U. S.* 11.—DISAPPROVING *Richardson v. New York C. R. Co.*, 98 *Mass.* 85; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 *Kan.* 46. FOLLOWING *Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.* 48.—APPLIED IN *Brisenden v. Chamberlain*, 53 *Fed. Rep.* 307. APPROVED IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503. DISTINGUISHED IN *Ash v. Baltimore & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 676, 72 *Md.* 144; *Vawter v. Missouri Pac. R. Co.*, 84 *Mo.* 679, 54 *Am. Rep.* 105. FOLLOWED IN *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291; *Missouri Pac. R. Co. v. Lewis*, 24 *Neb.* 848. QUOTED IN *McLeod v. Connecticut & P. R. R. Co.*, 28 *Am. & Eng. R. Cas.* 644, 58 *Vt.* 727; *Laird v. Connecticut & P. R. R. Co.*, 43 *Am. & Eng. R. Cas.* 63, 62 *N. H.* 254; *Bruce v. Cincinnati R. Co.*, 83 *Ky.* 174. QUOTED AND FOLLOWED IN *Nelson v. Chesapeake & O. R. Co.*, 88 *Va.* 971.—*Stallknecht v. Pennsylvania R. Co.*, 13 *Hun* (N. Y.) 451; *affirming* 53 *How. Pr.* (N. Y.) 305.—DISTINGUISHING *Beach v. Bay State Steamboat Co.*, 30 *Barb.* (N. Y.) 433; *Crowley v. Panama R. Co.*, 30 *Barb.* 99. REVIEWING *Whitford v. Panama R. Co.*, 23 *N. Y.* 474.

Unless the court is satisfied the statute was not intended to operate beyond the limits of the state enacting it. And where both statutes expressly authorize the personal representative to maintain the action and the persons entitled to the amount recovered are the same under both statutes, the personal representative appointed in Kentucky may maintain the action here

under the foreign statute, the cause of action having arisen under that statute. *Bruce v. Cincinnati R. Co.*, 83 Ky. 174.—QUOTING *Dennick v. Central R. Co.*, 103 U. S. 18; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121. REVIEWING *McDonald v. Mallory*, 77 N. Y. 547; *Richardson v. New York C. R. Co.*, 98 Mass. 85.

Where such a right of action is created by the statute of one state, it may be enforced in another independently of any statute provision in such other state, provided that it be not in conflict with the public policy of the state in which it is sought to enforce it. The existence of a similar statute in that state is evidence that the policy of the state is favorable to such rights of action not inimical to them. *Chicago, St. L. & N. O. R. Co. v. Doyle*, 8 Am. & Eng. R. Cas. 171, 60 Miss. 977.

The right of action given to a personal representative for wrongfully killing his intestate in Tennessee may be prosecuted in Mississippi by an administrator appointed here, though the action could not have been maintained by him if the injury had occurred here. *Illinois C. R. Co. v. Crudup*, 63 Miss. 291.—FOLLOWING *Dennick v. Central R. Co.*, 103 U. S. 11; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11. NOT FOLLOWING *Richardson v. New York C. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121.

Where a New York administrator sues in this state for the homicide of his intestate in another state, an action may be maintained without showing that letters of administration have also been taken out in the state where the homicide occurred. *Gurney v. Grand Trunk R. Co.*, 37 N. Y. S. R. 557, 13 N. Y. Supp. 645; affirmed in 138 N. Y. 638, mem., 53 N. Y. S. R. 929. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.—DISTINGUISHING *Richardson v. New York C. R. Co.*, 98 Mass. 85; *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121; *Needham v. Grand Trunk R. Co.*, 38 Vt. 295; *Allen v. Pittsburgh & C. R. Co.*, 45 Md. 41; *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461; *Marcy v. Marcy*, 32 Conn. 308.

111. The two statutes need not be

precisely alike.—The statutes of the two states need not be precisely alike; it is sufficient if they are of similar import and character, founded upon the same principle and possessing the same general attributes; the right is not affected by mere difference of detail. *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. Rep. 1050, 36 N. Y. S. R. 387; affirming 35 N. Y. S. R. 685, 12 N. Y. Supp. 908. *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116.—QUOTING *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11.—*Morris v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 180, 65 Iowa 727, 54 Am. Rep. 39, 23 N. W. Rep. 143.—DISAPPROVING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121; *Richardson v. New York C. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46.—DISTINGUISHING *Hyde v. Wabash, St. L. & P. R. Co.*, 61 Iowa 441. FOLLOWING *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.—FOLLOWED IN *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848. REVIEWED IN *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971.—*Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.—APPROVED IN *Stoekman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503. DISTINGUISHED IN *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 16 Civ. Pro. 255, 19 N. E. Rep. 625, 20 N. Y. S. R. 741. FOLLOWED IN *Dennick v. Central R. Co.*, 103 U. S. 11; *Morris v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 180, 65 Iowa 727, 54 Am. Rep. 39; *Illinois C. R. Co. v. Crudup*, 63 Miss. 291; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848. QUOTED IN *Bruce v. Cincinnati R. Co.*, 83 Ky. 174. REVIEWED IN *Ash v. Baltimore & O. R. Co.*, 44 Am. & Eng. R. Cas. 676, 72 Md. 144; *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971.—*Gurney v. Grand Trunk R. Co.*, 37 N. Y. S. R. 557, 13 N. Y. Supp. 645; affirmed in 138 N. Y. 638, mem., 53 N. Y. S. R. 929.—QUOTING *Whitford v. Panama R. Co.*, 23 N. Y. 467.

An administrator, appointed in Massachusetts, whose intestate, while domiciled there, was instantly killed in Connecticut, may maintain an action in Massachusetts for his death on the statute of that state, although the incidents of the recovery there may differ from those of an action brought therefor in Connecticut. *Higgins v. Central N. Eng. & W. R. Co.*, 48 Am. & Eng. R.

Cas. 512, 155 *Mass.* 176, 29 *N. E. Rep.* 534.—DISTINGUISHING *Richardson v. New York C. R. Co.*, 98 *Mass.* 85; *Davis v. New York & N. E. R. Co.*, 143 *Mass.* 301.

And it is not necessary to allege that the death was caused by such wrongful act, neglect, or default as would, under the laws of the foreign country, if death had not ensued, have entitled the decedent to maintain the action. *Gurney v. Grand Trunk R. Co.*, 37 *N. Y. S. R.* 557, 13 *N. Y. Supp.* 645; *affirmed in* 138 *N. Y.* 638, *mem.*, 53 *N. Y. S. R.* 929.

Defendant company was sued in Illinois for an injury causing death in Canada, the action being based upon a statute of that country. *Held*, that the fact that the two statutes differed in the distribution of the damages recovered, and that the Illinois statute limits the amount of the recovery, while the Canadian statute leaves it to the jury, the statutes in other respects being substantially alike, there is not sufficient difference to defeat the action. *Hanna v. Grand Trunk R. Co.*, 41 *Ill. App.* 116.

112. The statutes have no extraterritorial effect.*—The right of action for the death of a person caused by the wrongful act, neglect, or omission of another is purely statutory, and statutes giving this right of action can have no extraterritorial effect. If such statutes are to be administered outside of the jurisdiction where enacted, this must be done on principles of comity. The weight of authority is to the effect that these statutes can be enforced only by the courts of the jurisdiction where the wrong is suffered and the right of action is given. *Vawter v. Missouri Pac. R. Co.*, 19 *Am. & Eng. R. Cas.* 176, 84 *Mo.* 679, 54 *Am. Rep.* 105.—APPLIED IN *Oates v. Union Pac. R. Co.*, 104 *Mo.* 514. DISTINGUISHED IN *Nelson v. Chesapeake & O. R. Co.*, 88 *Va.* 971. REVIEWED IN *Ash v. Baltimore & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 676, 72 *Md.* 144.—*Ash v. Baltimore & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 676, 72 *Md.* 144, 19 *Atl. Rep.* 643.—DISTINGUISHING *Dennick v. Central R. Co.*, 103 *U. S.* 11. REVIEWING *Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.* 48; *Davis v. New York & N. E. R. Co.*, 143 *Mass.* 301; *Vawter v. Missouri*

Pac. R. Co., 84 *Mo.* 679; *Debevoise v. New York, L. E. & W. R. Co.*, 98 *N. Y.* 377.—*McCarthy v. Chicago, R. I. & P. R. Co.*, 18 *Kan.* 46.—DISAPPROVED IN *Dennick v. Central R. Co.*, 103 *U. S.* 11; *Morris v. Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 180, 65 *Iowa* 727, 54 *Am. Rep.* 39; *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503. DISTINGUISHED IN *Burns v. Grand Rapids & I. R. Co.*, 113 *Ind.* 169; *Boyce v. Wabash R. Co.*, 23 *Am. & Eng. R. Cas.* 172, 63 *Iowa* 70, 50 *Am. Rep.* 730. NOT FOLLOWED IN *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291; *Nelson v. Chesapeake & O. R. Co.*, 88 *Va.* 971.—*Vandeventer v. New York & N. H. R. Co.*, 27 *Barb. (N. Y.)* 244. *Mahler v. Norwich & N. Y. Transp. Co.*, 35 *N. Y.* 352; *reversing* 45 *Barb.* 226, 30 *How. Pr.* 237. *Hover v. Pennsylvania Co.*, 25 *Ohio St.* 667.—DISAPPROVED IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503.

And the above rule applies though the injured party be a citizen of and dies in the state where suit is brought, from the effects of the injury received in another state. *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 *Kan.* 46.—QUOTING *Richardson v. New York C. R. Co.*, 98 *Mass.* 85. REVIEWING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 *Ohio St.* 121.

An administrator appointed in Ohio cannot maintain an action in the courts there, under the statutes of another state, authorizing personal representatives to maintain actions for death caused by wrongful act, for the benefit of the widow or next of kin. *Woodard v. Michigan Southern & N. I. R. Co.*, 10 *Ohio St.* 121.—APPROVED IN *Mackay v. Central R. Co.*, 14 *Blatchf. (U. S.)* 65, 4 *Fed. Rep.* 617; *Vawter v. Missouri Pac. R. Co.*, 84 *Mo.* 679, 54 *Am. Rep.* 105. DISAPPROVED IN *Morris v. Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 180, 65 *Iowa* 727, 54 *Am. Rep.* 39; *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503. DISTINGUISHED IN *Burns v. Grand Rapids & I. R. Co.*, 113 *Ind.* 169; *Boyce v. Wabash R. Co.*, 23 *Am. & Eng. R. Cas.* 172, 63 *Iowa* 70, 50 *Am. Rep.* 730; *Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.* 48. NOT FOLLOWED IN *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291; *Missouri Pac. R. Co. v. Lewis*, 24 *Neb.* 848; *Nelson v. Chesapeake & O. R. Co.*, 88 *Va.* 971. QUOTED IN *Taylor v. Pennsylvania Co.*, 7 *Am. & Eng. R. Cas.* 23, 78 *Ky.* 348; *Bruce v. Cincinnati R. Co.*, 83

*Statutes giving remedy for death are not applicable to the tort when it is committed outside the jurisdiction of such statutes, see note, 23 *AM. & ENG. R. CAS.* 382.

Ky. 174. REVIEWED IN *McCarthy v. Chicago*, R. I. & P. R. Co., 18 Kan. 46.

The right of action created by statute in Illinois in favor of the administrator of a person whose death was caused by the wrongful act or negligence of a railroad in Illinois, cannot be regarded as property in the state of Iowa in such sense as to confer jurisdiction in that state to grant letters of administration upon the estate of the deceased. *Illinois C. R. Co. v. Cragin*, 71 Ill. 177.

A statute which provides that in the event of a person receiving injuries resulting in death through the failure of a railroad company to give the signals prescribed by statute when approaching a crossing, an action may be maintained by the executor or administrator of the deceased in which the damages recovered shall be not less than \$500 nor more than \$5000, and shall "be assessed with reference to the degree of culpability of the corporation, or of its servants or agents," is penal in its nature, and will not be enforced by the courts of a foreign state. *O'Reilly v. New York & N. E. R. Co.*, 42 Am. & Eng. R. Cas. 50, 16 R. I. 388, 29 Cent. L. J. 210, 6 L. R. A. 719, 17 Atl. Rep. 906.

113. What law governs.*—In actions for causing death the law of the place where the death has been occasioned governs, not that of the place where the action is brought. *Chicago, St. L. & N. O. R. Co. v. Doyle*, 8 Am. & Eng. R. Cas. 171, 60 Miss. 977. *Lung Chung v. Northern Pac. R. Co.*, 16 Am. & Eng. R. Cas. 548, 19 Fed. Rep. 254, 10 Sawy. (U. S.) 17. *Western & A. R. Co. v. Strong*, 52 Ga. 461. *McMaster v. Illinois C. R. Co.*, 41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59.

Where a statute declares that persons negligently causing death shall be liable, notwithstanding the death of the injured person, and a subsequent provision confers the right of action only upon the personal representatives of the deceased, the right to bring the action is not merely part of the remedy and governed by the *lex fori*, but is

* Actions for death where accident is in one state and suit in another. Conflict of laws, see note, 48 AM. & ENG. R. CAS. 516.

Action for negligently causing death brought by personal representative. As to how far *lex fori* governs, see note, 13 L. R. A. 458.

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part of the right conferred by the statute, and is governed by the law of the state in which the statute has been enacted. *Usher v. West Jersey R. Co.*, 41 Am. & Eng. R. Cas. 508, 126 Pa. St. 206, 17 Atl. Rep. 597.

A suit is properly brought in Virginia, where the corporation was found, for negligent killing of plaintiff's intestate in West Virginia by one of defendant's trains, the recovery to be according to the laws of West Virginia, such laws not being inconsistent with the laws or policy of Virginia; this being so notwithstanding the right to sue for such injury is statutory. *Nelson v. Chesapeake & O. R. Co.*, 54 Am. & Eng. R. Cas. 82, 88 Va. 971, 14 S. E. Rep. 838.—DISTINGUISHING *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679. NOT FOLLOWING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121; *Richardson v. New York C. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago*, R. I. & P. R. Co., 18 Kan. 46; *Ash v. Baltimore & O. R. Co.*, 72 Md. 144. QUOTING AND FOLLOWING *Dennick v. Central R. Co.*, 103 U. S. 11. REVIEWING *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.

If the statute of West Virginia giving the right to sue in a case like the above mentioned were a penal statute, an action under it could not be maintained in Virginia. It is otherwise, as the statute is not penal but compensatory. *Nelson v. Chesapeake & O. R. Co.*, 54 Am. & Eng. R. Cas. 82, 88 Va. 971, 14 S. E. Rep. 838.

A recovery in the action in Virginia will be a complete bar to another action, there or elsewhere, for the same wrong. *Nelson v. Chesapeake & O. R. Co.*, 54 Am. & Eng. R. Cas. 82, 88 Va. 971, 14 S. E. Rep. 838.—REVIEWING *Morris v. Chicago*, R. I. & P. R. Co., 65 Iowa 727.

114. Pleading law of foreign state.—An action cannot be maintained under Georgia Code, § 2920, for a wrongful act resulting in death in another state without an averment that the statutes of the two states are similar as to such right of action. In the absence of such averment, it will be presumed that the common law is in force in the other state. *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461.—DISTINGUISHED IN *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250.

It is not necessary for defendant to allege that the wrong was committed in another

state; it is for the plaintiff to allege and prove that the cause of action arose within the jurisdiction. *Debevoise v. New York, L. E. & W. R. Co.*, 25 *Am. & Eng. R. Cas.* 335, 98 *N. Y.* 377, 50 *Am. Rep.* 683; *affirming* 30 *Hun (N. Y.)* 479.

If a cause of action for injuries sustained in another state and resulting in death survives by the laws of that state, the existence of the statute must be pleaded like any other fact which is essential to the maintenance of the action, the presumption being that the rule of the common law abating such actions upon the death of the party injured exists in other states. *O'Reilly v. New York & N. E. R. Co.*, 42 *Am. & Eng. R. Cas.* 50, 16 *R. I.* 388, 29 *Cent. L. J.* 210, 6 *L. R. A.* 719, 17 *Atl. Rep.* 906.

Plaintiff's complaint alleged, in substance, that she is a resident of New York and defendant is a domestic corporation operating a line of railroad extending into the state of Pennsylvania; that plaintiff's husband was killed in that state through the negligence of defendant; that the statutes of said state give a right of action in such case for the injury sustained to the widow for her own benefit and that of the children of decedent, and that such statute is of similar import to the law in New York. *Held*, that the complaint set forth a good cause of action, and that a demurrer thereto was properly overruled; that the right of action given by the statutes of the two states is for the benefit of the same class of individuals; that while by the New York statute it is given to the executor or administrator of the decedent, it is to him simply as trustee; and that the difference in the trustee appointed by the two statutes to represent the parties injured was not such as to bar the tribunals of New York of jurisdiction. *Wooden v. Western N. Y. & P. R. Co.*, 126 *N. Y.* 10, 26 *N. E. Rep.* 1050, 36 *N. Y. S. R.* 387; *affirming* 35 *N. Y. S. R.* 685, 12 *N. Y. Supp.* 908.

The action was properly brought by the widow, as such, not as administratrix, as it is the cause of action created and arising in the state of Pennsylvania which is enforced, and so the action must be prosecuted in the name of the party to whom alone the right of action belongs. *Wooden v. Western N. Y. & P. R. Co.*, 126 *N. Y.* 10, 26 *N. E. Rep.* 1050, 36 *N. Y. S. R.* 387; *affirming* 35 *N. Y. S. R.* 685, 12 *N. Y. Supp.* 908.

115. Proving law of foreign state.*

—No recovery can be had for the wrongful killing of a person outside of the state, without proof that the action was allowable under the laws of the place where the killing occurred. *Geoghegan v. Atlas Steamship Co.*, 51 *N. Y. S. R.* 868, 22 *N. Y. Supp.* 749, 3 *Misc.* 224. *Debevoise v. New York, L. E. & W. R. Co.*, 25 *Am. & Eng. R. Cas.* 335, 98 *N. Y.* 377, 50 *Am. Rep.* 683; *affirming* 30 *Hun (N. Y.)* 479.—REVIEWED IN *Ash v. Baltimore & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 676, 72 *Md.* 144.—*Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.* 48. *Nashville & C. R. Co. v. Eakin*, 6 *Coldw. (Tenn.)* 582.—DISAPPROVED IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 *Mo. App.* 503.

Where an action is brought in one state for an injury resulting in death in an adjoining state, unless there be proof of the laws of that state, it will be presumed that the common law is in force there. *Chicago & W. I. R. Co. v. Schroeder*, 18 *Ill. App.* 328.

It seems that an action for an injury to the person in another state is maintainable in New York without proof of the *lex loci*, because permitted by the common law which is presumed to exist in the foreign state. Where, however, the right of action depends upon a statute conferring it, it can only be maintained there upon proof that the statute law, in the state in which the injury occurred, gives the right of action and is similar to that of New York. *Wooden v. Western N. Y. & P. R. Co.*, 126 *N. Y.* 10, 26 *N. E. Rep.* 1050, 36 *N. Y. S. R.* 387; *affirming* 35 *N. Y. S. R.* 685, 12 *N. Y. Supp.* 908.—FOLLOWING *McDonald v. Mallory*, 77 *N. Y.* 546.

Where a person is killed while on board a vessel in a foreign port and within the jurisdiction of the foreign country, there can be no recovery for the death in New York, without proof that the killing was an actionable wrong in such foreign country. *Geoghegan v. Atlas Steamship Co.*, 51 *N. Y. S. R.* 868, 22 *N. Y. Supp.* 749, 3 *Misc.* 224.

An action was instituted to recover for the killing of plaintiff's intestate through the negligence of the defendant. At the trial, after both sides had rested, the defendant moved to dismiss, because it appeared that the killing occurred in another state, and there was no allegation or proof

* Proof of law of state where cause of action arose, see note, 14 *AM. ST. REP.* 354.

that a recovery was authorized by the laws of such state; but the court allowed plaintiff to amend and to give proof of such a statute. *Held*: (1) that under N. Y. Code, § 723, relating to amendments, the complaint was properly amended; (2) that such amendment was not objectionable on the ground that it introduced a new cause of action. It only had the effect of changing it from a claim under one statute to that of another. *Lustig v. New York, L. E. & W. R. Co.*, 48 N. Y. S. R. 916, 65 Hun 547, 20 N. Y. Supp. 477.—QUOTING *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523.

116. How the rule is applied in Alabama.—The statutes of Mississippi which authorize an executor or administrator to prosecute any personal action which his testator or intestate might have prosecuted, and to maintain an action for any trespass to the person or property of the decedent, are not substantially similar to the Alabama statute known as the "Employers' Act." *Kahl v. Memphis & C. R. Co.*, 95 Ala. 337, 10 So. Rep. 661.

117. — Georgia.—The homicide of a person in another state on a line of railroad purchased, owned, and operated by a railroad company in this state is actionable in this state, if the action be brought by a person entitled to recover. *Central R. Co. v. Swint*, 26 Am. & Eng. R. Cas. 482, 73 Ga. 651.—FOLLOWING *South Carolina R. Co. v. Nix*, 68 Ga. 572.

When suit was brought in Georgia for a homicide which occurred in South Carolina, if the statute of that state did not require a prosecution as a condition precedent to a recovery in the civil case, such prosecution was not necessary in Georgia. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

A railroad company of South Carolina was permitted to extend its road into Georgia upon condition that suits might be brought against it in the latter state. *Held*, that the right to so sue was not confined to citizens of Georgia, but extended to an administrator, originally appointed in South Carolina, upon complying with the Georgia statute, to sue there for the death of his intestate occurring in South Carolina. *South Carolina R. Co. v. Nix*, 68 Ga. 572.—FOLLOWED IN *Central R. Co. v. Swint*, 26 Am. & Eng. R. Cas. 482, 73 Ga. 651.

118. — Maryland.—No action is maintainable in Maryland against a railroad company for damages resulting from death

by negligence, where the act complained of was committed in another state, and it was immaterial that the deceased was a citizen of this state at the time of his death. *State v. Pittsburgh & C. R. Co.*, 45 Md. 41.—DISTINGUISHING *Northern C. R. Co. v. Scholl*, 16 Md. 331.—APPROVED IN *Davis v. New York & N. E. R. Co.*, 28 Am. & Eng. R. Cas. 223, 143 Mass. 301, 58 Am. Rep. 138. DISTINGUISHED IN *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250.

Under Md. Code, art. 67, § 1, an action for the death of a person must be brought by the wife, husband, parent, or child of the deceased, to be prosecuted in the name of the state for the use of the person entitled. Under W. Va. Code, p. 709, § 6, actions for death must be brought in the name of the personal representative of the deceased. An administratrix appointed in Maryland brought suit in a Maryland court, under the West Virginia statute, for the death of her intestate, caused by negligence in West Virginia. *Held*, that the action was not maintainable. *Ash v. Baltimore & O. R. Co.*, 44 Am. & Eng. R. Cas. 676, 72 Md. 144, 19 Atl. Rep. 643.—NOT FOLLOWED IN *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971.

119. — Massachusetts.—An administrator appointed in this state cannot maintain an action here on the statute of another state which gives to the personal representatives of a person killed by wrongful act, neglect, or default, a right to maintain an action for damages in respect thereof, notwithstanding the death, against the person or corporation that would have been liable if death had not ensued. *Richardson v. New York C. R. Co.*, 98 Mass. 85.—APPROVED IN *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105. DISAPPROVED IN *Dennick v. Central R. Co.*, 103 U. S. 11; *Morris v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 180, 65 Iowa 727, 54 Am. Rep. 39; *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250. DISTINGUISHED IN *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Boyce v. Wabash R. Co.*, 23 Am. & Eng. R. Cas. 172, 63 Iowa 70, 50 Am. Rep. 730; *Higgins v. Central N. Eng. & W. R. Co.*, 155 Mass. 176; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. NOT FOLLOWED IN *Illinois C. R. Co. v. Crudup*, 63 Miss. 291;

Nelson *v.* Chesapeake & O. R. Co., 88 Va. 971. QUOTED IN McCarthy *v.* Chicago, R. I. & P. R. Co., 18 Kan. 46. REVIEWED IN Mackay *v.* Central R. Co., 14 Blatchf. (U. S.) 65, 4 Fed. Rep. 617; Bruce *v.* Cincinnati R. Co., 83 Ky. 174.

An action may be maintained in Massachusetts for the death of a brakeman domiciled in this state, but killed in Connecticut, under Conn. Gen. St. §§ 1008 and 1009, providing that all actions for injuries to a person, whether the same do or do not immediately result in death, shall survive to the personal representative, and that in all actions by an executor or administrator for injuries resulting in death from negligence, such personal representative may recover from the party legally in fault; but in order to recover under the statute it must be shown that the deceased was in the exercise of due care. *Chandler v. New York, N. H. & H. R. Co.*, 159 Mass. 589, 35 N. E. Rep. 89.—FOLLOWING *Higgins v. Central N. Eng. & W. R. Co.*, 155 Mass. 176.

120. — Missouri. — The statute of Rev. St. 1879, § 97, expressly inhibits the prosecution by an administrator of a civil action for injuries to the person of the intestate; therefore an administrator appointed in Missouri will not be permitted to sue in this state, under the statute of Kansas, for the death of the intestate in Kansas. *Vawter v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 176, 84 Mo. 679, 54 Am. Rep. 105.—APPROVING *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121; *Richardson v. New York C. R. Co.*, 98 Mass. 85. DISAPPROVING *Stockman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503. DISTINGUISHING *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Dennick v. Central R. Co.*, 103 U. S. 11. QUOTING *Taylor v. Pennsylvania Co.*, 78 Ky. 348.

Damages may be recovered in Missouri courts for the death of plaintiff's decedent under statutes of sister states founded upon the same general policy as those of Missouri. *Stockman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503.—APPROVING *Dennick v. Central R. Co.*, 103 U. S. 11; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. DISAPPROVING *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Vandeventer v. New York & N. H. R. Co.*, 27 Barb. (N. Y.) 244; *Beach v. Bay State Co.*, 10 Abb. Pr. (N. Y.) 71; *Vanderwerken v. New York & N. H. R. Co.*, 6 Abb. Pr. 239; *Hover v. Pennsyl-*

vania R. Co., 25 Ohio St. 667; *Nashville & C. R. Co. v. Eakin*, 6 Coldw. (Tenn.) 582; *Woodard v. Michigan Southern & N. I. R. Co.*, 10 Ohio St. 121; *Richardson v. New York C. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46. —DISAPPROVED IN *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105. FOLLOWED IN *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

Money recovered in an action for death is not general assets of the estate, and may be recovered by the administrator in Missouri, where the deceased resided at the time of his death. *Stockman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503.

An action for damages for the death of a person caused by the wrongful act or default of another is remedial, not penal. *Stockman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503.

The statute of a sister state, which gives a right of action for the death of a person caused by the wrongful act or default of another to the personal representatives of the deceased, and providing for a distribution of the proceeds of such action, will be enforced in Missouri. *Stockman v. Terre Haute & I. R. Co.*, 15 Mo. App. 584.

The money recovered under such a statute is not general assets of the estate, and may be recovered by the administrator in this state where the deceased was domiciled at the time of his death, such administrator being the "personal representative" of the deceased. *Stockman v. Terre Haute & I. R. Co.*, 15 Mo. App. 584.

A resident of Missouri was killed in Kansas by the negligent acts of a railroad company, in whose service he was engaged, under such circumstances as would have entitled his widow to recover under the second section of our damage act, if the accident had occurred in Missouri. The Kansas statute provides that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor. * * * The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Held, that the widow could not recover in an action in Missouri, though no administrator could be appointed in Kansas, because the deceased left no estate

there, and though the action could be brought in either state by an administrator appointed in Missouri. *Oates v. Union Pac. R. Co.*, 104 Mo. 514, 16 S. W. Rep. 487.—*APPLYING* *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679.

121. — New York.—The act of 1847, as amended in 1849, conferring a right of action for death by wrongful act, does not extend to cases where the killing occurs in another state. *Vanderwerken v. New York & N. H. R. Co.*, 6 Abb. Pr. (N. Y.) 239.—*DISAPPROVED* IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503.—*Crowley v. Panama R. Co.*, 30 Barb. (N. Y.) 99. *DISTINGUISHED* IN *Stallknecht v. Pennsylvania R. Co.*, 13 Hun (N. Y.) 451.

Or to a case where a party leaves the state and is killed in another state. *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.) 433, 10 Abb. Pr. (N. Y.) 71, 18 How. Pr. (N. Y.) 335; *reversing* 6 Abb. Pr. 415, 27 Barb. 248, 16 How. Pr. 1.—*DISTINGUISHED* IN *Stallknecht v. Pennsylvania R. Co.*, 13 Hun (N. Y.) 451. *QUOTED* IN *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

Even though the killing was done by a New York corporation. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *affirming* 3 Bosw. (N. Y.) 67.—*DISAPPROVED* IN *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503. *DISTINGUISHED* IN *Boyce v. Wabash R. Co.*, 23 Am. & Eng. R. Cas. 172, 63 Iowa 70, 50 Am. Rep. 730; *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250. *FOLLOWED* IN *McDonald v. Mallory*, 77 N. Y. 546. *QUOTED* IN *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 431, 31 Am. & Eng. R. Cas. 563, 15 Pac. Rep. 321; *Gurney v. Grand Trunk R. Co.*, 37 N. Y. S. R. 557, 13 N. Y. Supp. 645. *REVIEWED* IN *Stallknecht v. Pennsylvania R. Co.*, 13 Hun (N. Y.) 451; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

But an action may be maintained for negligently causing the death of a citizen of New York on the high seas, on a vessel hailing from and registered in a New York port, and employed by the owners at the time in their own business. *McDonald v. Mallory*, 77 N. Y. 546.—*FOLLOWING* *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Crowley v. Panama R. Co.*, 30 Barb. (N. Y.) 99; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; *Vandeventer v. New York & N. H. R. Co.*, 27 Barb. 244.—*FOLLOWED* IN *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10.

REVIEWED IN *Bruce v. Cincinnati R. Co.*, 83 Ky. 174; *In re Saratoga Elec. R. Co.*, 58 Hun (N. Y.) 287, 34 N. Y. S. R. 556, 12 N. Y. Supp. 318; *Willis v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 379, 61 Tex. 432.

122. — Pennsylvania.—An action may be maintained in this state against a foreign corporation (process having been served here) to recover damages in an action *ex delicto*, for negligence causing death in another state, where a statute of such state is similar to the Pennsylvania statute authorizing such an action. While the foreign statute has no extraterritorial force, rights under it, not contrary to the policy of this state, will, by comity, be enforced by remedies according to the procedure of this state. *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250.—*DISAPPROVING* *Richardson v. New York C. R. Co.*, 98 Mass. 85; *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 321. *DISTINGUISHING* *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461; *State, use of Allen v. Pittsburgh & C. R. Co.*, 45 Md. 41.

Where a person is injured by a railroad company in New Jersey, and subsequently dies of his injuries in Pennsylvania, no action can be brought in Pennsylvania by the widow of the deceased, suing for herself and her children, unless there was a negligent act or omission in Pennsylvania which was directly responsible for the injury received in New Jersey. *Derr v. Lehigh Valley R. Co.*, 158 Pa. St. 365, 27 Atl. Rep. 1002.—*REVIEWING* *Usher v. West Jersey R. Co.*, 126 Pa. St. 206.

In an action in Pennsylvania to recover for the death of a railroad employé occurring in West Virginia, the case was submitted to the jury, reserving to the court the question of law as to whether a recovery could be had under the West Virginia statute. The jury found for plaintiff, which the court set aside, and on the questions of law entered judgment for defendant, and in the opinion filed considered two questions of law as reserved: (1) Can plaintiff recover under the West Virginia statute? (2) Is there sufficient evidence of negligence to justify a verdict against defendant? *Held*, to be reversible error. *Patton v. Pittsburgh, C. & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 658, 96 Pa. St. 169.

123. — Tennessee.—An action

against a railroad company for an injury predicated upon a statute of another state may be brought in Tennessee; but the declaration must aver such statute. *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852, 20 Am. Ry. Rep. 55.

A husband may maintain an action in his own name in Tennessee for wrongs or injuries causing the death of his wife and child against a railroad company, where the negligence so resulting has occurred in a state whose statutes prescribe such actions and remedies. *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341.

124. — Texas.—In Texas the common law is in force in reference to actions for personal injuries, and an action dies with the person; and where the cause of action arises in another state, where, by a statute, the action survives, but suit was brought in Texas, it must be determined by the Texas law. *Texas & P. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. Rep. 627.

A suit in this state by a widow for damages for the negligent killing of her husband in the state of Arkansas will not be heard for want of jurisdiction. *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 9 S. W. Rep. 540.—FOLLOWING *Willis v. Missouri Pac. R. Co.*, 61 Tex. 432.

Conceding the duty of comity, still, while the cause of action here alleged is good under the statutes of both states, the statutes of Arkansas are so different from the laws of Texas upon the subject, that jurisdiction will not be taken. *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 9 S. W. Rep. 540.

VIII. PLEADING.

125. Sufficiency of the declaration, complaint, or petition, generally.—A declaration which clearly avers negligence on the part of the defendant and due care on the part of the deceased is good on demurrer, unless rendered bad by other averments therein. *Andrew v. Chicago & N. W. R. Co.*, 45 Ill. App. 269.

A declaration charging that the deceased "was struck and killed by a passing engine and train of cars," is sufficient if the evidence shows that he was struck and killed by any part of the train. *People v. Brumback*, 24 Ill. App. 501.

In an action under Md. Code, art. 65, it is not necessary to allege that defendant's negligence was such that if death had not

ensued the injured person would himself have been entitled to recover for the injury done him. *Philadelphia, W. & B. R. Co. v. State*, 10 Am. & Eng. R. Cas. 792, 58 Md. 372.

It is only necessary for a party wishing to avail himself of a statute to state facts which bring his case within its provisions (Wagn. Mo. Stat. 1020, § 41), although according to the rules of good pleading he ought to refer to it. But all the circumstances essential to support the action must be alleged or in substance appear on the face of the petition. If the matter were defectively stated therein objections should be raised in the court below; otherwise it cannot be entertained. *Kennayde v. Pacific R. Co.*, 45 Mo. 255.

Where a parent has a right of action for the wrongful killing of a minor unmarried child, a complaint is defective if it does not state that the deceased was unmarried. *Dulaney v. Missouri Pac. R. Co.*, 21 Mo. App. 597.—FOLLOWING *Baker v. Springfield & W. M. R. Co.*, 86 Mo. 75.

In a statutory action against a railroad company as employer, by the administrator of a brakeman who was killed while in its service (Ala. Code, §§ 2590, 2591), if the complaint avers that the intestate was killed while in the discharge of his duties, acting under the orders of the conductor, to whose orders he was subject, specifies the defect in the machinery or appliances which caused the accident, and that it had not been discovered and remedied owing to the negligence of the person in the defendant's service who was intrusted with that duty, this is sufficiently certain and definite, although it does not state the nature of the superintendency intrusted to such person, nor the nature of the service or employment of the person whose orders he was bound to obey, nor of the particular orders or directions. *Louisville & N. R. Co. v. Orr*, 94 Ala. 602, 10 So. Rep. 167.—FOLLOWING *Mobile & O. R. Co. v. George*, 94 Ala. 199.

A complaint for injury to an employé, causing death, which charges that the company itself by its negligence and unskillfulness in the management, etc., of its engines and cars, etc., caused the injury complained of, without any fault of the deceased, does not raise the question of the liability of the company for the negligence of its servants, by which a fellow-servant is killed or injured, and is good on demurrer. *Hilde-*

brand v. Toledo, W. & W. R. Co., 47 Ind. 399.

A declaration that plaintiff's husband was approaching a railroad crossing under the mistaken information that the regular train had passed, when such train came around a sharp curve through a ravine at a great and criminally reckless rate of speed, without sounding the whistle or checking the speed as required by law, and that plaintiff's husband and his companions were prevented from hearing the train by the noise made by their empty wagons and could not see it until on the track, when they made an effort to escape, but were prevented by the team becoming frightened and the speed of the train, whereby plaintiff's husband was killed, states a good cause of action. *Chattanooga, R. & C. R. Co. v. Clowdis, 90 Ga. 258, 17 S. E. Rep. 88.*

126. — illustrations.—In an action for negligent killing of a brakeman, the complaint alleged that the company had negligently and unskillfully placed a window on the top of the caboose, at the rear end of the freight train on which the brakeman was employed, so near the front end of the caboose that he could not climb on the top of the caboose without falling between the cars; that it was the duty of the brakeman to set all brakes at all stations where his train was required to stop, and that in attempting to go to his post of duty by the usual way, which was through the window, he fell between the cars and was killed, without negligence on his part. *Held*, that the complaint did not show that the brakeman was absent from his place of duty, within the meaning of the law, when he lost his life. *Louisville, N. A. & C. R. Co. v. Hobbs, 3 Ind. App. 445, 29 N. E. Rep. 934.*

The declaration averred that the deceased was in employment of defendant, under the orders, direction, and control of its servants and agents; that it became his duty to couple and uncouple cars upon a certain track, and to give signals, and that while performing that duty with due care on his part, the defendant, by its servants, carelessly, negligently, improperly, unlawfully, and wrongfully was driving and managing an engine and car attached thereto, when, by and through negligence, etc., of the defendant, the said engine and car ran at a great and unlawful rate of speed, and struck the deceased, and that the place where the injury occurred was within an incorporated

town; and that section 1 of an ordinance of the town was as follows [giving the same *in haec verba*], which prohibited the engine and car from running at a greater speed than eight miles an hour. *Held*, that although the declaration was not well drawn, and obnoxious to a demurrer, it was sufficient to justify the admission of the ordinance in evidence. *Lake Shore & M. S. R. Co. v. O'Conner, 115 Ill. 254, 3 N. E. Rep. 501.*

A paragraph of complaint by an administrator, charging gross negligence in the construction of a crossing of the railroad over a certain public highway, and that such negligent and defective construction of said crossing caused injuries which resulted in the death of the plaintiff's intestate—*held*, sufficient; and another paragraph of said complaint, charging negligence in the construction of the railroad at said crossing, and also in the running of a train on the defendant's road, by which said injuries were caused—*held*, to be unquestionably good. *Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.*—QUOTED IN *Louisville, N. A. & C. R. Co. v. Smith, 13 Am. & Eng. R. Cas. 608, 91 Ind. 119.*

Plaintiffs sought recovery against a railroad company for the death of their child, claiming that the company permitted ice, while it was being unloaded from the cars, to fall under and around the same, thereby attracting children of tender years; and that while plaintiff's child was so attracted under the cars the company carelessly and negligently bumped a long train of cars against those loaded with ice and ran over one child, causing its death. *Held*, that the petition was fatally defective, *first*, in failing to charge that the company had part in loading or unloading the cars; *second*, in not alleging that the cars were being unloaded in a negligent manner; and *third*, in not stating the time the child was under the car before it was moved. *Rushenberg v. St. Louis, I. M. & S. R. Co., 54 Am. & Eng. R. Cas. 118, 109 Mo. 112, 19 S. W. Rep. 216.*

The declaration alleged that the death for which the suit was brought was caused by negligence in not allowing a safe and convenient platform or way, and sufficient time to get into the cars, and causing an engine to run alongside the cars which killed the deceased. *Held*, that delay in the arrival of the train in which the deceased was to go, not being alleged in the declaration, was not a cause of action, but was a circumstance

bearing on the question of negligence. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.—APPROVED IN *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

Under Tenn. Code, § 2884, a complaint is sufficient if by a fair and natural construction it shows a substantial cause of action. *Held*, that, under this statute, a complaint in an action against a company which operates a road which lay only partly in the state, is sufficient though it does not locate the killing in the state. *Hobbs v. Memphis & C. R. Co.*, 12 Heisk. (Tenn.) 526.

127. Showing plaintiff's capacity to sue.—In a statutory action for death the person suing must bring himself within the statutory requirements necessary to confer the right of action; and this must appear in the petition, otherwise it will show no cause of action. *Barker v. Hannibal & St. J. R. Co.*, 91 Mo. 86, 14 S. W. Rep. 280.—FOLLOWED IN *McIntosh v. Missouri Pac. R. Co.*, 103 Mo. 131; *Dulaney v. Missouri Pac. R. Co.*, 21 Mo. App. 597.

Under the Arkansas statute a mother can sue for the homicide of her son only when the father is dead. If the mother sues, she must show affirmatively and positively that the father is dead; and an allegation that she is a widow is not sufficient. *St. Louis, I. M. & S. R. Co. v. Yocum*, 34 Ark. 493.

The right of action against the employer, for personal injuries causing the death of an employé while in the service, being given only to the personal representative of the deceased. (Code, Ala. §§ 2590-91), it is sufficient if the complaint shows that the plaintiff is his administratrix, although it does not allege that she sues in that character. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. Rep. 870.

In an action on the case by one suing as administrator of an estate of a deceased person, against a railway company, to recover for causing the death of the plaintiff's intestate, unless the representative capacity of the plaintiff is put in issue by plea, it is not necessary to make any proof of his letters of administration, or his appointment, or right to sue in such capacity. *Union R. & T. Co. v. Shacklet*, 28 Am. & Eng. R. Cas. 193, 119 Ill. 232, 10 N. E. Rep. 896.

A wife suing under Mo. Rev. St. § 2121, for the death of her husband, by reason of the negligence of the defendant, and who brings her suit within a year, but after the expiration of six months from the death of the

husband, must show that there was no minor child surviving the marriage, or she cannot recover. *Barker v. Hannibal & St. J. R. Co.*, 91 Mo. 86, 14 S. W. Rep. 280.

The right of parents to maintain an action under said section 2121, Mo. Rev. St. 1879, for damages for the death of their minor son, depends in part upon the facts that he left neither widow nor minor children surviving him, and unless these facts are alleged either directly or inferentially, the petition will be fatally defective. *McIntosh v. Missouri Pac. R. Co.*, 103 Mo. 131, 15 S. W. Rep. 80.

128. Averment as to previous criminal prosecution.—In Georgia, in an action by a parent for the killing of his child, where the tort complained of amounts to a felony, he must aver that he has prosecuted the agent of the railroad in a criminal action, as required by Ga. Code, section 2970, or show an excuse for not doing so. *Allen v. Atlanta St. R. Co.*, 54 Ga. 503.

Otherwise a demurrer to the declaration will be properly sustained. *Chick v. Southwestern R. Co.*, 57 Ga. 357.—APPROVED IN *Smith v. East & W. R. Co.*, 84 Ga. 183.

129. Necessity of alleging existence of beneficiaries.*—In an action against a railroad company by an administrator to recover damages for the unlawful killing of plaintiff's decedent, the complaint must allege the existence of widow, children, or next of kin. *Stewart v. Terre Haute & I. R. Co.*, 21 Am. & Eng. R. Cas. 209, 103 Ind. 44, 2 N. E. Rep. 208. *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400. *Schwartz v. Judd*, 28 Minn. 371, 10 N. W. Rep. 208. *Burlington & M. R. Co. v. Crockett*, 17 Neb. 570, 24 N. W. Rep. 219. *Lucas v. New York C. R. Co.*, 21 Barb (N. Y.) 245. *Conlin v. City Council of Charleston*, 15 Rich. (So. Car.) 201. *Louisville & N. R. Co. v. Pitt*, 91 Tenn. 86, 18 S. W. Rep. 118.—DISTINGUISHING *Warner v. Western N. C. R. Co.*, 94 N. Car. 250.

And failure to so allege is good ground for arrest of judgment. *Stewart v. Terre Haute & I. R. Co.*, 21 Am. & Eng. R. Cas. 209, 103 Ind. 44, 2 N. E. Rep. 208.—DISAPPROVED IN *Warner v. Western N. C. R. Co.*, 25 Am. & Eng. R. Cas. 432, 94 N. Car. 250.

The omission of this material averment cannot be cured by amendment after judg-

* Declaration must allege existence of beneficiaries, see 54 AM. & ENG. R. CAS. 97, *abstr.*

ment, under the statute providing that defects "in matters of form may be rectified and amended after judgment. *Louisville & N. R. Co. v. Pitt*, 91 *Tenn.* 86, 18 *S. W. Rep.* 118.

But if the complaint states that the deceased left a widow or next of kin, it need not state that they have sustained damages. *Kenney v. New York C. & H. R. Co.*, 49 *Hun* (N. Y.) 535, 18 *N. Y. S. R.* 441.

Where a complaint is defective in failing to allege the existence of next of kin, the defect is not necessarily waived by a failure to demur; neither is such defect cured by a verdict where proof is permitted, over defendant's objection, of the existence of next of kin. *Serensen v. Northern Pac. R. Co.*, 45 *Fed. Rep.* 407.

When the injuries result in death the right of action is given to the personal representative; and it is not necessary to aver in the complaint that deceased left any heirs at law surviving him, though the damages recovered are to be distributed according to the statute of distributions. *Columbus & W. R. Co. v. Bradford*, 38 *Am. & Eng. R. Cas.* 214, 86 *Ala.* 574, 6 *So. Rep.* 90. *Alabama & F. R. Co. v. Waller*, 48 *Ala.* 459. *Warner v. Western N. C. R. Co.*, 25 *Am. & Eng. R. Cas.* 432, 94 *N. Car.* 250.—APPROVING *Baltimore & O. R. Co. v. Wightman*, 29 *Gratt.* (Va.) 431. DISAPPROVING *Stewart v. Terre Haute & I. R. Co.*, 21 *Am. & Eng. R. Cas.* 209.—DISTINGUISHED IN *Louisville & N. R. Co. v. Pitt*, 91 *Tenn.* 86.—*Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695.—DISTINGUISHING *Baltimore & O. R. Co. v. Gettle*, 3 *W. Va.* 376.

130. Naming the beneficiaries; showing relationship, etc.—(1) *General rules.*—A suit prosecuted by the personal representative of one wrongfully killed is for the benefit of the widow and children or next of kin; and the complaint should state the names of these persons and their relationship to the deceased. *Indianapolis, P. & C. R. Co. v. Keely*, 23 *Ind.* 133. *Baltimore & O. R. Co. v. Gettle*, 3 *W. Va.* 376.—DISTINGUISHED IN *Searle v. Kanawha & O. R. Co.*, 37 *Am. & Eng. R. Cas.* 179, 32 *W. Va.* 370, 9 *S. E. Rep.* 248; *Madden v. Chesapeake & O. R. Co.*, 28 *W. Va.* 610, 57 *Am. Rep.* 695.

It is sufficient, in a suit for negligence resulting in death, to aver in the declara-

tion that the deceased left a widow or children, without naming them. It is proper, though perhaps not indispensable, to allege that such widow or next of kin has sustained some pecuniary loss. *McGlone v. New Jersey R. & T. Co.*, 37 *N. J. L.* 304.

When an action is brought by the personal representative to recover damages for the death of his intestate, for the benefit of the deceased's next of kin, the declaration is sufficient if it sets forth the right of the plaintiff to recover without alleging specifically the rights of the respective distributees. *Howard v. Delaware & H. Canal Co.*, 41 *Am. & Eng. R. Cas.* 473, 40 *Fed. Rep.* 195.

It is sufficient to allege in the complaint and prove on the trial that there are persons who are entitled under the statute to the damages. It is not necessary to name the persons or to amend the complaint so as to state the fact in the event of the death of any of those persons, leaving heirs, after suit brought. *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 *Ind.* 48.

In an action brought under Kan. Code, § 422, by the administratrix of an intestate, to make the petition sufficient in that respect it is only necessary to allege that the deceased left surviving him, as next of kin, the plaintiff, who was his mother. *Missouri Pac. R. Co. v. Barber*, 44 *Am. & Eng. R. Cas.* 523, 44 *Kan.* 612, 24 *Pac. Rep.* 969.

A complaint in an action under Minn. Gen. St. 1878, ch. 77, § 2, which sets out the names of the next of kin and how they are related to the deceased, with an allegation of damage to them, is sufficient so far as relates to the manner of pleading the damages. *Barnum v. Chicago, M. & St. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 513, 30 *Minn.* 461, 16 *N. W. Rep.* 364.

In an action by an administrator, the naming in the complaint of one as beneficiary who is not entitled to recover may be corrected by striking out such name, if those who are entitled to share in the distribution of the recovery are all properly mentioned. *Reed v. Northeastern R. Co.*, 37 *So. Car.* 42.

A complaint under the Texas statute, allowing a right of action for causing the death of another by negligence, must show all of the persons among whom the damages recoverable are to be distributed. *Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31.—FOLLOWING *Houston & T. C. R. Co.*

v. Bradley, 45 Tex. 171.—QUOTED IN *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189; *Dallas & W. R. Co. v. Spiker*, 59 Tex. 435.

In an action under W. Va. Code, ch. 103, the declaration is not demurrable simply because it names the widow and children of the decedent and avers that the damages claimed by the plaintiff accrued to them. Such parts of the declaration will be treated as surplusage. *Seale v. Hawha & O. R. Co.*, 37 Am. & Eng. R. Cas. 270, 32 W. Va. 370, 9 S. E. Rep. 210.—DISTINGUISHING *Baltimore & O. R. Co. v. Gettle*, 3 W. Va. 376.

(2) *Illustrations*.—A child, twenty-one months old, was killed at a crossing. Two months thereafter another child was born to his father and mother. *Held*, in an action by the administrator for causing the death, that the after-born child was an heir of the one killed, and the declaration should have averred that he was one of the next of kin. *Chicago & A. R. Co. v. Logue*, 47 Ill. App. 292.

A father sued for the loss of services resulting from an injury to his minor son, who was an employé of the company. The complaint alleged the relationship of the parties and the minority of the son, and that he was injured while in the employment of the company, whereby plaintiff lost the benefit of his services. *Held*, that the complaint set out a good cause of action. *Burton v. Missouri Pac. R. Co.*, 32 Mo. App. 455.

Plaintiff sued as administratrix to recover for the death of her intestate, alleging in the complaint that "plaintiff and — children of tender years were solely dependent for a support upon" the intestate, but did not charge directly that there was a wife or children or parents left surviving, or that the action was for their benefit. *Held*, that it did not state a cause of action and was bad on demurrer; and that it was not error to refuse an amendment at the trial alleging that the deceased left a widow and children for whose benefit the action was brought. *Lilly v. Charlotte, C. & A. R. Co.*, 32 So. Car. 142, 10 S. E. Rep. 932.

When such an action was instituted by the widow in her own name, by petition which disclosed that there was an only child of the deceased, whose name was stated, and the prayer of the petitioner was that the damages might be apportioned between

them, after an averment that both were damaged by the death—*held*, that the averments were in substance sufficient, and that, if defective, the defect should have been taken advantage of by special exception. *Texas & N. O. R. Co. v. Berry*, 31 Am. & Eng. R. Cas. 147, 67 Tex. 238, 5 S. W. Rep. 817.

131. Plaintiff must aver facts showing pecuniary injury.*—In a suit by an administrator to recover damages for the negligent killing of the decedent, under How. St. § 8314, the plaintiff must allege and prove that some person has suffered some pecuniary injury by such death. *Charlebois v. Gogebic & M. R. R. Co.*, 91 Mich. 59, 51 N. W. Rep. 812.—FOLLOWING *Hurst v. Detroit City R. Co.*, 84 Mich. 539.

In an action for damages by the surviving parent (mother) for the death of her adult son her pecuniary condition may properly be alleged to show the reasonable expectation of pecuniary assistance from the deceased, but not for the purpose of increasing the amount of damages. *International & G. N. R. Co. v. Kindred*, 11 Am. & Eng. R. Cas. 649, 57 Tex. 491.

132. — or loss of services.—In an action by a mother for damages for the loss of the services of an infant child, plaintiff must allege and prove that at the date of the accident the child was in her service. (Thompson, J., dissenting.) *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75.—OVERRULED IN *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380. REVIEWED IN *Buck v. People's St. R., El. L. & P. Co.*, 46 Mo. App. 555.

The loss of the services of the deceased child is not special damage necessary to be averred, but is a natural and necessary sequence of the death. *Morgan v. Southern Pac. Co.*, 54 Am. & Eng. R. Cas. 101, 95 Cal. 510, 30 Pac. Rep. 603.

On April 10, 1886, a parent's only right of action for the homicide of a minor child was for the loss of services; and a declaration for "the financial value of the life of" the child "from the time he was killed until the time he reached his majority, and for punitive damages," and containing no averment that the plaintiff (the child's mother) is a widow, or that the child was a member of her family, or as to her right to

* Necessity for alleging and proving pecuniary injury, see 48 AM. & ENG. R. CAS. 14, *abstr.*

recover for loss of services, instead of the father, sets forth no cause of action. *Perry v. Georgia R. & B. Co.*, 85 Ga. 193, 11 S. E. Rep. 605.

Where plaintiff's declaration claims damages for loss of services of her minor son, the further allegation, by way of showing the aggravated nature of the tort, that death resulted from the injuries does not change the nature of the action so as to make it a suit for the homicide of the son. Where the mother is the sole surviving parent she may recover for the loss of services of her minor son, but not for his death. *Chick v. Southwestern R. Co.*, 57 Ga. 357.—FOLLOWED IN *McDowell v. Georgia R. Co.*, 60 Ga. 320.

To enable the parent to recover full damages for the services of the child during his minority, such damages must be specially averred and demanded in the complaint. *Pennsylvania Co. v. Lilly*, 4 Am. & Eng. R. Cas. 540, 73 Ind. 252.

133. Sufficiency of averment of pecuniary loss.—The law will imply pecuniary loss in some amount to the wife and child by the death of the husband and father who was at the time employed and presumably receiving wages, and, therefore, able to discharge his obligation to support them; and a complaint showing these facts and that his death was caused by defective machinery owned and used by his employer, a railroad company, is sufficient. *Louisville, N. A. & C. R. Co. v. Buck*, 38 Am. & Eng. R. Cas. 152, 116 Ind. 566, 19 N. E. Rep. 453, 2 L. R. A. 520, 28 Am. L. Reg. 148.—DISTINGUISHING *Regan v. Chicago, M. & St. P. R. Co.*, 51 Wis. 599.

The declaration averred that by the death of the deceased (plaintiff's husband) the widow and minor children named were deprived of their support, and said minors of their means of education, to the damage, etc. *Held*, that such averment was sufficient to admit evidence tending to show the ability of the deceased to earn money. *Chicago & A. R. Co. v. Carey*, 115 Ill. 115, 3 N. E. Rep. 519.

Under the provision of Tex. Const. art. 16, § 26, providing that "the surviving husband, widow, heirs of his or her body," may recover exemplary damages for death by "wilful act or omission, or gross negligence," where the suit is by a parent for the death of a son above 21 years of age, the complaint must show that the deceased supported or contributed to the support of the

plaintiff, or that there was some expectation of pecuniary benefit to be derived from him; and an allegation that plaintiff is the sole surviving parent and has been damaged in a certain amount by reason of the death is not sufficient. *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 11 S. W. Rep. 907.—REVIEWED IN *Gulf, C. & S. F. R. Co. v. Compton*, 44 Am. & Eng. R. Cas. 637, 75 Tex. 667.

In an action to recover for the death of a girl, a complaint alleging that the plaintiff, who sues as administrator, was the mother of the intestate and dependent upon her in a large degree for support and had suffered pecuniary injury by reason of her death to an amount stated, is sufficient to show that the plaintiff was a person entitled to the money when recovered. *Wiltse v. Tilden*, 77 Wis. 152, 46 N. W. Rep. 234.

Evidence, in such case, that the plaintiff had been divorced from her husband and that the custody of the girl had been awarded to her, and evidence of her pecuniary necessities and of the education and capacity of the girl for earning money was admissible. *Wiltse v. Tilden*, 77 Wis. 152, 46 N. W. Rep. 234.

Averments showing that deceased was a laboring man, working for defendant (without alleging that he was receiving any compensation for his labor), and that he left no widow, but left a child three years old, show sufficiently that such child suffered pecuniary damage by her father's death. *Kelley v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. Cas. 65, 50 Wis. 381, 7 N. W. Rep. 291.—REVIEWED IN *Regan v. Chicago, M. & St. P. R. Co.*, 51 Wis. 599.

A complaint by an administrator, who is also a child of the intestate, for injuries to his intestate causing his death, which alleges that, by means of such wrong, plaintiff has sustained damages in a certain sum, but states no facts to show pecuniary loss, present or prospective, resulting from the death, to the widow or relatives of deceased, does not state a cause of action under Tay. Wis. St. §§ 12, 13. *Regan v. Chicago, M. & St. P. R. Co.*, 51 Wis. 599, 8 N. W. Rep. 292.—APPROVING *Duckworth v. Johnson*, 4 H. & N. 653. CRITICISING *Chapman v. Rothwell*, El. Bl. & El. 168; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310. REVIEWING *Kelley v. Chicago, M. & St. P. R. Co.*, 50 Wis. 381.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Buck*, 116

Ind. 566, 38 Am. & Eng. R. Cas. 152, 19 N. E. Rep. 453, 2 L. R. A. 520, 28 Am. L. Reg. 148.

A complaint stating that plaintiff's intestate was a widow at the time of her death, and that three of her children, being of the ages of thirteen, eleven, and nine years, respectively, were dependent upon her for their support, nurture, and education, shows sufficiently that such children suffered a pecuniary loss by her death. *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. Rep. 298.—REFERRING TO Vicksburg & M. R. Co. v. Putnam, 118 U. S. 554.

134. Alleging loss of society, mental suffering, etc.—Where a widow sues for the death of her husband, allegations to the effect that by reason of the death plaintiff had been deprived of the society, company, and companionship of her husband, causing her great mental pain and suffering, and leaving her infant child, twelve years old, fatherless, are properly stricken out as irrelevant. *Killian v. Augusta & K. R. Co.*, 79 Ga. 234, 4 S. E. Rep. 165.

A petition alleged that plaintiff's intestate offered the driver of one of the defendant's street cars the ordinary fare for carrying passengers, when the driver refused to take it, assaulting and striking plaintiff's intestate, knocking him off the car, and that he was then run over by the car, receiving injuries from which he died, after suffering great bodily pain and mental anguish. For the injury, resulting in the mental and physical pain as alleged, the administrator seeks to recover. *Held*, that a demurrer to the petition was improperly sustained. *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

135. Pleading damage to next of kin.—A widow and next of kin are entitled to an action for wrongful death, without showing that they had any legal claim on the deceased for support; and therefore, a complaint need not set out specifically the damages which they have sustained. *Serensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407. *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S.) 412, 453.

In an action for negligently causing the death of one who left a widow and infant child, a general averment of damages, without averring actual pecuniary loss by those for whose benefit the suit is brought, is sufficient as against a demurrer to the complaint. *Louisville, N. A. & C. R. Co. v.*

Buck, 116 Ind. 566, 38 Am. & Eng. R. Cas. 152, 19 N. E. Rep. 453, 2 L. R. A. 520, 28 Am. Law Reg. 148.—DISTINGUISHING *Regan v. Chicago, M. & St. P. R. Co.*, 51 Wis. 599.

The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children. *Korrad v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069.

In an action under § 2, Gen. St. Minn. ch. 77, 1878, the complaint, where it states the names of the next of kin, and how they were related to the deceased, with an allegation of damage to them, is sufficient, so far as pleading the damages is concerned. *Barnum v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. Cas. 513, 30 Minn. 461, 16 N. W. Rep. 364.—FOLLOWED IN *Johnson v. St. Paul & D. R. Co.*, 31 Minn. 283.

A declaration which alleges that the death resulted from the tortious acts of the defendant, that deceased left a widow and next of kin, and that plaintiff was his personal representative, shows a cause of action under Vt. R. L. §§ 2138, 9, without the further allegation that the suit was brought for the benefit of such widow and next of kin. *Westcott v. Central Vt. R. Co.*, 61 Vt. 438, 17 Atl. Rep. 745.—QUOTING *Church v. Westminster*, 45 Vt. 380.

As the damages recoverable in such action go only to the beneficiaries who are living when suit is brought, the fact that such beneficiaries are then living must be averred, but their names, ages, and residences, together with the extent of their dependence on the deceased, need not appear in the declaration. *Westcott v. Central Vt. R. Co.*, 61 Vt. 438, 17 Atl. Rep. 745.

136. Setting out the negligent or wrongful acts, generally.—In an action for damages by the administrator of a person who was run over and killed by a train of cars within the corporate limits of a city or town, a count which avers that the engineer did not blow the whistle or ring the bell at short intervals while moving through the city, and that "owing to such failure said intestate was killed;" and a count which avers that the accident occurred near a public crossing; that the engineer did not blow the whistle or ring the bell at least one fourth of a mile before reaching said crossing, "and that said intestate was killed on

account of such omission;" and a count which avers, "at the time of the killing of said intestate, said engine was being run negligently in this, it was a dark night, the engine had no headlight, and was being run rapidly, and on account of said negligence said intestate was killed"—each is sufficient in its averments of negligence. But a count which shows that the intestate was a mere trespasser on the railroad track at the time he was killed, or was otherwise guilty of contributory negligence, must allege or show more than simple negligence on the part of the persons in charge of the train—must show wanton or reckless negligence on their part, or intentional injury. *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137, 10 So. Rep. 141.

There can be no recovery under Mass. Pub. St., ch. 112, § 113, for an injury causing death, unless the declaration shows that the accident occurred at a grade crossing, or was caused by a collision with an engine or cars of the defendant. *Allerton v. Boston & M. R. Co.*, 34 Am. & Eng. R. Cas. 563, 146 Mass. 241, 5 N. Eng. Rep. 828, 15 N. E. Rep. 621.

A petition in an action against a railroad company for the negligent killing of plaintiff's husband which specifically states the circumstances attending the killing, and alleges that the deceased was run upon and killed by a designated locomotive and train of defendant, and that his death was occasioned by the negligence of defendant's servants while running, conducting and managing said locomotive and train of cars is sufficiently specific, and is, therefore, good against an objection made to the introduction of any evidence, after answer and on the trial. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113, 10 S. W. Rep. 852.—FOLLOWED IN *Pope v. Kansas City Cable R. Co.*, 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891.

A petition in an action against a railroad for the death of a person by its negligence is sufficient which avers in substance that the defendant, by its servants, while running a locomotive and train of cars over its road, did so carelessly and negligently manage and conduct the same that it ran against, struck, and fatally injured the deceased. *Shaw v. Missouri Pac. R. Co.*, 104 Mo. 648, 16 S. W. Rep. 832.

A declaration against a railroad company which avers that the company's servants

wrongfully and negligently ran its cars over the plaintiff's intestate, thereby causing his death, gives notice that the injury was done contrary to the statute (§ 1298 M. & V. Tenn. Code), and that the company will be required to prove, in its defense, that it observed the precautions prescribed by the same statute, although there may be no reference to the statute in the declaration. *East Tenn., V. & G. R. Co. v. Pratt*, 85 Tenn. 9, 1 S. W. Rep. 618.

If a petition alleges acts of negligence on the part of the defendant at the time of a collision, causing the death of plaintiff's son; that, without negligence on the part of deceased, he was struck by the passing train and killed; and that the death was caused by the negligence of defendant;—these allegations are sufficient to state the cause of action. *Missouri Pac. R. Co. v. Lee*, 35 Am. & Eng. R. Cas. 364, 70 Tex. 496, 7 S. W. Rep. 857.

A declaration alleged that a passenger on a railroad train in South Carolina "was violently ejected and thrown from the said cars by the defendant, and by its agents and servants, in the course of their employment, and, in being thus forcibly and unjustly ejected from said cars as aforesaid, was thrown thereunder, and run over and killed thereby." The evidence showed that the passenger was run over and was injured by this train, and that about an hour afterwards another train ran over the body. Whether life was extinguished by the first or second train was not absolutely certain. *Held*, that such declaration furnished a sufficient basis for a recovery on these facts. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

Where in an action for damages for the death of a child the complaint averred that the child, when first seen, was not on but on the side of the track and by the use of due care could have been seen a distance of two thousand feet, and yet the servants of the company in charge of the train carelessly and negligently failed to watch said track and keep a lookout ahead and thereby did not discover said child until the train was within fifty yards of her, when the train could not be stopped in time to avoid injury to her—this is sufficient to charge the company with negligence. *Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. Rep. 425.

137. — in actions for killing em-

ployes.—In a suit against a railroad on account of the homicide of an employé an allegation that the company did the negligent or careless act which caused the homicide, or omitted the diligence which would have prevented it, is sufficient, and is equivalent to an allegation that the co-employés of the decedent were guilty of such negligence. *Central R. Co. v. Crosby*, 74 Ga. 737.

Where a company is sued for negligently causing the death of one of its employés, and the complaint positively alleges that the acts complained of were by the company, it will not be presumed that they were by a fellow employé. *Brown v. Central Pac. R. Co.*, 68 Cal. 171, 8 Pac. Rep. 828.

A declaration alleging that the plaintiff's husband, an employé of defendant, was killed by an engine of the company, setting forth such a statement of the facts and circumstances connected with the killing as did not of themselves negative the existence of negligence on the part of the company, and distinctly averring that the deceased was without fault, and that the killing was caused by the negligence of the company's servants in the running of such engine, is not demurrable. *Central R. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. Rep. 1020.

Where the action is for the wrongful death of a fireman, a complaint which charges that the death was occasioned by the original defective construction of a certain portion of the road, which caused a train to be thrown from the track and the fireman killed, is sufficient in that respect. *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197.

Where the complaint, among other things, alleged that the "defendant, by its agents and employés, acting under the orders of its superintendent and foreman," committed the wrongful act which caused the plaintiff's intestate's death, such allegation, in connection with the other averments of the complaint, is sufficient to charge the defendant with the wrongful act, and cannot be construed to lay the fault with his co-employés. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. Rep. 956.

A complaint alleging, in general terms, that defendant corporation negligently ran its snow-plow over plaintiff's intestate, defendant's servant, it may be shown that the accident was directly caused by the negligence of the corporation or a superior officer, and not alone by the negligence of

a fellow-servant. *Olson v. St. Paul, M. & M. R. Co.*, 34 Minn. 477, 26 N. W. Rep. 605.

In a suit against a railroad in consequence of the death of an employé, a count which charges that a switch had been misplaced in the night-time, and "by reason of the want of proper signals, and a proper signal-lamp on said switch," the accident and death occurred, etc., is good against a demurrer. *Deremer v. Delaware, L. & W. R. Co.*, 54 N. J. L. 407, 24 Atl. Rep. 481.

In such a statement the want of proper signals is made the proximate cause of the injury. *Deremer v. Delaware, L. & W. R. Co.*, 54 N. J. L. 407, 24 Atl. Rep. 481.

138. Rule that facts constituting negligence must be set out.—A declaration in case for a fatal railway injury is demurrable if it does not so state the cause of action that the defendant can, with reasonable certainty, ascertain in what respect it is charged with negligence, or if it does not count specifically upon some particular duty and breach thereof as causing the injury; it is not enough to refer to matters in an uncertain, doubtful, and ambiguous manner, as a kind of general drag to meet whatever evidence may be presented. *Addison v. Lake Shore & M. S. R. Co.*, 15 Am. & Eng. R. Cas. 512, 48 Mich. 155, 12 N. W. Rep. 42.

In an action by an administrator against a railroad company to recover damages for the death of plaintiff's decedent, which was alleged to have been caused by the negligence of the defendant, the negligence averred in the complaint was: (1) The constructing and maintaining its track in the streets of a city so that the rails and part of the ties were above the surface of the ground. (2) The failure to post a flagman at a certain street crossing, as required by ordinance. (3) Wrongfully and negligently running its trains without having a brakeman in front of the cars. *Held*, that the complaint was sufficient, although it did not appear precisely how the death in question was caused. *Johnson v. St. Paul & D. R. Co.*, 15 Am. & Eng. R. Cas. 467, 31 Minn. 283, 17 N. W. Rep. 622.

A petition in an action for damages by a wife for the wrongful killing of her husband, which alleges that the defendant, at the time of the accident was operating the cars which did the injury, and that the deceased, in the exercise of proper care and caution, was crossing the railway track,

when defendant, by its agents and servants, negligently, carelessly, and wrongfully, ran its cars against the wagon of the deceased, overturned the same and killed him, states a cause of action. The petition is good against the objection that it does not specify the particular act of negligence which caused the injury. *Pope v. Kansas City Cable R. Co.*, 43 *Am. & Eng. R. Cas.* 290, 99 *Mo.* 400, 12 *S. W. Rep.* 891.—FOLLOWING *Sullivan v. Missouri Pac. R. Co.*, 97 *Mo.* 113; *Johnson v. Missouri Pac. R. Co.*, 96 *Mo.* 340.

A complaint in an action for wrongful death is fatally defective which alleges that plaintiff "was, by the wrongful act, neglect, and default of the defendant slain and killed," in that the facts constituting the alleged negligence are not set out. *Conley v. Richmond & D. R. Co.*, 52 *Am. & Eng. R. Cas.* 490, 109 *N. Car.* 692, 14 *S. E. Rep.* 303.

A complaint states sufficient facts of negligence to constitute a cause of action where it alleges that the death of plaintiff's intestate was caused by the derailment of defendant's train on a spur track, resulting from a careless and negligent act of defendant in leaving open the switches leading to such spur track at a time when such train was properly passing on the main line. *Reed v. Northeastern R. Co.*, 37 *So. Car.* 42, 16 *S. E. Rep.* 289.

In an action for damages, a count in the declaration, after setting out that the defendants, were operating a railroad in the county, with engines and cars for carrying passengers and freight, alleged that on a day named "the defendants conducted themselves so carelessly, negligently, and unskillfully in the operation of their said business as to inflict upon A. (the plaintiff's intestate) severe bodily injuries, by reason whereof he did, on the 28th of June, die." Held, that the count was defective in not stating where the deceased was, or how he was injured. *Baltimore & O. R. Co. v. Whittington*, 30 *Gratt. (Va.)* 805.

139. When general charge of negligence, without specific acts, is sufficient.—The petition need not state the circumstances from which the neglect is to be inferred; it is sufficient to allege the extent of the injury and the manner of its infliction, and to charge negligence in general terms. *Louisville, C. & L. R. Co. v. Case*, 9 *Bush (Ky.)* 728.—REVIEWING

Louisville & P. Canal Co. v. Murphy, 9 *Bush* 522.—REVIEWED IN *Claxton v. Lexington & B. S. R. Co.*, 13 *Bush* 636.

A petition is sufficient which, in general terms, charges that by reason of defendant's negligence and unskillfulness in running and managing its cars the deceased was run against and killed. *Le May v. Missouri Pac. R. Co.*, 105 *Mo.* 361, 16 *S. W. Rep.* 1049. *Murphy v. New York & N. H. R. Co.*, 30 *Conn.* 184.

The averment that the "defendant negligently conducted itself in and about the carrying of plaintiff's intestate," is broad enough to cover the omission of any duty which the carrier owed to the passenger, including the employment of competent, skilful, and careful servants. *Kansas City, M. & B. R. Co. v. Sanders*, 58 *Am. & Eng. R. Cas.* 140, 98 *Ala.* 293, 13 *So. Rep.* 57.

The general averment that "the defendant, by her agents and servants, did carelessly and negligently run over," etc., is sufficient, without stating the particular acts constituting such negligence. *Indianapolis, P. & C. R. Co. v. Keely*, 23 *Ind.* 133.—FOLLOWING *Indianapolis, P. & C. R. Co. v. Taffe*, 11 *Ind.* 458.—DISTINGUISHED IN *Central R. Co. v. Van Horn*, 38 *N. J. L.* 133. FOLLOWED IN *Evansville & C. R. Co. v. Dexter*, 24 *Ind.* 411.

A complaint alleging that defendant company, on its railroad, in the county of M., did carelessly and negligently, and with force and violence, run and drive one of its engines and divers of its cars and coaches upon and against plaintiff's intestate, T. H., then and there being, and then and there did so greatly wound said T. H. that by reason thereof he then and there died, and that his death was caused by said wrongful act, neglect, and default of said company, etc., is sufficient on demurrer. *Norfolk & W. R. Co. v. Harman*, 83 *Va.* 553, 8 *S. E. Rep.* 251.—DISTINGUISHING *Dun v. Seaboard & R. R. Co.*, 78 *Va.* 645. FOLLOWING *Baltimore & O. R. Co. v. Sherman*, 30 *Gratt. (Va.)* 602.

The declaration in an action under the West Virginia statute, which avers that the decedent was killed by the oversetting and throwing down of the railroad car in which he was at the time being carried by the defendant as a passenger, and that said oversetting and throwing down of the car were caused by the negligence of the defendant, is not demurrable on the ground that the

allegation is too general. *Searle v. Kana-wha & O. R. Co.*, 37 *Am. & Eng. R. Cas.* 179, 32 *W. Va.* 370, 9 *S. E. Rep.* 248.—FOLLOWING *Blaine v. Chesapeake & O. R. Co.*, 9 *W. Va.* 252; *Hawker v. Baltimore & O. R. Co.*, 15 *W. Va.* 628.

140. Must allege that death resulted from acts charged.—A complaint to recover damages for the death of a person must show that the death resulted from the negligent acts charged. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 *Am. & Eng. R. Cas.* 88, 107 *Ind.* 442, 57 *Am. Rep.* 120, 8 *N. E. Rep.* 18, 9 *N. E. Rep.* 357.

141. Alleging defendant's control of road.—In an action against two companies, the one owning the road and the other using the same, to recover damages for negligence resulting in the death of the plaintiff's intestate, the declaration alleged that the first named company was a corporation owning and using certain railroad tracks upon which the other defendant and other railroads ran their cars and locomotives, and that the latter company had control and occupation of said tracks. *Held*, that these allegations were sufficiently general to comprehend therein, by fair and reasonable intendment, that the latter company was so in control lawfully, or by the consent of the owner corporation, and the omission to charge so specifically was cured after verdict. *Pennsylvania Co. v. Ellett*, 42 *Am. & Eng. R. Cas.* 64, 132 *Ill.* 654, 24 *N. E. Rep.* 559; *affirming* 35 *Ill. App.* 278.

142. Averment of negligence of conductor.—It is sufficient to aver the negligence which caused the injury sued for in general terms; so where the negligence charged is that of a conductor which caused the death of an employé, it is not necessary to set out the specific acts constituting the negligence. *Chicago, B. & Q. R. Co. v. Blank*, 24 *Ill. App.* 438.

In an action for the death of a baggage-master caused by the negligence of a conductor, a complaint averring that the conductor was not careful, skilful, and attentive, which was known to the defendant, and that the death of the baggage-master was caused by the negligence of the conductor, is sufficient to withstand a demurrer. *Kerlin v. Chicago, P. & St. L. R. Co.*, 53 *Am. & Eng. R. Cas.* 530, 50 *Fed. Rep.* 185.

143. — or engineer.—In an action by an administrator, an averment in the complaint that the intestate received the

injuries from which he died by a collision of the defendant's trains, through the carelessness of its engineer in charge of one of them, is not subject to demurrer for an insufficient statement of facts. *Alabama & F. R. Co. v. Waller*, 48 *Ala.* 459.—DISAPPROVED IN *Ensley R. Co. v. Chewning*, 93 *Ala.* 24.

A complaint in an action for causing the death of a fireman charged that the injuries were caused by the explosion of a boiler, and that the explosion was caused by the recklessness of defendant's engineer, who was retained in service with knowledge that he was unfit for the position; but the specific acts constituting the negligence or unskilfulness were not set out. *Held*, that the complaint was sufficient on demurrer. *Fitts v. Waldeck*, 51 *Wis.* 567, 8 *N. W. Rep.* 363.

The complaint avers that "defendants and their agents and servants were informed of and well knew" the unfitness of said engineer at and before the time of the injuries complained of. *Held*, that this is not an averment of such knowledge on the part of the deceased. *Fitts v. Waldeck*, 51 *Wis.* 567, 8 *N. W. Rep.* 363.

144. Averment of knowledge of defect by defendant.—Where the complaint alleges that a brake was defective in certain particulars, and that the defendant company negligently used such brake in its business upon the day of the injury, and for many days prior thereto, a demurrer will not lie on the ground that the complaint does not allege that the defendant company had any knowledge of the defect, by means of which it is averred the deceased received the fatal injury. *Ohio & M. R. Co. v. Percy*, 128 *Ind.* 197, 27 *N. E. Rep.* 479.—REVIEWING *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 *Ind.* 151.—FOLLOWED IN *Lake Erie & W. R. Co. v. Mugg*, 132 *Ind.* 168. REVIEWED IN *Louisville, E. & St. L. Cons. R. Co. v. Utz*, 133 *Ind.* 265.—*Louisville, E. & St. L. Cons. R. Co. v. Utz*, 133 *Ind.* 265, 32 *N. E. Rep.* 881.—REVIEWING *Ohio & M. R. Co. v. Percy*, 128 *Ind.* 197.

The complaint alleged that while the decedent, a yard conductor in the employ of defendant, was making up a train and coupling cars his foot caught under the slivered portion of a defective tie, whereby he was, without fault on his part, thrown down on the track, run over and killed; that the decedent had no knowledge of the

defective tie which caused his injury, and that the defendant had knowledge of such defect long enough before the decedent was injured to have repaired the same, but negligently failed and refused to make such repairs. *Held*, that the complaint stated a cause of action. *Pennsylvania Co. v. Brush*, 130 Ind. 347, 28 N. E. Rep. 615.

145. Negating assumption of risks by deceased.—In an action for the death of a brakeman alleged to have been caused by the unsafe and defective condition of a brake on one of the defendant's cars, it is not necessary to aver facts in the complaint, showing affirmatively that the employé had no means of ascertaining the defect. *Ohio & M. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. Rep. 479.

A complaint by an administrator for negligently causing the death of his decedent while he was engaged in repairing a tunnel on the line of the road, alleged the insufficiency of the braces of the tunnel, and its dangerous condition, and that it had long remained in such condition, the defendant knowingly allowing it to become and remain so; that the defendant, well knowing the dangerous condition of the tunnel, and that its condition was not visible by ordinary observation, ordered the deceased, who was free from fault, without warning him of the character or condition of the supports, braces, or walls, or of the danger, to work at the place where he was injured and killed, and exposed him to the perils and hazards of falling timbers, stones, and dirt; that the deceased was wholly without fault, and wholly ignorant of the condition or character of the tunnel, rocks, dirt, and supports. *Held*, that the complaint was not subject to the objection that it appeared therefrom that the deceased assumed the risk of the necessarily hazardous work, nor to the objection that it did not show that the danger could not have been known to the deceased by the use of ordinary diligence and care. *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. Rep. 668.

146. Negating contributory negligence on part of deceased.—(1) *In general.*—A complaint for the death of a person caused by the wrongful act or omission of the defendant, is bad on demurrer, if it is not alleged therein that the person killed was not guilty of negligence contributing to his injury, or that he was without

fault, and the facts alleged do not show that he was not guilty of such negligence, and it is not alleged that the defendant caused the injury wilfully or purposely, though it be alleged that the defendant inflicted the injury recklessly and with gross negligence. *Cincinnati & M. R. Co. v. Eaton*, 53 Ind. 307.—*CRITICISING Lafayette & I. R. Co. v. Adams*, 26 Ind. 76.—*DISTINGUISHED IN Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122. *QUOTED IN Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298.—*Hildebrand v. Toledo, W. & W. R. Co.*, 47 Ind. 399. *Toledo, W. & W. R. Co. v. Brannagan*, 5 Am. & Eng. R. Cas. 630, 75 Ind. 490. *State v. Baltimore & L. R. Co.*, 77 Md. 489, 26 Atl. Rep. 865.

A general averment that the party was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence. Such an averment is sufficient to withstand a demurrer or a motion to make more specific. *Pennsylvania Co. v. McCormack*, 53 Am. & Eng. R. Cas. 107, 131 Ind. 250, 30 N. E. Rep. 27. *Louisville, E. & St. L. Cons. R. Co. v. Summers*, 131 Ind. 241, 30 N. E. Rep. 873.

A complaint against a railroad company to recover for an injury resulting in death, which showed that the deceased, in company with others, was voluntarily riding upon a hand-car on the track of the defendant, in the night-time, and thus collided with a locomotive and train of the defendant, is bad, because it shows contributory negligence on the part of the deceased. *Ream v. Pittsburgh, Ft. W. & C. R. Co.*, 49 Ind. 93.

Where a father seeks to recover for the death of his minor son while in the company's employment, the complaint must show both that the deceased and plaintiff were without fault. *Sullivan v. Toledo, W. & W. R. Co.*, 58 Ind. 26.

In an action against a railroad company for injuries to plaintiff's intestate, caused by his falling into a culvert constructed by the defendant under its track in a public street of a city, and by defendant negligently permitted to remain open and uncovered, a complaint which avers that the intestate "while exercising due and reasonable care and without his fault or negligence on his part," fell into and through the opening in the culvert, sufficiently alleges that he was not guilty of contributory negligence. *To-*

Iledo, W. & W. R. Co. v. Brannagan, 5 *Am. & Eng. R. Cas.* 630, 75 *Ind.* 490.

Knowledge of the existence of a dangerous defect in a highway makes it incumbent on the traveler to use care and caution proportionate to the danger which he knows lies in his way; but knowledge will not overcome an explicit averment of reasonable care and prudence. *Toledo, W. & W. R. Co. v. Brannagan*, 5 *Am. & Eng. R. Cas.* 630, 75 *Ind.* 490.

Where a complaint in an action by a father for the death of his infant child, did not aver in general terms that the parents were free from contributory negligence, but the special facts averred show that there was no negligence on their part contributing to the injury, it is sufficient on that point. *Pennsylvania Co. v. Davis*, 4 *Ind. App.* 51, 29 *N. E. Rep.* 425.

A declaration by a widow against a railroad company to recover damages for the death of her husband, which states that the husband got on defendant's track sixty feet in front of a train approaching at the rate of fifteen to thirty miles an hour, but was not observed by him, though there was nothing to obstruct the view thereof, and proceeded to walk in the middle of the track in front of such train on his way home, and was overtaken and killed by it, and that the engineer might and ought to have seen him but did not, states no cause of action, and a demurrer thereto ought to be sustained. *Mobile & O. R. Co. v. Stroud*, 31 *Am. & Eng. R. Cas.* 443, 64 *Miss.* 784, 2 *So. Rep.* 171.

A declaration which alleges that deceased (a track laborer) was being carried from one point on the railroad to another, and was ordered by his superior to ride on top of the car, whereon he was standing when struck by bridge timbers, and that he was ignorant of the dangerous character of the bridge is not demurrable, the mere fact that he was standing on top of the car not being of itself negligence on his part. *Nelson v. Chesapeake & O. R. Co.*, 54 *Am. & Eng. R. Cas.* 82, 88 *Va.* 971, 14 *S. E. Rep.* 838.—QUOTING *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.

The declaration need not aver the absence of contributory negligence on the part of the injured person. An averment that the injury was caused by the fault or negligence of the defendant is sufficient. It is only necessary for the plaintiff to state a *prima facie* case. *Hickman v. Kansas*

City, M. & B. R. Co., 66 *Miss.* 154, 5 *So. Rep.* 225.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 *N. Dak.* 252.—*O'Connor v. Missouri Pac. R. Co.*, 32 *Am. & Eng. R. Cas.* 61, 94 *Mo.* 150, 7 *S. W. Rep.* 106, 13 *West. Rep.* 587. *Unfried v. Baltimore & O. R. Co.*, 34 *W. Va.* 260, 12 *S. E. Rep.* 512.—FOLLOWING *Hawker v. Baltimore & O. R. Co.*, 15 *W. Va.* 645; *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 *W. Va.* 14.

(2) *Illustrations*.—A paragraph of the complaint which alleged that the injury was caused by "defendant not having stopped the motion of the cars a sufficient length of time to allow the deceased to safely and securely leave the cars, but having so far checked the motion thereof that she could safely leave the same, while she was in the act of leaving suddenly started the train again without giving her a reasonable time to get off, and without want of ordinary care on her part, she was thrown violently from the train of cars, and the platform of the depot was so negligently constructed that the foot of said deceased was caught in a hole thereof and she was run over by the said train," etc., was not liable to the objection that it did not show that the deceased was free from negligence, but did affirmatively show that she was guilty of contributing to the injury received. The allegation that the injury occurred "without want of ordinary care on the part of the decedent" was equivalent to an averment that the injury occurred "without the fault or negligence of the plaintiff." The additional averment was made "that the defendant was not present in person or by her servants or agents to assist the deceased from the cars." These averments of the paragraph showed that the deceased was without fault in attempting to leave the train. She had a right to expect the cars to remain stationary long enough for her to step from the train and to expect the servants of the defendant to be present to assist her. *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 *Ind.* 48.—DISAPPROVED IN *Texas & P. R. Co. v. Miller*, 79 *Tex.* 78.

The complaint alleged that the intestate was employed by the defendant company at the time of the accident, and at the close of a day's work was ordered to get on certain flat cars and passed thence into a caboose, to be carried to his home; and that he was thrown off and killed by defendant negligently starting the cars. *Held*,

that the complaint was not open to demurrer on the ground that it showed contributory negligence. *Luby v. Chicago, R. I. & P. R. Co.*, 52 Iowa 168, 2 N. W. Rep. 1114.

The complaint alleged that it was the duty of the deceased, as an employé of defendant company, to take care of its cars in a certain yard; and it then alleged, in substance, that, seeing an unattended car upon a track in such yard approaching another car so that it would collide with the latter unless it was arrested, the deceased, in order to prevent such collision, and "without fault or negligence on his part," undertook to climb upon the top of the approaching car by an outside ladder thereon; and that, while he was so climbing, the two cars collided, causing the injury. *Held*, on demurrer, that the court could not on these averments determine that deceased was guilty of negligence. *Kelley v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. Cas. 65, 50 Wis. 381, 7 N. W. Rep. 291.

147. Sufficiency of averments to warrant exemplary damages.—Where the complaint is to recover both compensatory and exemplary damages the better practice is that they should be claimed by proper allegations in the nature of separate counts, and the jury should show by their verdict what is actual and what exemplary damages. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.—DISAPPROVED IN *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

Under Tex. Const. art. 16, § 26, allowing exemplary damages for the death of a person caused by the wilful act or omission or gross negligence of a corporation, a complaint which charges gross negligence and that the injury was done by a train carrying officers of the company is not sufficient, unless there be facts alleged which show "a wilful act or omission or gross negligence" on the part of some one representing the corporation and approved by it. *Winnit v. International & G. N. R. Co.*, 74 Tex. 32, 11 S. W. Rep. 907.

148. Averment of wilful injury or negligence.—In an action by an administrator a count which avers that the defendant, "by and through its conductor, engineer," etc., "negligently, wantonly, recklessly, and wilfully caused and permitted its said train to run into and against said

(dummy) engine on which plaintiff's intestate was," thereby causing the injuries which resulted in his death, is an averment that the injuries were wilfully caused, and does not authorize a recovery on proof of mere negligence; but a count which avers that the defendant's train was wilfully run at a high rate of speed "towards and to said crossing" at which the dummy-engine was is not equivalent to an averment that the collision was wilfully caused. *Birmingham Mineral R. Co. v. Jacobs*, 49 Am. & Eng. R. Cas. 263, 92 Ala. 187, 9 So. Rep. 320.—ADHERING TO *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436.

A complaint, to be good as charging wilfulness in the killing by a train of cars, must show that the deceased was purposely or wilfully killed, or that the train was purposely or wilfully run upon him. It is not sufficient to charge that the acts in the management of the train resulting in the death were purposely and wilfully done. *Chicago & E. I. R. Co. v. Hedges*, 25 Am. & Eng. R. Cas. 550, 105 Ind. 398, 7 N. E. Rep. 801.—REVIEWED IN *Mary Lee Coal & R. Co. v. Chandliss*, 53 Am. & Eng. R. Cas. 254, 97 Ala. 171, 11 So. Rep. 897.

A complaint which alleges that the defendant unlawfully, carelessly, and wilfully ran one of its locomotives and trains over the decedent, who was walking in the street adjoining its track, the specific acts charged being the running of the train at a high and dangerous rate of speed without ringing the bell, in violation of a city ordinance, charges negligence, but not a wilful killing, there being no averment that the defendant knew of the presence of the decedent upon the street or track or that circumstances existed making the running of the train in the manner charged a reckless disregard of human life. *Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. Rep. 273.

An allegation in a petition that a railroad company "carelessly, negligently, wrongfully, and unlawfully" ran its cars over and killed the plaintiff's intestate does not amount to an allegation that the carelessness and negligence were wilful, and the recovery must be confined to compensatory damages. *Jacob v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

To authorize a recovery under section 3 of Ky. Act of March 10, 1854, it is essential that the loss of life shall have been the result of wilful neglect; and as the statute is

highly penal in its nature, a petition under it, to be good, must charge the exact character of neglect for which the recovery may be had; and while it is not indispensable that the exact language of the statute shall be used, it is absolutely necessary that the charge shall be made in language clearly importing as high a degree of negligence as that for which the law-making power intended the penalty to be imposed. *Lexington v. Lewis*, 10 *Bush* (Ky.) 677. *Hansford v. Payne*, 11 *Bush* (Ky.) 380.

While the character of neglect alleged must determine whether a recovery is sought under section 1 or section 3 of ch. 57 of Ky. General Statutes, yet where the plaintiff is required to elect whether he will proceed under section 1 or section 3, and he elects to proceed under section 1, and the issue is fully made as in an action under that section, it will be so treated, although wilful neglect is alleged, the facts being sufficient to show negligence. And this is true, although the court, after the election, refused to strike out of the petition the averments as to wilful neglect. *Schoolcraft v. Louisville & N. R. Co.*, 92 Ky. 233, 17 *S. W. Rep.* 567.

In an action by an administrator to recover for the negligent killing of his decedent by the servants of the defendant, while running a locomotive and train of cars across a public street in a populous part of the city, the complaint alleged that when the decedent was run over and killed the defendant was running such locomotive and train "at a recklessly and grossly negligent and dangerous rate of speed, to wit, at the rate of forty miles per hour," in violation of an ordinance of such city, limiting the rate of speed to six miles per hour. *Held*, it being admitted that the decedent was guilty of contributory negligence in stepping upon the track in front of the engine, that evidence that the defendant had wilfully committed the injury was not admissible under the complaint. *Pennsylvania Co. v. Sinclair*, 62 *Ind.* 301.—NOT FOLLOWED IN *Deans v. Wilmington & W. R. Co.*, 107 *N. Car.* 686. QUOTED IN *Palmer v. Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70.

149. Joinder of counts or causes of action.—Where, by means of the same negligent act of one person, bodily injuries are inflicted upon another, his wife, and his minor child, resulting in the loss to him of

his wife's services, and the expenditure by him of means and labor in healing and caring for himself and his child, all constitute but a single cause of action, and may be united in a single paragraph of a complaint to recover damages therefor. *Cincinnati, H. & D. R. Co. v. Chester*, 57 *Ind.* 297.—DISAPPROVED IN *Skoglund v. Minneapolis St. R. Co.*, 45 *Minn.* 330.

A complaint in an action to recover for the death of plaintiff's husband, in two counts, one charging the killing to be directly by the company, and the other by the company through its employes, charges but a single cause of action, being merely stated in different ways to meet the evidence. *Brownell v. Pacific R. Co.*, 47 *Mo.* 239.—FOLLOWED IN *Straub v. Eddy*, 47 *Mo. App.* 189.

Under the New York practice a complaint in an action for negligently causing death should state all of the acts constituting the negligence in one count; and if they be separated when they might be stated in one count it is proper to compel plaintiff to elect on which one he will rely. *Dickens v. New York C. R. Co.*, 13 *Hov. Pr. (N. Y.)* 228.

An administrator may join a count for damages done his intestate in life by the defendant with a count for damages accruing to the widow and next of kin by the death of the intestate also resulting from the negligence of the defendant. *Ranney v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 277, 24 *Atl. Rep.* 1053.—FOLLOWED IN *Preston v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 280.—*Preston v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 280, 25 *Atl. Rep.* 486.—FOLLOWING *Ranney v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 277.

In an action by the administrator of a person killed while employed as a section hand (Ala. Code, §§ 2590, 2591) a count is demurrable for ambiguity and uncertainty, and for the improper joinder of causes of action, which alleges that the injury was caused (1) by the gross negligence of the foreman of the two handcars in running at a reckless rate of speed and in too close proximity; (2) by the negligence of some person who had charge of the rear car; (3) by the defective condition of one or both of the cars, which defect had arisen from, or had not been discovered or remedied, owing to the negligence of the defendant or of some person in its service who was intrusted with the duty of seeing that the machinery, etc., was in proper condition; and (4) by the

negligence of some person or persons in the defendant's service who had the superintendence of the moving of the rear car, and while in the exercise of such superintendence. *Highland Ave. & B. R. Co. v. Dusenberry*, 94 Ala. 413, 10 So. Rep. 274.

150. Sufficiency of declaration where defendant is a receiver.—A receiver of a railroad appointed under Tenn. Code, § 1101, is an agent of the state, and in an action against such receiver for the death of an employé a declaration that the injury resulted from material defects in the machinery and equipments of the train, which were known to the defendant, as it charges a misfeasance, is sufficient. In such case the agent is personally responsible, whether he did the wrong intentionally or ignorantly, as the principal could not confer authority on him to commit a tort upon the person or property of another. Such an averment would have been sufficient to hold the company for the injury. *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44, 19 Am. Ry. Rep. 274.—REVIEWED IN *Turner v. Cross*, 83 Tex. 218.

151. Amendment of plaintiff's pleadings.—(1) *General rules.*—Where an original complaint for wrongfully causing death contains enough to amend by, it is proper at the trial, even after the defendant has commenced to introduce evidence, to allow an amendment charging acts of negligence different from those originally set up, in order to conform the pleadings to the proofs, where such amendment does not change the cause of action. *Harris v. Central R. Co.*, 30 Am. & Eng. R. Cas. 581, 78 Ga. 525, 3 S. E. Rep. 355.

Where the action is for injuries causing death, and homicide is alleged, generally the mode of committing it may be particularly specified by amendment, without adding a new cause of action. *Central R. & B. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. Rep. 827.

A declaration at the suit of children for the homicide of their father is amendable by alleging that the deceased left no widow and that the plaintiffs are all the children which survived him. *Van Pelt v. Chattanooga R. & C. R. Co.*, 89 Ga. 706, 15 S. E. Rep. 622.

A husband suing under the Pa. Act of April, 1851, as the administrator of his wife,

for the injuries to her person resulting in death, may amend his narrative in accordance with the provisions of the second section of the act of April, 1855. The fact of describing him as her administrator would not vitiate the writ, but would be treated as mere surplusage. *Conroy v. Pennsylvania R. Co.*, 1 Pittsb. (Pa.) 440.

When the evidence develops the fact that deceased (for causing whose death damages are sought) had other relatives who, under the statute, can share in the damages recovered for his death, the proceedings must be arrested until the pleadings are so amended that the suit can be conducted for the use of all of the beneficiaries. *Fl. Worth & D. C. R. Co. v. Wilson*, 85 Tex. 516, 22 S. W. Rep. 578.

In an action by a mother suing for the homicide of her son, where the fact omitted from the declaration was that she was dependent upon him for a support, the declaration was amendable by alleging that fact. *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. Rep. 809.—APPLIED IN *James v. Atlanta St. R. Co.*, 90 Ga. 695.

The action being by a mother for causing the death of her minor son, and the declaration counting apparently on the homicide, and not on the loss of service, as the grievance to be redressed, and there being no claim of right in the mother to the son's service or to recover hire for the same, the court below was justifiable in treating the declaration as not amendable, and in dismissing the action. *Smith v. East & W. R. Co.*, 84 Ga. 183, 10 S. E. Rep. 602.—APPROVING *Chick v. Southwestern R. Co.*, 57 Ga. 357. REVIEWING *East Tenn., V. & G. R. Co. v. Maloy*, 77 Ga. 237.—*Bell v. Central R. Co.*, 73 Ga. 520.

(2) *Illustrations.*—An original complaint charged that the death was caused by knowingly employing an incompetent engineer. Afterwards an amendment was allowed, charging that the accident resulted from the negligence of the engineer and denying that he and the deceased were fellow-servants. *Held*, that no new cause of action was introduced and the amendment was properly allowed. *Smith v. Missouri Pac. R. Co.*, 56 Fed. Rep. 458; reversing 50 Fed. Rep. 760.—APPLYING *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Iowa 67, 40 N. W. Rep. 92. DISTINGUISHING *Scovill v. Glasner*, 79 Mo. 449.

A declaration against a company for the

* See also *ante*, 108.

homicide of plaintiff's husband, which alleged, after describing the manner of the homicide, that the acts complained of constitute gross negligence on the part of the company, its agents, servants, and employés, and that said gross negligence caused the death, was amendable by striking therefrom an allegation that "the engineer on said engine was looking, not at the track in front, but towards the fireman who was on the opposite side of the engine," and inserting an allegation that "said engineer could have seen said Barnett and lumber, and did see them in time to have stopped before reaching them, but failed to do so, and failed to give any signal, and made no effort to stop before reaching said lumber and said Barnett." *Rome R. Co. v. Barnett* 89 Ga. 718, 15 S. E. Rep. 639.

The original declaration alleging that plaintiff's husband was killed by the gross negligence of the agents of defendant in running its cars, etc., there was enough therein to amend by; and an amendment alleging that he "was on the railroad track where persons were accustomed to walk; that he was between the blow-post and the crossing on said track, and that the agents of said company failed to give any signals or to blow its engine as required by law, and that they, without any fault on his part, did by said negligence run over and kill him, to her injury," made the declaration sufficient to authorize a recovery, if supported by evidence, and did not state a new cause of action. *Central R. & B. Co. v. Denson*, 83 Ga. 266, 9 S. E. Rep. 788.

In an action by an administrator, the cause of action, as stated in the complaint, was the death of plaintiff's intestate, caused by the wrongful act or omission of the company, without the fault of the deceased; but the particular means or manner of her death were not stated. A demurrer being sustained to the complaint, because it did not appear that the injury producing death was not caused by the contributing fault of the deceased—held, that to amend the complaint so as to allege the facts of the accident more particularly was not stating a new cause of action, liable to objection as not declared upon within the time limited by the statute. It would be a new cause of action if the amendment contained a recital of facts connected with some other and different accident and date. The cause of action was the wrongful act of the company,

and the question of fact was of what the wrongful act consisted. *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48.

In an action under Kan. Civ. Code, § 422, by an administrator, the original complaint charged that the intestate was negligently killed while being transported as a passenger; but an amendment was allowed charging that he was killed while being transported as an employé of the company. Held, that the amendment was properly allowed. *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512.

Suit by the widow and administratrix of an intestate to recover damages against the proprietor of a railroad for the carelessness, negligence, and unfitness of the employés and agents of the company in running the engine over and killing her husband. The style of the action in the petition is "E. L., plaintiff, administratrix of M. L., deceased, against R. B. B., defendant." Held, that this shows conclusively the character in which she sues, and an amended petition, in which it is distinctly averred that the action is brought as administratrix, does not, therefore, change the character of action. *Bowler v. Lane*, 3 Metc. (Ky.) 311.

In an action for causing the death of a person not an employé of the company, an amended petition was filed alleging that said death was caused by the wilful neglect of said company. Held, that said amendment was not an amended petition setting up a new cause of action, but simply an amendment bringing the original cause of action within the third section of the act named, which authorizes the giving of punitive damages. *Louisville, C. & L. R. Co. v. Case*, 9 Bush (Ky.) 728.—OVERRULED IN *Cincinnati, N. O. & T. P. R. Co. v. Privitt*, 92 Ky. 223.

152. Variance between allegation and proof.—Where the complaint alleges that the plaintiff's intestate was killed in the discharge of his duties as brakeman, "while ascending the side of the car," by coming in contact with a water-tank which had been placed too near the railroad track, and the evidence shows that, when struck by the tank, he was standing on the platform between two cars, with his back toward the tank, the variance is fatal. *Hood v. Pioneer Min. & Mfg. Co.*, 95 Ala. 461, 11 So. Rep. 10.

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deceased was on a freight car unloading stone, he was, by a sudden jerk of the train, of which no notice or warning was given him, thrown down between the cars, and run over and killed, no recovery could be had on the ground that the foreman, under whom the deceased was employed, recklessly and negligently ordered him to go upon the cars having the stone, before they were detached, and that he obeyed such order. *Chicago, B. & Q. R. Co. v. Bell*, 112 Ill. 360.

In an action against a railroad company for negligently killing a plaintiff's son, where the petition only charges the violation of an ordinance of the city of St. Louis requiring the bell of the locomotive to be rung when moving within the city limits and a man to be stationed on the end of the car farthest from the engine, when backing cars, and freight trains to be well manned by experienced brakemen when moving within the city limits, a case is not made out where the evidence shows that the injury was caused by the dropping of two box cars, without an engine attached, down an inclined track in the company's yard, where they were coupled with others standing thereon, and the coupled cars then striking another car on such track, jarring it and knocking plaintiff's son off the same, when he was killed by being run over by the trucks of the car, and fails to show that such cars were not well manned or that the brakeman having them in charge was not experienced. *Rafferty v. Missouri Pac. R. Co.*, 91 Mo. 33, 3 S. W. Rep. 393.—DISTINGUISHED IN *Grube v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 357, 98 Mo. 330, 11 S. W. Rep. 736, & L. R. A. 776. RECONCILED IN *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348.

Such box cars, when coupled to the others on the side track, did not constitute a backing train within the meaning of the ordinance. *Rafferty v. Missouri Pac. R. Co.*, 91 Mo. 33, 3 S. W. Rep. 393.

153. Plea or answer.—The plaintiff's right to maintain the statutory action, when the complaint alleges that she is the administratrix of the deceased employé, can only be put in issue by a plea of *ne unques administrator*, and a plea of the general issue is an admission of the representative character. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. Rep. 870.

In a suit by the widow of a deceased em-

ployé of a railroad for his homicide by the negligence of his co-employés, a plea which admitted the killing but did not admit either that decedent was free from fault or that the other employés were at fault, was not a plea of justification. *Central R. Co. v. Crosby*, 74 Ga. 737.

In an action for negligently causing death at a crossing, by running a train at a rate prohibited by a municipal ordinance, which is set out, on a plea of not guilty, plaintiff has a right to prove the ordinance, though a demurrer would have been sustained to the count had it been demurred to. *Atchison, T. & S. F. R. Co. v. Feehan*, 47 Ill. App. 66.

A paragraph of answer was filed to the complaint, which set out a rule of the railroad company requiring its brakemen to examine and know for themselves that the brakes, ladders, etc., which they were to use were in proper condition, and if not, to put them in condition or report for repairs. It was further averred that the decedent had knowledge of this rule, but was negligent in failing to make an examination of the brake-staff and report it out of repair before the car left the point of starting on the trip on which he was injured. Ignorance of the defect on the part of the defendant was also averred. *Held*: (1) that while the above paragraph of answer was little more than a special denial of the complaint, it was not error to overrule a demurrer to the same; (2) that a paragraph of reply to said paragraph of answer was good which showed that the deceased was not furnished with the appliances, nor had he the opportunity to make the inspections required by the rules of the company. *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. Rep. 989.

In an action by a personal representative of a brakeman who was killed while attempting to couple cars in a place of unusual danger, the original complaint charged that the conductor ordered the brakeman to go where he was killed, which was not denied in the company's answer. An amended complaint contained the same charge, which was denied in the company's answer. *Held*, that this was a sufficient denial, and that the burden was on the plaintiff to prove the allegation. *Brice v. Louisville & N. R. Co.*, (Ky.) 9 S. W. Rep. 283.

154. Demurrer.—In a suit for the

negligent killing of plaintiff's son the fact that the petition showed that the son was over twenty-one years of age at the time of his death would not make the petition subject to demurrer. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.—QUOTING *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.—FOLLOWED IN *Galveston R. & T. Co. v. Burkett*, 2 Tex. Civ. App. 308. REVIEWED IN *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181.

The objection that it appears from the complaint that the action was not brought within the time limited may be taken by demurrer on that specific ground; and a complaint which shows that no administrator of the estate of such decedent was appointed till more than two years after his death is open to that objection. *George v. Chicago, M. & St. P. R. Co.*, 51 Wis. 603, 8 N. W. Rep. 374.

155. Amendment of plea or answer.—In an action for the negligent killing of a person upon a railroad track, it is not an abuse of the discretion of the court to refuse to allow the defendant to withdraw an admission that the death of the deceased directly resulted from the accident, and to assert that the accident was but the remote cause of the death, when the application for such amendment is not made until the second day of the trial. *Illis v. Chicago, M. & St. P. R. Co.*, 37 Am. & Eng. R. Cas. 299, 40 Minn. 273, 41 N. W. Rep. 1040.

156. Bill of particulars.—Where the defendant to an action brought under Md. Code, art. 65, § 3, does not demand the particular required to be furnished by that section, but files its pleas without it, it may be considered as having waived its right to have it. This section is not mandatory. The requirement to deliver a "particular," as provided by it, is merely directory, and in no wise affects the right of the plaintiff to maintain the suit. *Philadelphia, W. & B. R. Co. v. State*, 10 Am. & Eng. R. Cas. 792, 58 Md. 372.—REVIEWING *Baltimore & O. R. Co. v. State*, 41 Md. 297; *Murphy v. Logan*, 10 Ir. C. L. 87.

IX. DEFENSES.

1. Generally.

157. What defenses are available, generally.—In an action by the wife against a railroad company for the homi-

cide of her husband, any defense which would bar a recovery by him for damages, in case he had not died, will apply to and govern the right of the wife. *Hendricks v. Western & A. R. Co.*, 52 Ga. 467.

Where a brakeman on a freight train of a railroad company was killed, while at his work, by the smoke and gas in a tunnel which was insufficiently ventilated, and the proof showed that the deceased accepted and continued in the employment of the railroad company with full knowledge of the condition of the tunnel and of the risk of the work therein, he could not, if death had not ensued, have recovered for any injury sustained by reason of the condition of the tunnel, and consequently, under section 1 of art. 67 of the Md. Code, his father would not be entitled to recover for his death. *Baltimore & P. R. Co. v. State*, 53 Am. & Eng. R. Cas. 379, 75 Md. 152, 23 Atl. Rep. 370.—FOLLOWING *Northern C. R. Co. v. State*, 54 Md. 113; *State v. Baltimore & O. R. Co.*, 58 Md. 221.

A railway company will not be excused from the consequences of its own negligence, or its liability for an injury caused thereby, by the fact that another company was more culpably negligent than it, thereby contributing to the injury, as in the case of a collision of trains causing the death of a passenger. *Union R. & T. Co. v. Shacklet*, 28 Am. & Eng. R. Cas. 193, 119 Ill. 232, 10 N. E. Rep. 896.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

If a passenger on a railroad car, who has in his possession a ticket good from one station to another on that road, leaves the car at an intermediate station, not having had an opportunity to surrender his ticket or pay his fare, it cannot be assumed, as a matter of law, in an action against a railroad corporation for negligently causing his death, that he was not riding upon the ticket which he held, or that he intended to evade the payment of his fare, or left the car for that purpose. *McKimble v. Boston & M. R. Co.*, 21 Am. & Eng. R. Cas. 213, 139 Mass. 542, 2 N. E. Rep. 97.—FOLLOWED IN *McKimble v. Boston & M. R. Co.*, 24 Am. & Eng. R. Cas. 463, 141 Mass. 463.

Where a person lawfully on a station platform is by a sudden and violent rush of a great crowd at the station pushed on the track and killed by the engine of an ap-

proaching train, the company is not liable. *Cannon v. Midland G. W. R. Co.*, 6 Ir. L. R. 199, 3 Ry. & C. T. Cas. xv.

The acquittal of the locomotive driver on a train upon a charge of manslaughter for the death of the party on account of whose death the action for damages was brought by his administratrix, did not constitute any answer to the action. *Ham v. Grand Trunk R. Co.*, 11 U. C. C. P. 86.

158. Another action pending.—It is no bar to a suit by the mother for the homicide of her minor son that the father has a pending suit in which he claims damage for the loss of the son's services up to the time the latter would have arrived at his majority. *Augusta R. Co. v. Glover*, (Ga.) 58 Am. & Eng. R. Cas. 269, 18 S. E. Rep. 406.

159. Death from another cause.—Plaintiff's intestate lived for some time after the injury, and the evidence showed that the immediate cause of death was peritonitis. There was medical evidence that this disease might be caused in seven different ways, and there was no proof but that several of these causes, which could not have been attributed to defendant's negligence, existed in the case; but there was other evidence that a certain cause, which the jury might competently find ensued from defendant's negligence, actually existed. *Held*, that the rule to be applied in such case is, that causes which were not made to appear did not exist; and there was sufficient evidence to support a verdict for plaintiff. *Looram v. Third Ave. R. Co.*, 25 J. & S. (N. Y.) 165, 6 N. Y. Supp. 504, 25 N. Y. S. R. 926; affirmed in 117 N. Y. 657, mem., 22 N. E. Rep. 1133, 27 N. Y. S. R. 981.

160. Deceased a trespasser.—A company is not liable for the death of a boy eleven years of age who goes upon the company's grounds of his own accord for the purpose of play and is injured by a defective car standing upon the company's track. *McEachern v. Boston & M. R. Co.*, 150 Mass. 515, 23 N. E. Rep. 231.—FOLLOWED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

That deceased was a trespasser on the track of the railroad did not relieve the railroad company from all care towards him. *Rine v. Chicago & A. R. Co.*, 25 Am. & Eng. R. Cas. 545, 88 Mo. 392.

If those in charge of the engine saw de-

ceased in an exposed and dangerous position before the injury in time to have avoided it by reasonable care, they were bound to do so. *Rine v. Chicago & A. R. Co.*, 25 Am. & Eng. R. Cas. 545, 88 Mo. 392.—DISTINGUISHING *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 595; *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 138.

Where a railway company allows the public to disregard notices posted, forbidding persons to cross the track at a particular point, it cannot in case of injury at that point set up as a defense the existence of such notices. *Dublin, W. & W. R. Co. v. Slattery, L. R.* 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191.

A railroad company, for its convenience and that of shippers, had constructed at the termination of its track at Black River an elevator, or platform car, which was used in lowering and raising freight, on an incline track extending from its depot on the bank to the water's edge; and the plaintiff's husband, having prepared for shipment a small cargo of fish, and placed same on the platform of the elevator, undertook to ride thereon without defendant's consent up to the station, when the wire rope, by means of which the car was operated, suddenly broke, while the car was ascending, and caused the injury and death of deceased. *Held*, that plaintiff cannot recover, because the deceased was not a passenger, and no contractual or quasi contractual relations existed between him and the defendant—he being a mere stranger, or a trespasser in the company's property. *Snyder v. Natchez, R. R. & T. R. Co.*, 44 Am. & Eng. R. Cas. 278, 42 La. Ann. 302, 7 So. Rep. 582.

A boy was permitted by a conductor to ride on the train of a railroad company, to sell newspapers, in violation of the regulations of the company, and was killed by an accident. *Held*, that the boy was a mere trespasser, and the company was not liable. *Duff v. Allegheny V. R. Co.*, 2 Am. & Eng. R. Cas. 1, 91 Pa. St. 458, 36 Am. Rep. 675.—LIMITED IN *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.

Where plaintiff's intestate was a trespasser in a car of defendant company, where he was discovered and ordered out by the conductor of the train, and, in attempting to obey the order, he fell under the cars and was run over and killed—*held*, that the fact of his being a trespasser was not material in an action to recover for his death on

the ground of defendant's negligence. *Benton v. Chicago, R. I. & P. R. Co.*, 55 Iowa 496, 8 N. W. Rep. 330.—REVIEWING *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa 29.—RECONCILED IN *Carter v. Louisville, N. A. & C. R. Co.*, 98 Ind. 552.

161. Deceased traveling on Sunday.—The question of defendant's liability is not affected by the fact that the injury resulting in his death occurred while deceased was engaged on an excursion with other passengers upon defendant's steamboat in violation of the Sunday law. The general obligation of the defendants to use such care and diligence as the law enjoins upon carriers of passengers is not determined by the contract or engagement with the passengers, but by consideration of public policy. *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. Rep. 575.

162. Emancipation of child killed.—Mo. Rev. St. § 2121 is both penal and compensatory, and the emancipation of a minor son by his parents is no defense to an action thereon by them for his death. *Philpott v. Missouri Pac. R. Co.*, 27 Am. & Eng. R. Cas. 323, 85 Mo. 164.

163. Former recovery.—(1) *When a bar.*—Under Cal. Civ. Code, § 377, an action may be brought either by the heirs of one who is negligently killed, or by his personal representative; but the statute only permits one action. *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303.

And a former recovery by an executor may be pleaded and proved in bar to an action subsequently brought by the heirs. *Hartigan v. Southern Pac. Co.*, 86 Cal. 142, 24 Pac. Rep. 851.

A common law action for the mental and bodily suffering of the deceased caused by the same acts of negligence which caused his death—his death not being immediate—will bar an action under the statute by the widow, or heir, or personal representative of the deceased, to recover for the loss of his life. *Conner v. Paul*, 12 Bush (Ky.) 144.—DISTINGUISHING *Hansford v. Payne*, 11 Bush 380.

The statutory action by the widow, heir, or personal representative of the deceased for the loss of his life will bar an action by his personal representative for the mental and bodily suffering of the deceased before his death caused by the same acts or negligence which caused his death. *Conner v. Paul*, 12 Bush (Ky.) 144.

A common law action cannot be maintained by parents for the death of a minor child after there has been a recovery under Mo. Rev. St. § 2123. *Graham v. Hannibal & St. J. R. Co.*, 28 Fed. Rep. 744.

In an action brought by a father as administrator, under N. Y. Laws of 1847, ch. 450, Laws of 1849, ch. 256, to recover damages for the death of his infant son, where the recovery is for his exclusive benefit, he may proceed for and recover his whole damages, including the loss of services of his son during minority. The recovery will be a bar to another action by the father, as such, assuming that he has a right of action independent of the statute. *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417, 15 Am. Ry. Rep. 119.—FOLLOWING *Ford v. Monroe*, 29 Wend. (N. Y.) 210.—REVIEWED IN *Hooghkirk v. Delaware & H. Canal Co.*, 63 How. Pr. (N. Y.) 328.

(2) *When not a bar.*—Where a railroad company is sued, under the statute of Illinois, by a father for wrongfully causing the death of his minor child, the fact that there has been a recovery before death for medical attendance and other expenses, and for loss of service before death, does not affect the damages recoverable in the second action. *Barley v. Chicago & A. R. Co.*, 4 Biss. (U. S.) 430.

The fact that one injured by the negligence of another had instituted suit for damages because of such negligence does not bar a suit by his wife and children after his decease. *International & G. N. R. Co. v. Kuehn*, 35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484.

Nor does it bar an action brought by his administrator under the statute. *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626.—CRITICISING AND NOT FOLLOWING *Dibble v. New York & E. R. Co.*, 25 Barb. (N. Y.) 183. QUOTING *Whitford v. Panama R. Co.*, 23 N. Y. 470.

A posthumous child is not concluded from suing to recover damages for the death of his father by a suit brought by his mother and another beneficiary under the statute and a recovery thereunder. *Nelson v. Galveston, H. & S. A. R. Co.*, 48 Am. & Eng. R. Cas. 8, 78 Tex. 621, 14 S. W. Rep. 1021.

If the minor has improperly recovered damages in its own favor for its reduced capacity to earn money during minority, such judgment cannot affect the parent's

right to recover damages in another action on the same ground. *Texas & P. R. Co. v. Morin*, 25 *Am. & Eng. R. Cas.* 539, 66 *Tex.* 133.

A recovery for wrongfully causing the death of a person is not a bar to a subsequent action by the administrator to recover damages for the loss to the deceased's estate. *Barnett v. Lucas*, 6 *Ir. R. C. L.* 247; *affirming* 5 *Ir. R. C. L.* 140.

Where an administratrix of a man killed in an accident brings two suits, one to recover damages for the wrongful death and the other for the benefit of the estate, the two actions are not brought in the same right, and the company is not estopped from raising in the second action certain issues which had been determined against it in the former action. *Leggott v. Great Northern R. Co.*, 45 *L. J. Q. B. D.* 557, 24 *W. R.* 784, *L. R. 1 Q. B. D.* 599, 35 *L. T.* 334.

164. Incapacity of plaintiff to sue.

—Where an administrator sues for the death of his intestate and the defendant pleads the general issue, he cannot challenge the appointment of the plaintiff as administrator. If he wishes to do so he must file a special plea of *ne unques administrator*. *Denver, S. P. & P. R. Co. v. Woodward*, 4 *Col.* 1. See also *Denver, S. P. & P. R. Co. v. Woodward*, 4 *Col.* 162.

165. Incompetency or mistake of physician employed by deceased.

—Where a person who, through the negligence of another, has received an injury which without a surgical operation would cause his death, employs a competent and skilful surgeon, by whose mistake the operation is not successful, and the patient dies, the wrong-doer is not shielded from liability by the surgeon's error, although the operation is the immediate cause of the death. *Sauter v. New York C. & H. R. Co.*, 66 *N. Y.* 50, 23 *Am. Rep.* 18; *affirming* 6 *Hun (N. Y.)* 446.—**DISTINGUISHING** *Patrick v. Commercial Ins. Co.*, 11 *Johns. (N. Y.)* 14; *Livie v. Janson*, 12 *East* 648. **FOLLOWING** *Lyons v. Erie R. Co.*, 57 *N. Y.* 489; *Hope v. Troy & L. R. Co.*, 40 *Hun (N. Y.)* 438.

166. Negligence of fellow-servant.

—Whether or not a person who is sent by a railroad company with a train to deliver certain freight is a fellow-servant with the persons in charge of the train, if he is negligently killed his widow may maintain an action for damages. *Killian v. Augusta & K. R. Co.*, 78 *Ga.* 749, 3 *S. E. Rep.* 631.

Deceased kept a boarding-house for section hands employed on defendant's road and was in the habit of going to a neighboring station to get her pay direct from the agent of the company. On the day of the accident, as she was on her way to the station on a hand-car (it appeared from the evidence that she had permission of the road-master to go on the hand-car) it was struck by a construction train, and she and several employés were killed. *Held*, that the position of deceased on the hand-car was not that of a trespasser, but that she was there with the company's permission and occupied the same position as the section men, who were on the hand-car for their own accommodation and not for any profit or business of the company, and that she was bound to use ordinary care and was chargeable with the gross negligence of the section men. *Chicago & E. I. R. Co. v. McKnight*, 16 *Ill. App.* 596.—**REVIEWING** *Burling v. Illinois C. R. Co.*, 85 *Ill.* 18.

167. Operation of road by lessee or receiver of defendant.

—Under a plea of general denial, in an action against a company for negligently causing the death of an employé, it may be shown that the road was operated at the time by lessees in whose employment the decedent was. *Baxter v. New York, T. & M. R. Co.*, (*Tex. Civ. App.*) 22 *S. W. Rep.* 1002.

Where the defendant road allowed another to use its track for a short distance in getting to a station, and some cars on the road became detached from a train and ran on the defendant's road, in consequence of which an accident occurred and the plaintiff's intestate was killed—*held*, that the defendant was not negligent and the action would not lie. *Sellers v. Richmond & D. R. Co.*, 25 *Am. & Eng. R. Cas.* 451, 94 *N. Car.* 654.

Suit was brought against defendant for wrongfully causing death under the corporate name of the Wabash railroad company. The evidence showed that the road was owned by the Wabash, St. Louis and Pacific railroad company, but was operated at the time by a receiver. *Held*, that the action could not be maintained. *Wabash R. Co. v. McKittrick*, 36 *Ill. App.* 82.

By the terms of a written contract entered into between the Missouri Pacific R. Co. and the defendant the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific,

defendant's eastern terminus, and the city of St. Louis; the Missouri Pacific company using its own locomotive and crew of same, and the defendant furnishing at its own expense all trainmen for the care and management of its trains, the manner of running the latter, and the control and acts of said trainmen being subject to the rules and regulations of the Missouri Pacific company while so running on its track. *Held*, that there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for the deceased to alight at his destination and while the train was being operated between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific company, and for transportation between St. Louis and the town of Webster, where the accident occurred. (Black and Norton, JJ., dissenting.) *Smith v. St. Louis & S. F. R. Co.*, 29 *Am. & Eng. R. Cas.* 106, 85 *Mo.* 418, 55 *Am. Rep.* 380.

Under the contract between the two companies the train by which the deceased was killed cannot be regarded as defendant's train in such a sense as to make it liable for the accident. *Smith v. St. Louis & S. F. R. Co.*, 29 *Am. & Eng. R. Cas.* 106, 85 *Mo.* 418, 55 *Am. Rep.* 380.

168. Receipt of insurance money by plaintiff.—The fact that plaintiff's husband had his life insured, payable to her, and that after his death she collected the insurance money, is no defense to an action on Mo. Rev. St. § 2121. *Carroll v. Missouri Pac. R. Co.*, 26 *Am. & Eng. R. Cas.* 268, 88 *Mo.* 239.

169. Release by deceased in his lifetime.*—Proof that the injured party has during his lifetime received payment by way of settlement for the injury will defeat an action under the New York Act of 1847 to recover for his death. *Dibble v. New York & E. R. Co.*, 25 *Barb. (N. Y.)* 183. —CRITICISED AND NOT FOLLOWED IN *Schlichting v. Wintgen*, 25 *Hun (N. Y.)* 626.

The employé of a company having received injuries through its alleged negligence, released the company, for value, from all liability on account of such injuries, and afterwards died. *Held*, that his administratrix suing for the use of the widow and

child of the intestate could not maintain an action for the damages resulting to them from his death, as, under the statute, such action can be maintained only where the party injured could have maintained such action if death had not ensued; and this the deceased could not have done, because his release debarred him. And the trial judge erred in refusing to admit this release in evidence against the administratrix. *Price v. Richmond & D. R. Co.*, 33 *So. Car.* 556, 12 *S. E. Rep.* 413.

170. Release by husband of woman killed.*—A release given by the husband to a corporation by whose wrongful act or omission the wife was killed is no bar or defense to an action brought by her representative to recover damages. *South & N. Ala. R. Co. v. Sullivan*, 59 *Ala.* 272.

171. — by father of minor child killed.—Where a statute gives a right of action for negligently killing a minor child, for the benefit of the father alone, a release by the father is a bar to the action, though it be prosecuted by the personal representative. *Stuebing v. Marshall*, 10 *Daly (N. Y.)* 406, 2 *Civ. Pro.* 77.

172. Switch misplaced by stranger.—Plaintiff sued for the killing of his intestate while a passenger on defendant's road. The evidence showed that the accident was caused by some one, not connected with the road, misplacing a switch at night, just before the arrival of the train, but failed to show any negligence on the part of the company in the management of its road or in the running of the train. *Held*, that a nonsuit was properly allowed. *Keeley v. Erie R. Co.*, 47 *How. Pr. (N. Y.)* 256.—DISTINGUISHING *Edgerton v. New York & H. R. Co.*, 39 *N. Y.* 229.

173. Violation of rules by passenger killed.—Under Mo. St. of 1855, 438, § 54, a company is not liable for injuries to passengers received while violating printed regulations of the company posted up in its cars. So where a passenger is killed while riding in a baggage car, evidence that a regulation prohibiting such riding was printed and posted is admissible. *Higgins v. Hannibal & St. J. R. Co.*, 36 *Mo.* 418.—DISTINGUISHING *Carroll v. New York & N. H. R. Co.*, 1 *Duer (N. Y.)* 571.

* Release of right of action by injured party prior to death, see 48 *AM. & ENG. R. CAS.* 15, *abstr.*

* Power to compromise action for death, see note, 21 *L. R. A.* 158.

Power of widow to compromise cause of action, see 54 *AM. & ENG. R. CAS.* 73, *abstr.*

2. Contributory Negligence.

a. When a Defense, Generally.

174. The general rule.—To sustain an action for causing death it must appear that the negligence of defendants alone caused the injury. If the negligence of the deceased contributed thereto, the action cannot be maintained. *McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144. *Rowland v. Cannon*, 35 Ga. 105. *Seats v. Georgia Midland & G. R. Co.*, 86 Ga. 811, 13 S. E. Rep. 88. *Chicago & A. R. Co. v. Fietsam*, 123 Ill. 518, 15 N. E. Rep. 169, 12 West. Rep. 844; affirming 24 Ill. App. 210. *Northern C. R. Co. v. State*, 29 Md. 420. *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476.—NOT FOLLOWED IN *Hudson v. Wabash Western R. Co.*, 101 Mo. 13.—*Blaker v. New Jersey Midland R. Co.*, 30 N. J. Eq. 240, 18 Am. Ry. Rep. 81. *Matthews v. Pennsylvania R. Co.*, 148 Pa. St. 491, 24 Atl. Rep. 67. *Galveston, H. & S. A. R. Co. v. Bracken*, 14 Am. & Eng. R. Cas. 691, 59 Tex. 71. *Rozwadowskie v. International & G. N. R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. Rep. 872. *Norfolk & W. R. Co. v. Carper*, 88 Va. 556, 14 S. E. Rep. 328.

The test of the plaintiff's right to recover is the exercise by the deceased of ordinary care, or such care as a prudent and ordinarily cautious man would observe for his personal safety, and the failure of the railway company to exercise proper care, and injury therefrom causing the death. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197.

A person is bound to use the senses and exercise the reasoning faculties with which nature has endowed him; and if he fail to do so, and is injured in consequence, neither he in life, nor his representatives after his death, can recover for resulting injuries. *Stewart v. Pennsylvania Co.*, 130 Ind. 242, 29 N. E. Rep. 916.

Where the undisputed evidence showed that the negligence of the deceased contributed directly to produce his death, and that it was not possible after he placed himself in danger to prevent the accident, the railroad company is not liable. *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22.

And the jury may be properly told, as matter of law, that the plaintiff cannot recover. *Creamer v. West End St. R. Co.*, 52

Am. & Eng. R. Cas. 558, 156 Mass. 320, 31 N. E. Rep. 391, 16 L. R. A. 490.

Where material defensive facts are disclosed by the testimony adduced on the part of the plaintiff, and the evidence thus adduced by the plaintiff clearly establishes the fact of contributory negligence on the part of the person killed or injured, there is nothing to be left to the jury to find. *State v. Baltimore & P. R. Co.*, 15 Am. & Eng. R. Cas. 409, 58 Md. 482.—REVIEWING *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1166.—DISTINGUISHED IN *State v. Union R. Co.*, 42 Am. & Eng. R. Cas. 167, 70 Md. 69.

If deceased was guilty of negligence that was the proximate cause of his death, the company is not liable unless, after discovering the injured party's negligence, it failed to use proper care to avoid the consequence of such negligence. *Virginia Midland R. Co. v. Barksdale*, 82 Va. 330. *Jones v. Louisville & N. R. Co.*, 82 Ky. 610.

If the deceased's own negligence and want of ordinary care contributed to his death, the company was not liable, although guilty of negligence, unless that negligence was so gross as to imply a willingness to inflict the injury. *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120.—DISTINGUISHED IN *Lehey v. Hudson River R. Co.*, 4 Robt. (N. Y.) 204.—*Rome R. Co. v. Barnett*, 89 Ga. 718, 15 S. E. Rep. 639.

The want of such care as very prudent men take of their own concerns does not constitute such gross negligence as would render the company liable if deceased, by his own negligence, contributed to his death; while the exercise of such care would render the company excusable, although deceased was also without fault. *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120.

Where there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided the injury, and did not, he is the author of his own injury and cannot recover. *Carter v. Columbia & G. R. Co.*, 15 Am. & Eng. R. Cas. 414, 19 So. Car. 20, 45 Am. Rep. 754. *Southwestern R. Co. v. Johnson*, 60 Ga. 667.—QUOTED IN *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427. REVIEWED IN *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604.—*Berry v. Northeastern R. Co.*, 28 Am. & Eng. R. Cas. 575, 72 Ga. 137. *Central R. Co. v. Thompson*, 76 Ga. 770. *Dowdy v.*

Georgia R. Co., 88 Ga. 726, 16 S. E. Rep. 62.
Rome R. Co. v. Barnett, 89 Ga. 718, 15 S. E. Rep. 639.
Chattanooga, R. & C. R. Co. v. Whitehead, 90 Ga. 47, 15 S. E. Rep. 629.
Murray v. Pontchartrain R. Co., 31 La. Ann. 490.

In an action under Ga. Code, § 2971, by a widow for the homicide of her husband, any negligence on the part of the deceased which would have been a defense to an action brought by him had he lived, will defeat an action brought to recover for his death. *Berry v. Northeastern R. Co.*, 28 Am. & Eng. R. Cas. 575, 72 Ga. 137.

The mere shifting of the burden of proving contributory negligence on the part of the deceased, upon the defendant, does not lessen or affect the materiality of a failure by deceased to use reasonable care for her own safety, under all the circumstances of the case. *Cleveland, C., C. & St. L. R. Co. v. Doerr*, 41 Ill. App. 530.—QUOTING *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132.

Where an action is brought under the statute to recover damages for the benefit of the next of kin of the deceased, and the plaintiff's testimony shows that the negligence of the deceased contributed directly to the injuries resulting in the death of the deceased, the plaintiff has failed to make out a *prima facie* right of recovery, and a demurrer interposed to the evidence should be sustained. *Dewald v. Kansas City, Ft. S. & G. R. Co.*, 47 Am. & Eng. R. Cas. 557, 44 Kan. 586, 24 Pac. Rep. 1101.

The fact that a person killed upon a railroad track was rendered mentally incapable of saving himself by the appalling situation in which he was placed will not relieve him from the imputation of contributory negligence, unless such mental condition was brought about by some fault on the part of the railroad company. *Houston v. Vicksburg, S. & P. R. Co.*, 34 Am. & Eng. R. Cas. 76, 39 La. Ann. 796, 2 So. Rep. 562.

The plaintiff must show that neither the party injured, nor the parties for whose use the action was brought, had contributed by neglect or want of care to the calamity complained of. *State v. Baltimore & O. R. Co.*, 24 Md. 84.—APPROVING *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 257; *Keech v. Baltimore & W. R. Co.*, 17 Md. 46.—RECONCILED IN *Baltimore & O. R. Co. v. State*, 30 Md. 47.

Where a wife sues for the death of her husband, if plaintiff's evidence shows that

deceased did not exercise ordinary diligence to avoid the consequence of the company's negligence, a nonsuit is proper. *White v. Central R. & B. Co.*, 83 Ga. 595, 10 S. E. Rep. 273.

It is error to instruct the jury that plaintiff may recover if the deceased was guilty of slight negligence and the defendant guilty of gross negligence. Contributory negligence, however slight, will prevent a recovery, if it is the proximate cause of the injury. *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372.—MODIFIED IN *Ward v. Milwaukee & St. P. R. Co.*, 29 Wis. 144.

Where no evidence was introduced showing that the deceased exercised ordinary care, and the circumstances made it affirmatively appear that he did not exercise such care—held, that the court was justified in directing a verdict for defendant. *Starry v. Dubuque & S. W. R. Co.*, 51 Iowa 419.—FOLLOWED IN *Youll v. Sioux City & P. R. Co.*, 21 Am. & Eng. R. Cas. 589, 66 Iowa 346; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624.

175. What amounts to contributory negligence, generally.—A complaint which showed that the deceased, in company with others, was voluntarily riding upon a hand-car on the track of the defendant, in the night-time, and thus collided with a locomotive and train of the defendant, is bad, because contributory negligence is shown on the part of the deceased. *Ream v. Pittsburgh, Ft. W. & C. R. Co.*, 49 Ind. 93.

It appeared that deceased was a lumber shed fronting on a spur track of defendant, and that while a flat car was being sent down this track deceased called to the brakeman in charge not to let it move a box car on the track in front of the shed; that the brakeman requested him to throw something under the flat car to stop it; and that while so doing he stepped on the main track in front of the tender of the engine, which was backing up, and was killed. It appeared that deceased knew the mode of switching, and that the engineer usually rang the bell when backing the engine, but did not do so on this occasion. Held, that deceased was guilty of contributory negligence. *St. Louis, I. M. & S. R. Co. v. Ross*, 56 Ark. 271, 19 S. W. Rep. 837.

Defendant's coal pier had, as usual, uncovered chutes through which coal was dumped from cars into vessels. These were

dangerous traps; but safe walkways were provided, and at night the pier was lighted by electricity. Plaintiff's intestate, the engineer of a steamship lying ready to take on coal, was acquainted with such piers, and was warned of the uncovered chutes and told to wait for a guide before going ashore. Nevertheless, he proceeded at night alone across the pier, and falling into a chute, was killed. *Held*, that his own negligence was the proximate cause of the accident. *Stewart v. Newport News & M. V. Co.*, 86 Va. 988, 11 S. E. Rep. 885.

Deceased was employed in a brickyard, for the accommodation of which a spur track had been constructed. When wood was required for the kilns laborers from the brickyard would uncouple a car and would, by hand, push it down grade to the desired point on the spur track opposite the kilns. It was well known to the switch crew employed at this point that this was the custom of the brickyard hands. Whilst the deceased was engaged in pushing a car of wood along the spur track, the switch crew backed down a number of other cars until they struck the car which the deceased was pushing, in such a manner that he was caught and crushed so seriously as to cause his death. Previously to approaching the wood car the locomotive had backed down and placed it upon a side track. The evidence showed that it had usually been regarded that the brickyard employes might safely approach and work about the cars after the locomotive had pushed them down and had withdrawn. *Held*, that the deceased was not guilty of contributory negligence and that the plaintiff was entitled to recover on account of the negligence of the switch crew in moving the cars down without taking precautions to guard against injuries to those pushing the car of wood. *Illis v. Chicago, M. & St. P. R. Co.*, 37 Am. & Eng. R. Cas. 299, 40 Minn. 273, 41 N. W. Rep. 1040.

176. Error of judgment in moment of great peril.—Where the deceased is placed in a sudden and perilous exigency, the question is not whether he did the wisest thing possible under the circumstances, but whether he exercised ordinary care and prudence. *Remer v. Long Island R. Co.*, 15 N. Y. S. R. 884.—QUOTED IN *Atwater v. Veteran*, 26 N. Y. S. R. 945.

The natural instinct of self-preservation may be considered by the jury, and in the absence of all testimony upon the subject,

they may find that the deceased, in obedience to the ordinary instincts of mankind, exercised that care for his safety which a prudent man would, under the same conditions, have made use of. *Illinois C. R. Co. v. Nowicki*, 46 Ill. App. 566.

The jury may, in determining what was due diligence, or the want of it, consider the fact, if established, that deceased was panic-stricken and his energies paralyzed by the awful nature of the sudden catastrophe, being overwhelmed by a stream of molten iron in the ditch in which he was working. *Holland v. Tennessee C., I. & R. Co.*, 91 Ala. 444, 8 So. Rep. 524.

The failure of deceased to be cool and collected, and to act with perfect prudence and in the exercise of a deliberate judgment in the presence of an unexpected and deadly danger—to take unusual care—constitutes no defense. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

Plaintiff's intestate was riding on a street-car, and when approaching the track of a steam railroad a train was seen approaching and a collision seemed unavoidable. The intestate jumped from the car and was killed. If he had remained in his seat he would not have been injured. There was negligence on the part of the driver in not observing the approach of the train. *Held*, that the intestate was not required to exercise any better judgment or greater care than would be required of a prudent person under the same condition of peril, and his mistaken judgment would not relieve the company of liability. *Cuyler v. Decker*, 20 Hun (N. Y.) 173.

177. Risking one's life to save another's.—It is not contributory negligence in a person to risk his life, or place himself in a position of great danger, in an effort to save the life of another, or to rescue another from a sudden peril or great bodily harm. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons. *Peyton v. Texas & P. R. Co.*, 41 Am. & Eng. R. Cas. 550, 41 La. Ann. 861, 6 So. Rep. 690.—APPROVING *Eckert v. Long Island R. Co.*, 43 N. Y. 503.

Plaintiff's intestate, seeing a little child on the track and a train swiftly approaching, rushed upon the track and succeeded in saving the child, but was himself killed.

Held, that his thus voluntarily exposing himself to danger was not, as matter of law, negligence so as to entitle defendants to a nonsuit. A person voluntarily placing himself, for the protection of property merely, in a position of danger, is negligent; but it is otherwise when it is for the purpose of saving human life. *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *affirming* 57 Barb. 555.—APPROVED IN *Condiff v. Kansas City, Ft. S. & G. R. Co.*, 45 Kan. 256; *Peyton v. Texas & P. R. Co.*, 41 Am. & Eng. R. Cas. 550, 41 La. Ann. 861, 6 So. Rep. 690; *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594. DISAPPROVED IN *Anderson v. Northern R. Co.*, 25 U. C. C. P. 301. FOLLOWED IN *Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y. 22, 21 N. E. Rep. 696, 23 N. Y. S. R. 554; *Gibney v. State*, 137 N. Y. 1; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316. REVIEWED IN *Cassida v. Oregon R. & N. Co.*, 14 Oreg. 551.

A railroad company erected a wharf and laid three tracks thereon, so distanced that it was difficult to distinguish between the tracks and the spaces between them. The wharf was the only means of access to vessels. A woman was going over the wharf to a vessel, and in passing around some men, stepped on a track immediately in front of a moving train. One of the men sprang forward and pushed her off, but was himself killed. There was no lookout man on the train, and the evidence was contradictory as to whether the train was going more than six miles an hour, or whether the bell was rung or the whistle sounded. It was clear that the woman would have been killed had she not been pushed off. *Held*, that the man's own act amounted to contributory negligence, however praiseworthy, and there could be no recovery for his death. *Anderson v. Northern R. Co.*, 25 U. C. C. P. 301.—DISAPPROVING *Eckert v. Long Island R. Co.*, 43 N. Y. 502.—DISTINGUISHED IN *Conneff v. Prescott*, 20 Ont. App. 49. LIMITED IN *Carty v. London*, 18 Ont. 122.

178. When not a bar to action, generally.—The failure of the person killed to use great care and caution to avoid danger affords no excuse to the corporation if the death resulted from the negligence of its servants or agents; but if he failed to use that degree of care which may be reasonably expected from one in like situation,

and by such failure proximately co-operated in causing the death, no recovery can be had, unless the servants of the corporation might, by the exercise of ordinary care, nevertheless have prevented the injury. This rule is subject to modification only in cases of wilful neglect. *Jacob v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263. *Beems v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. Cas. 222, 10 Am. & Eng. R. Cas. 658, 58 Iowa 150, 12 N. W. Rep. 222. *Scoville v. Hannibal & St. J. R. Co.*, 22 Am. & Eng. R. Cas. 534, 81 Mo. 434.—QUOTING *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 482; *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22.—FOLLOWED IN *Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678.

Where a switchman is killed by coming in contact with a car on a siding too near the main track, while riding on a ladder at the side of a freight car, contributory negligence is unavailing as a defense, if it appears that the one in charge of the train knew of the position of the car and might have avoided the accident. *Louisville & N. R. Co. v. Earl*, (Ky.) 22 S. W. Rep. 607.

Although a party injured, and who subsequently died, may have incautiously gotten upon the track of the railroad, yet if he could not at the time of the collision, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, assuming that there was such, the right to recover exists. *Northern C. R. Co. v. State*, 29 Md. 420.

That an injured party does not adopt the best remedies, or follow implicitly the directions of his physician, will not excuse a wrongful injury which produces as its direct effect a disease from which death ensues. The law fixes no exact standard here, and it should be left to the jury as to the reasonableness of his conduct, and whether or not the death was caused by the injury. *Texas & St. L. R. Co. v. Orr*, 46 Ark. 182.

In an action under the Ohio Act of March 25, 1851 (S. & C. 1139), by the personal representative, for damages resulting from the death of his intestate, caused by the wrongful act or neglect of the defendant, it is not competent for the defendant, in order to defeat the action, to prove that some of the next of kin of the intestate for whose benefit the action is prosecuted, were guilty of negligence which contributed to the injury that resulted in the death.

Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 631, 7 Am. Ry. Rep. 172.

It is no defense to an action of tort against a railroad corporation, under Mass. Pub. St. ch. 112, § 212, for causing the death of a passenger, that the passenger was not in the exercise of due care. *Merrill v. Eastern R. Co.*, 139 Mass. 252, 29 N. E. Rep. 666. — FOLLOWING Commonwealth v. Boston & L. R. Corp., 134 Mass. 211.

The defendants cannot rely upon the contributory negligence of the deceased as a bar to the action, unless they show that they were observing not only all the precautions prescribed by the statute, but also employed all necessary and proper means to make those precautions effective: e. g., the engine of the plaintiff in error was run during a dark night without a headlight, and ran over and killed the intestate of the defendant in error, who was negligently lying across the track. *Held*, the plaintiff in error cannot rely on the negligence in bar. *Nashville & C. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174.

179. Plaintiff's negligence must be proximate cause of injury.— Unless the acts of a person killed by cars were the direct and proximate cause of the disaster, the company will not be exonerated from liability on the ground of contributory negligence. *Kennayde v. Pacific R. Co.*, 45 Mo. 255. *Meyer v. People's R. Co.*, 43 Mo. 523.

An action for the use of the widow and children is maintainable if it appear that the company's negligence was the proximate and immediate cause of the injury, notwithstanding the deceased may have been guilty of a want of ordinary care and prudence, tending in a remote degree to cause the injury which resulted in his death. *Baltimore & O. R. Co. v. State*, 36 Md. 366.

180. Defendant liable for wilful negligence notwithstanding plaintiff was also negligent.— The defense that the deceased was guilty of contributory negligence is not available in a case where the death resulted from the wilful negligence of the defendant. *Schoolcraft v. Louisville & N. R. Co.*, 48 Am. & Eng. R. Cas. 1, 92 Ky. 233, 17 S. W. Rep. 567. *Louisville & N. R. Co. v. Ritter*, 28 Am. & Eng. R. Cas. 167, 85 Ky. 368, 3 S. W. Rep. 591. *Eskridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580.

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But where the plaintiff sues for an injury resulting from defendant's ordinary or gross neglect, he cannot recover if there was such negligence upon his part that but for it the injury would not have happened. *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. Rep. 665.

Although the deceased may have acted negligently in riding on some one of the cars instead of another deemed less dangerous, or might, notwithstanding the wreck of the train, have effected his escape by the use of ordinary diligence, yet if the disaster resulted from a wilful neglect of duty on the part of other agents of the defendant, who controlled the running operations of the train, and it might have been prevented or avoided by them by the use of ordinary prudence and care in the discharge of their duty, the company was not exonerated from responsibility. *Louisville, C. & L. R. Co. v. Mahony*, 7 Bush (Ky.) 235.—DISTINGUISHED IN *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160. FOLLOWED IN *Claxton v. Lexington & B. S. R. Co.*, 13 Bush 636.

181. When contributory negligence only goes in mitigation of damages.—The contributory negligence of the deceased may be shown in mitigation of the damages. *Nashville & C. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174.—APPROVED IN *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428. Compare also *Matthews v. Warner*, 29 Gratt. (Va.) 570.

Where it appears that defendant was negligent in running its passenger train at a high rate of speed within a city and over public crossings, and in not checking its speed so as to stop in time should any person or thing be crossing the track, the company may defend by showing that the injury was done with the consent of deceased, or that he could have avoided it by the exercise of ordinary care, or (in mitigation of damages) that he contributed to it. *Atlanta & W. P. R. Co. v. Newton*, 45 Am. & Eng. R. Cas. 211, 85 Ga. 517, 11 S. E. Rep. 776.—QUOTED IN *Richmond & D. R. Co. v. Johnston*, 89 Ga. 560.

Plaintiff's intestate was an employé of the defendant company, and was in charge of a train which at the time of the killing was being run on the track of another company. The injury resulted either from a defect in the track or in the trucks used,

or both. *Held*, that he was a passenger as to the company owning the track, and if the injury was caused solely by a defect therein, and he was not negligent and could not have avoided the injury by the exercise of ordinary care, his widow was entitled to recover the full damages she had sustained; but if he was negligent, but could not by the exercise of ordinary care have avoided the injury caused by defendant's negligence, then the damages should be reduced as in cases of contributory negligence. *Killian v. Augusta & K. R. Co.*, 79 Ga. 234, 4 S. E. Rep. 165.

b. Of Passengers.

182. While waiting for train.—

Where a passenger, about to take a train, walked in daylight in dangerous proximity to the railroad track, without looking or listening for the approach of the train for which he was waiting, and finally stepped partly upon the track, in which position he was struck and killed by the approaching engine, he was guilty of contributory negligence, and in an action by his administratrix for his death thereby caused, the plaintiff is properly nonsuited; and the fact that the engineer only rang the bell, and did not sound the alarm whistle, is immaterial in view of the negligent conduct of the deceased. *Holmes v. South Pac. C. R. Co.*, 97 Cal. 161, 31 Pac. Rep. 834.

The deceased, a passenger walking in the station yard to take a coming train, was not bound to look on both sides; she had the right to assume that some warning would be given of engines running through the station, still she had no right to shut her eyes. She must, as the saying is, keep her wits about her. *Pinco v. New York C. & H. R. R. Co.*, 34 Hun N. Y. 80; *affirmed* (P) 99 N. Y. 644, *mem.*

A passenger waiting at a station for a train, who crosses the track when the train is only about twenty yards distant in order to reach a platform on the other side, from which the train started, and is struck and killed, is guilty of such contributory negligence that no recovery can be had for his death although no warning was given of the approach of the train. *Wright v. Midland R. Co.*, 51 L. T. 539.

183. In boarding train.—There can be no recovery against a railroad company for the death of a person who attempts to get on the cars at a station after they have

been put in motion. *Knight v. Pontchartrain R. Co.*, 23 La. Ann. 462.—**FOLLOWED** IN *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 36 Fed. Rep. 879; *Johnson v. Canal & C. R. Co.*, 27 La. Ann. 53.

Plaintiff's intestate on a dark night went to a station for the purpose of taking passage on a train, and as it approached, signaled it to stop. The train overshot the station some two hundred or three hundred feet, but was backed up to it. Upon reaching the station no one was seen, and it was again started. Next morning the intestate's body was found some four hundred feet beyond the station. There was no direct evidence as to how he was killed, but the circumstances indicated that he had walked past the station and attempted to get on the train after it had passed the station the second time, and fell between the cars. None of the train employes saw him after he signaled. *Held*, not sufficient to sustain a verdict in favor of the plaintiff. *Chicago & A. R. Co. v. Mock*, 88 Ill. 87, 21 Am. Ky. Rep. 287.

In an action for the death of H., it appeared that H., a healthy, active man thirty-six years old, who had for several years resided in sight of one of defendant's stations, at which he had frequently boarded trains, went to the depot to take a train; he stood upon the freight platform until the train came in sight; he then descended some steps to the passenger platform and stood three or four feet from the steps waiting for the train, which slowed up but did not stop. As the passenger car approached, moving at the rate of from one to two miles an hour, the conductor, who was standing on the forward end, said, "If you are going, jump on." H. attempted to do so, but was caught and crushed between the moving train and the freight platform. *Held* (Ruger, C. J., Andrews and O'Brien, JJ., dissenting), that H. was guilty of contributory negligence, and the submission of that question to the jury was error. *Hunter v. Cooperstown & S. V. R. Co.*, 47 Am. & Eng. R. Cas. 534, 126 N. Y. 18; *former appeal*, 112 N. Y. 371, 26 N. E. Rep. 958, 36 N. Y. S. R. 367; *reversing* 58 Hun 606, 34 N. Y. S. R. 1016, 13 N. Y. Supp. 953.—**DISTINGUISHING** *Filer v. New York C. R. Co.*, 49 N. Y. 47.

While a train stood in front of a passenger platform, the deceased approached from the opposite side, without the knowledge of defendant's employes, got upon a car, found

the car door locked, got off on the side from which he approached it, and undertook to walk between the tracks to the end of the train, without looking behind him, and was killed by a working train. *Held*, that the negligence of the intestate contributed to the injury. *Elwood v. New York C. & H. R. R. Co.*, 4 *Hun* (N. Y.) 808.

The fact that the working train did not give the signal required by statute on crossing a street before reaching the depot was not an act of negligence toward the intestate, who was not on the street or where he had any business to be. *Elwood v. New York C. & H. R. R. Co.*, 4 *Hun* (N. Y.) 808.—DISTINGUISHED IN *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 *Am. & Eng. R. Cas.* 16, 62 *Wis.* 178, 51 *Am. Rep.* 712.

Plaintiff's intestate ran across a track in front of one train in an attempt to board another which was moving slowly in the opposite direction, but finding he was too late, stood between the tracks and was crushed between the cars of the two trains. The collision occurred by reason of the rear car of one train being off the track and thus coming nearer the other train than it otherwise would. *Held*, that the question of his contributory negligence in standing between the tracks was for the jury. *Hives v. Brooklyn City R. Co.*, 5 *N. Y. S. R.* 877.

Defendant company operated a single-track dummy line, with sidings or turn-outs at points along the road to allow trains to pass. Plaintiff's testator signaled a train to stop, but it proceeded a short distance and stopped on one of the sidings. In passing diagonally toward the train over the track, he was struck and killed by another train. There was nothing to have prevented his seeing the train if he had looked. *Held*, that his contributory negligence would defeat a recovery. *Enk v. Brooklyn City R. Co.*, 45 *N. Y. S. R.* 627, 64 *Hun* 634, 19 *N. Y. Supp.* 130.

184. Riding in place of danger.—In an action against a carrier, under the statute for the better security of life, etc. (1 *R. C.* 647), if the deceased was killed by reason of his voluntarily taking an improper or dangerous position by which he lost his life, the carrier is not liable. *Huelsenkamp v. Citizens' R. Co.*, 34 *Mo.* 45.

In determining whether the deceased was negligent in occupying a place of danger, the jury may consider not only the acts of the deceased, but also the acts of the ser-

vants of the company, not alone in respect to the management of the engine, but as connected with the act of the deceased. Placing the passenger in a place of unnecessary hazard, or giving him assurance of safety, and thereby throwing him off his guard, may render his apparent want of care the negligence of the carrier, and relieve his act of the quality of negligence. *Lake Shore & M. S. R. Co. v. Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.—DISTINGUISHED IN *Ohio & M. R. Co. v. Allender*, 47 *Ill. App.* 484.

One of a large funeral party who took passage upon a train was standing upon the steps of a platform of one of the cars, holding on to the railing, when the conductor came along, collecting the fare. The passenger, in attempting to regain change blown from his hand in paying fare, fell under the cars and was killed. The cars were quite full, but there was standing room in all of them. *Held*, it was the negligence of the deceased, not that of the company, which caused his death, and there could be no recovery. *Quinn v. Illinois C. R. Co.*, 51 *Ill.* 495.—DISTINGUISHING *Colegrove v. New York & N. H. R. Co.*, 20 *N. Y.* 492; *Willis v. Long Island R. Co.*, 32 *Barb.* 399, 34 *N. Y.* 681.—APPROVED IN *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403. DISTINGUISHED IN *Chicago & A. R. Co. v. Fisher*, 141 *Ill.* 614. QUOTED IN *Chicago & N. W. R. Co. v. Rielly*, 40 *Ill. App.* 616.

185. Riding in baggage or freight car.—Where the evidence shows the existence of a rule excluding passengers from freight trains, and that the conductor had no authority to relax the rule, and that the party injured was acquainted with the regulations of the company, it cannot be presumed that the company had contracted to carry such injured party as a passenger; and no action can be maintained for the injury resulting in his death, caused by the wreck of the freight train. *Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31.—QUESTIONING *Dunn v. Grand Trunk R. Co.*, 58 *Me.* 187.—DISTINGUISHED IN *Robostelli v. New York, N. H. & H. R. Co.*, 34 *Am. & Eng. R. Cas.* 515, 33 *Fed. Rep.* 796.

Plaintiff's intestate was a member of a theatrical company, but traveled on a regular ticket. The train was made up of a show-car, a baggage car, a smoking-car, a sleeper, and two passenger coaches. The

show-car did not belong to the company, but was fitted up with sleeping bunks. The intestate went to bed in one of these, and against the remonstrances of the conductor, who told him it was against the rules, insisted on sleeping there, as he could remain in it until morning and otherwise would have to leave one of the other cars before the usual time for rising in the morning. The show-car was weak in its construction, and, on account of the heavy articles carried and its position in the train, was not a safe place to ride. *Held*, that there was such contributory negligence for riding thus as to defeat a recovery for his death. *Blake v. Burlington, C. R. & N. R. Co.*, 39 *Am. & Eng. R. Cas.* 405, 78 *Iowa* 57, 42 *N. W. Rep.* 580.

186. In passing from one car to another.—A passenger has a right to pass from an ordinary coach into a smoking-car, and in doing so only assumes the visible risks and not the risks of defective couplings; and if he falls between the cars and is killed by reason of a defective coupling he is not chargeable with contributory negligence. *Costikyan v. Rome, W. & O. R. Co.*, 35 *N. Y. S. R.* 163, 12 *N. Y. Supp.* 683, 58 *Hun* 590; *affirmed in* 128 *N. Y.* 633, *mem.*, 40 *N. Y. S. R.* 977. — *REVIEWING* *Goodrich v. New York C. & H. R. R. Co.*, 116 *N. Y.* 398, 26 *N. Y. S. R.* 767.

A train officer ordered plaintiff's intestate, a female passenger, on a dark night, to pass forward into another car, and in attempting to do so she fell between the cars and was killed. *Held*, not such contributory negligence as to justify withdrawing the case from the jury. *McIntyre v. New York C. R. Co.*, 43 *Barb. (N. Y.)* 532. — *REVIEWED IN* *Mowrey v. Central City R. Co.*, 66 *Barb.* 43.

187. Endeavoring to escape impending collision.—Plaintiff's intestate had taken his seat as a passenger in a car in the rear of the train, which had been put in place to receive passengers; and while he was seated waiting for it to proceed another train approached from the rear at a great speed. He realized the danger and attempted to escape, but was killed on the platform. Other passengers got off the car and were uninjured. One who remained in the car was not killed. *Held*, that there was no evidence to establish contributory negligence on the part of intestate. *St. Louis, I. M. & S. R. Co. v. Maddy*, 57 *Ark.* 306, 21 *S. W. Rep.* 472.

188. In alighting from train.—Where a passenger, without looking or listening for approaching trains, leaves his train voluntarily before it is stopped at its station and before it is time for the train to stop, and the train is running at the rate of six miles an hour when he gets off, and he is then run against by a tender and engine following his train on a parallel track, and receives injuries resulting in his death, the passenger contributes directly to the injuries causing his death. *Dewald v. Kansas City, Ft. S. & G. R. Co.*, 47 *Am. & Eng. R. Cas.* 557, 44 *Kan.* 586, 24 *Pac. Rep.* 1101.

Where a passenger failed to leave a train until it was in motion, in the absence of any mismanagement of the train this was such contributory negligence as exonerated the company from liability for his death. *Illinois C. R. Co. v. Slatton*, 54 *Ill.* 133. — *QUOTED IN* *Chicago & N. W. R. Co. v. Scates*, 90 *Ill.* 586.

As a train approached a station where plaintiff's intestate would leave, he went on the car platform before the station had been called, and while the train was some 900 feet away and running 40 miles an hour. It was daylight, at a place where the intestate was familiar; and while standing there he was thrown down by the oscillating of the train and killed. *Held*, that it was negligence in him to thus get on the car platform. *Herdman v. New York, L. E. & W. R. Co.*, 42 *N. Y. S. R.* 293, 62 *Hun* 621, 17 *N. Y. Supp.* 198.

Defendant's road crossed a bridge just before reaching the crossing of the track of another company. Before reaching said track the train was stopped, as required by law, which left the car in which plaintiff's intestate was over the bridge. It was dark, and the intestate, thinking that he was at the station some half a mile ahead, stepped off and fell through the bridge and was drowned. *Held*, that his death was caused by his own negligence. *Davis v. Lehigh Valley R. Co.*, 46 *N. Y. S. R.* 735, 19 *N. Y. Supp.* 516, 64 *Hun* 492.

A train on which plaintiff's intestate rode arrived at a station only a minute or two before an express train going in the opposite direction was due. His train pulled in on the east track next to the platform, but he got off on the west side where it would be necessary to cross the adjoining track on which the express would pass. In doing so he was either struck by the express or, in

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stepping back from it, fell under the wheels of the other train and was killed. It appeared that no bell was rung or whistle sounded on the approaching express. *Held*, that getting off the train on the west side was not negligence *per se*, and inasmuch as no signals had been given he was not negligent in assuming that the express train would not arrive until he had time to get across the track. *Gonzales v. New York & H. R. Co.*, 39 *How. Pr. (N. Y.)* 407.—QUOTING *Keller v. New York C. R. Co.*, 24 *How. Pr.* 177.

In such case, at a subsequent trial, it appeared that the vision of the deceased was imperfect, but that he could see from 90 to 100 feet, and that his hearing was good, and that he was warned by another passenger that the west side was a dangerous place to get off. *Held*, that the court should have directed a verdict for the defendant, though it was negligent in the manner of running the express train. *Gonzales v. New York & H. R. Co.*, 50 *How. Pr. (N. Y.)* 126.—REVIEWING *Harty v. Central R. Co.*, 42 N. Y. 468; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177.

189. In leaving station after alighting from train.—Plaintiff's intestate got off a passenger train of defendant which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train standing on a side track, with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giving proper signals, just as he got between the cars. *Held*, the conduct of the deceased cannot be classed less than negligence, bordering on recklessness, and contributed proximately to his death, and his personal representative cannot recover, though defendant was negligent in not giving proper signals before its train started, the injury not having been inflicted wantonly or intentionally. *Memphis & C. R. Co. v. Copeland*, 61 *Ala.* 376.—APPROVING IN PART *Stillson v. Hannibal & St. J. R. Co.*, 7 *Cent. L. J.* 107.—QUOTED IN *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403.

As plaintiff's intestate was about to leave the train a conductor cautioned him as to the danger of crossing the track; but immediately on leaving the train he turned his

collar up, put a muffler over his ears, and, without looking or listening, went on the adjoining track and was killed by an engine going in the opposite direction. *Held*, that a nonsuit was properly granted. *Meserole v. Brooklyn City R. Co.*, 32 *N. Y. S. R.* 708, 10 *N. Y. Supp.* 813, 57 *Hun* 591.

Plaintiff's testator left a train at a suburban station, where the only exit was across private grounds or along the tracks. While walking along one track he stepped to another to avoid a train, and was struck by still another. *Held*, that the question of his contributory negligence was for the jury. *Ried v. New York, N. H. & H. R. Co.*, 44 *N. Y. S. R.* 688, 63 *Hun* 630, 17 *N. Y. Supp.* 801; *affirmed in* 136 *N. Y.* 638, *mem.*, 32 *N. E. Rep.* 1014, 49 *N. Y. S. R.* 913.—QUOTING *Hulbert v. New York C. R. Co.*, 40 *N. Y.* 145. REVIEWING *Hoffman v. New York C. & H. R. R. Co.*, 75 *N. Y.* 606.

Where a passenger alighted from a train on the platform, and was killed in attempting to cross the track in front of the engine on her way home, and the evidence was conflicting as to her conduct and also as to the management of the train, it was proper to submit the case to the jury. *Delaware, L. & W. R. Co. v. Jones*, 128 *Pa. St.* 308, 18 *Atl. Rep.* 330.

190. While out of train and proceeding towards station.—Plaintiff's testator got on a caboose to ride to a station, though it was not intended for passengers. He was familiar with the method of running trains and knew that the caboose would be left at a roundhouse about a quarter of a mile from the station. After leaving the caboose he proceeded to walk on the tracks toward the station, but while standing for a moment at the end of cars on a parallel track a train was backed down against the cars and propelled them against him, causing his death. *Held*, that the facts showed contributory negligence as a matter of law. *Van Schaick v. Hudson River R. Co.*, 43 *N. Y.* 527.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Smith*, 28 *Kan.* 541. FOLLOWED IN *O'Mara v. Delaware & H. Canal Co.*, 18 *Hun (N. Y.)* 192.

191. Blind or intoxicated passenger.—The fact that intestate was almost blind does not make him chargeable with contributory negligence in attempting to travel without an attendant, even if sight would have enabled him to escape injury; since his blindness was not the juridical cause

of his injury, but only a condition that made it possible. *St. Louis, I. M. & S. R. Co. v. Maddy*, 57 Ark. 306, 21 S. W. Rep. 472.

A passenger under the influence of liquor got out of a railroad car on a bridge at the end of a station platform when the train had stopped at the station. The bridge was planked over, and on the side on which the passenger got off, the side opposite the station platform, the space between the track on which the train was and the edge of the bridge was 14 feet. In this space was another track. The bridge had no railing, and the passenger fell into the creek beneath and was so injured that he died. In a suit for damages commenced by his widow and prosecuted by her administrator after her death, a nonsuit was entered. *Held*, not error. *Deselms v. Baltimore & O. R. Co.*, 149 Pa. St. 432, 24 Atl. Rep. 283.

c. Of Persons Crossing Track.

192. What amounts to contributory negligence.—(1) *Generally*.—Freedom from contributory negligence must be proved, and where the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a refusal to nonsuit is error. *Wiwrowski v. Lake Shore & M. S. R. Co.*, 124 N. Y. 420, 26 N. E. Rep. 1023, 36 N. Y. S. R. 405; *reversing* 58 Hun 40, 33 N. Y. S. R. 666, 11 N. Y. Supp. 361.

Where one approaches a track and the view is temporarily obstructed by escaping steam and smoke, he should wait until it blows away before attempting to cross the track; and if he fails to do so, and is killed, there can be no recovery; and especially is this so where the party is familiar with the crossing and knows the danger. *McCrary v. Chicago, M. & St. P. R. Co.*, 31 Fed. Rep. 531.—*QUOTED IN* *Flucher v. Fitchburg R. Co.*, 149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302.—*Heaney v. Long Island R. Co.*, 37 Am. & Eng. R. Cas. 529, 112 N. Y. 122, 19 N. E. Rep. 422, 20 N. Y. S. R. 296; *reversing* 9 N. Y. S. R. 707.—*APPLIED IN* *Hoffmann v. Fitchburg R. Co.*, 67 Hun 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463. *DISTINGUISHED IN* *Puff v. Lehigh Valley R. Co.*, 71 Hun 577; *Haywood v. New York C. & H. R. R. Co.*, 35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177. *FOLLOWED IN* *Foran v. New York C. & H.*

R. R. Co., 64 Hun 510, 46 N. Y. S. R. 423, 19 N. Y. Supp. 417; *Whalen v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 566.

Plaintiff's decedent was guilty of such negligence, in walking for 30 feet in plain view of an approaching train, and in attempting to cross defendant's track at a street crossing in front of the train, as to bar a recovery. *Graf v. Chicago & N. W. R. Co.*, 94 Mich. 579, 54 N. W. Rep. 388.

A husband cannot recover for the death of his wife, killed by a train at a crossing, where the evidence shows that the killing was the result either of his own carelessness in driving on the track in plain view of the approaching train, or his horse becoming unmanageable. *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329.—*QUOTED IN* *St. Lawrence & O. R. Co. v. Lett*, 11 Can. Sup. Ct. 422.

In an action for causing death by a moving train, there can be no recovery where it appears that the train was moving so slowly as to warrant the conclusion that the danger-signal was set; and if it was set, it was deceased's duty to see it, or seeing it, and failing to heed it, he was guilty of contributory negligence. *Burnham v. New York, P. & B. R. Co.*, 17 R. I. 544, 23 Atl. Rep. 638.

There can be no recovery for the death of one killed by a shunting engine in a railway yard on his way to the station before daylight, where the accident was due to the carelessness of the deceased and not to the negligence of the company's servants. *Jones v. Grand Trunk R. Co.*, 18 Can. Sup. Ct. 696; *affirming* 16 Ont. App. 37.

Where one attempts to cross a track while an approaching train is clearly visible, and the engine bell is ringing, and the guardian or gateman is warning him against the danger, there can be no recovery for his death. *Curran v. Grand Trunk R. Co.*, 5 Mont. Super. 251. See also to nearly same effect *Carney v. Chicago, St. P., M. & O. R. Co.*, 46 Minn. 220, 48 N. W. Rep. 912. *Aiken v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 571, 130 Pa. St. 380, 18 Atl. Rep. 619.—*DISTINGUISHED IN* *Schmidt v. Philadelphia & R. R. Co.*, 149 Pa. St. 357.—*Nicholson v. Erie R. Co.*, 41 N. Y. 525.—*DISTINGUISHING* *Driscoll v. Newark & R. L. & C. Co.*, 37 N. Y. 638.—*APPROVED IN* *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. Rep. 539, 5 N. Y. S. R. 722, 58 Am. Rep. 512. *DISTINGUISHED IN*

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(2) *Illustrations.*—It appeared from the plaintiff's evidence that the plaintiff's intestate, while crossing one of the defendant's tracks in the town of C., known as the "new house track," was run over by a flat car and a box car moving of their own momentum upon that track; that the deceased was familiar with the crossing, knew that no flagman was kept there, and knew that cars were liable to be moved upon that track at any time; that the evening was cloudy and there were engines fired up and emitting smoke in the vicinity, so that the view of approaching cars would be partially obscured, and that the deceased, though somewhat deaf, approached the track in question looking downward. *Held*, that the court should have directed a verdict for the defendant because of the contributory negligence of the deceased. *Tierney v. Chicago & N. W. R. Co.*, 84 Iowa 641, 51 N. W. Rep. 175.

Plaintiff's intestate was employed in a mill which stood only a few feet from defendant's track, and placed two bags of flour on his shoulder, completely obstruct-

ing his view of approaching trains in one direction; and upon stepping on the track was killed by a train running four miles an hour, and killed. *Held*, that there could be no recovery for his death. *Rothe v. Milwaukee & St. P. R. Co.*, 21 Wis. 256.—DISTINGUISHED IN Butler v. Milwaukee & St. P. R. Co., 28 Wis. 487; Gower v. Chicago, M. & St. P. R. Co., 45 Wis. 182; Duffy v. Chicago & N. W. R. Co., 32 Wis. 269. FOLLOWED IN Delaney v. Milwaukee & St. P. R. Co., 33 Wis. 67.

Plaintiff's intestate was killed while crossing a side track by cars being backed against him. It appeared that a train was being made up, and two cars were cut loose for the purpose of shunting them past the crossing. Plaintiff contended that the train was standing still, and therefore, deceased was justified in attempting to cross. It appeared that if the train had stopped, it was but momentary, and that the circumstances were such as to convince one that the cars were part of the train and liable to be moved at once. *Held*, that the facts showed that the intestate well knew the situation, and assumed the hazard of attempting to cross before the cars could be moved to the crossing. *Mehegan v. New York C. & H. R. R. Co.*, 46 N. Y. S. R. 497, 19 N. Y. Supp. 444.

Where W. drove his horses upon a railroad where it crossed a street, without giving any heed to the signal made, or to the track, until he came very near it, and then, seeing a train approach, he attempted to cross the track in front of the engine, whipping his horses for that purpose, which became restive and uncontrollable, and a collision ensued by which W. was killed—*held*, that no action would lie by his administratrix against the railroad company. *Wilds v. Hudson River R. Co.*, 29 N. Y. 315.—FOLLOWING *Spencer v. Utica & S. R. Co.*, 5 Barb. (N. Y.) 337; *Stevens v. Oswego & S. R. Co.*, 18 N. Y. 422.—QUOTED IN *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.

Plaintiff's intestate, who was familiar with the crossing, attempted to drive across the track at a trot, against the warnings of the flagman. There was no evidence tending to show that the view of approaching trains was obstructed. *Held*, not sufficient to establish due care, and no recovery could be had. *Mulligan v. New York C. & H. R. R. Co.*, 33 N. Y. S. R. 534, 58 Hun 602, 11 N. Y. Supp. 452.—REVIEW-

ING Colt v. Sixth Ave. R. Co., 49 N.Y. 671.
—REVIEWED IN Nolan v. New York C. & H. R. R. Co., 40 N. Y. S. R. 848.

For a considerable time before the accident the deceased had been engaged in driving a baggage express wagon to and from defendant's depot in a city. At the time of the accident he started from the baggage room and drove about a block along a track in the face of an incoming train, when he undertook to cross the track between the approaching train and a standing engine, though he might have remained in safety where he was. The evidence showed that there was nothing to have prevented his seeing the train a sufficient length of time to have avoided it. *Held*, that a complaint for his death was properly dismissed on the ground of contributory negligence. *Fitzpatrick v. New York, N. H. & H. R. Co.*, 16 J. & S. (N. Y.) 539.

193. What does not show contributory negligence.—Plaintiff's intestate was killed by an engine running 45 to 50 miles an hour, while attempting to drive across a track where the view was obstructed until the horse was almost on the track. The train approached without signals, and several witnesses testified that they could not hear its approach though they listened. *Held*, sufficient to justify a finding that the deceased exercised due care. *Skinner v. Prospect Park & C. I. R. Co.*, 51 N. Y. S. R. 554, 67 Hun 649, 22 N. Y. Supp. 30.

A train was cut in two and run through a populous village in two sections. When the engine and cars attached passed a certain street, the deceased stood at the head of his horse, which was hitched to a buggy, some 70 feet from the track. The horse became frightened, and in his effort to hold him the deceased was drawn upon the track and killed by the rear section. *Held*: (1) that he was chargeable with contributory negligence if he actually saw the cars approaching; (2) that it was for the jury to determine whether he was negligent in not seeing the rear section. *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 487, 5 Am. Ry. Rep. 454.—FOLLOWED IN *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67.

In such case the deceased had a right to prevent the escape of his horse, and the fact that the risk was increased by the conduct of the horse will not relieve the company from liability for its own negligence.

Butler v. Milwaukee & St. P. R. Co., 28 Wis. 487, 5 Am. Ry. Rep. 454.—DISTINGUISHING *Rothe v. Milwaukee & St. P. R. Co.*, 21 Wis. 256.

Plaintiff's intestate was last seen alive walking beside a switch track in defendant's yard, going eastward towards a street which crossed said yard from north to south. It was a cold and stormy day, and he had a shawl about his head and ears. His dead body was found on the switch track about fifteen feet east of a sidewalk which ran along the west side of said street. Blood was found on the east side of that sidewalk and thence along the track to the spot where the body was found. He had been struck and killed by cars which had passed him going westward and which had then been pushed upon said switch track and negligently left to run eastward unattended. Upon the evidence, showing the foregoing facts among others—*held*, that the jury might properly have found that the deceased, when struck by the cars, was on the sidewalk, where he had a right to be, and that he was not guilty of any contributory negligence in failing to see the cars as they approached him. *Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, 46 N. W. Rep. 543.

194. Duty to stop, look, and listen.—(1) *In general.*—A person who attempts to cross a railroad track in front of an approaching train without looking up or down the track is guilty of such negligence as bars a recovery of damages by his administrator for injuries causing his death, unless the defense of contributory negligence is overcome by proof of such gross negligence on the part of the persons in charge of the train, as amounts to recklessness, wantonness, or intentional wrong. *Leak v. Georgia Pac. R. Co.*, 90 Ala. 161, 8 So. Rep. 245. *Northern C. R. Co. v. State*, 6 Am. & Eng. R. Cas. 66, 54 Md. 113. *Day v. Flushing, N. S. & C. R. Co.*, 75 N. Y. 610.—FOLLOWING *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y. 248.—*Irey v. Pennsylvania R. Co.*, 132 Pa. St. 563, 19 Atl. Rep. 341. *Hamilton v. Delaware, L. & W. R. Co.*, 50 N. J. L. 263, 11 Cent. Rep. 562, 13 Atl. Rep. 29. *Connelly v. New York C. & H. R. R. Co.*, 8 Am. & Eng. R. Cas. 459, 88 N. Y. 346; reversing 25 Hun 311.—APPROVED IN *Seefeld v. Chicago, M. & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

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There can be no recovery for the death of one who drives on a track with head and face closely wrapped, and looking in the opposite direction from which the train approached, where the train was properly managed and could have been seen in time to prevent the accident. *Chicago, St. P. & K. C. R. Co. v. Anderson*, 47 Ill. App. 91. *Rodrian v. New York, N. H. & H. R. Co.*, 125 N. Y. 526, 26 N. E. Rep. 741, 35 N. Y. S. R. 814; *reversing* 28 N. Y. S. R. 625, 7 N. Y. Supp. 811.—DISTINGUISHED IN *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302, 52 N. Y. S. R. 351.

The deceased was killed at a point where defendant's track and the track of another company were about 15 feet apart. He was on the track of the other company when he saw a train approaching a little ahead of defendant's train, and stepped from that track to defendant's track. There was a curve near by, and a dense smoke from the first train settled over the track which would prevent the deceased from being seen. *Held*, that he had no right to be on either track, and as it appeared that he could have stepped on to the highway outside of the track, or stood safely between the tracks, his death was the result of his own carelessness. *East Tenn., V. & G. R. Co. v. Hartley*, 73 Ga. 5.

The approach by a public road crossing a railroad was particularly dangerous, because the railroad from natural and other obstructions could not be seen nor the whistle heard. The deceased in approaching the railroad did not stop to listen, etc. In crossing the railroad he was killed by the locomotive. *Held*, that the deceased was guilty of negligence and his family could not recover damages for his death. *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 6 Am. Ry. Rep. 158.

The deceased was walking home while a rainstorm was approaching. As he was passing over the railroad crossing he was struck by a freight car backing from the north and killed. Action was brought by the administrator of the deceased to recover damages. The evidence showed that the deceased was in full possession of his sight and hearing, that he was well acquainted with the crossing, that the night was dark and stormy, and that he did not stop and listen. *Held*, that he was guilty of such contributory negligence as would defeat a recovery of damages for his death. *Mynn-*

ing v. Detroit, L. & N. R. Co., 28 Am. & Eng. R. Cas. 665, 64 Mich. 93, 31 N. W. Rep. 147.—QUOTING *Beisiegel v. New York C. R. Co.*, 34 N. Y. 622, 40 N. Y. 9; *Grippen v. New York C. R. Co.*, 40 N. Y. 34.

In an action by a husband to recover damages for the death of his wife, killed at a grade crossing, it is proper to enter a compulsory nonsuit where the evidence for the plaintiff shows that, at the point where the accident occurred, there were three main tracks and a siding, and the deceased crossed the siding and one track before she reached the track upon which she was struck, and that on both the siding and the first track she could have had an unobstructed view of the railroad for a distance of nine hundred feet in the direction from which the train came which struck her. *Lees v. Philadelphia & R. R. Co.*, 154 Pa. St. 46, 25 Atl. Rep. 1041.

(2) *Where train could have been seen if looked for.*—If the deceased, by the exercise of ordinary care, could have seen the approach of the train, and he failed to do so, his failure would bar a recovery, unless the defendant was guilty of negligence so gross as to amount to a wilful disregard of the rights or the safety of the public. *Chicago & N. W. R. Co. v. Dunleavy*, 39 Am. & Eng. R. Cas. 381, 129 Ill. 132, 22 N. E. Rep. 15; *affirming* 27 Ill. App. 438. *Bronk v. New York & N. H. R. Co.*, 5 Daly (N. Y.) 454. *Mitchell v. New York C. & H. R. R. Co.*, 64 N. Y. 655; *affirming* 2 Hun 535, 5 T. & C. 122. *Cullen v. Delaware & H. Canal Co.*, 113 N. Y. 667, 2 Silv. App. 255, 21 N. E. Rep. 716, 23 N. Y. S. R. 719; *reversing* 40 Hun 637, *mem.*—DISTINGUISHED IN *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302, 52 N. Y. S. R. 351.—*Ward v. Rochester Elec. R. Co.*, 43 N. Y. S. R. 84, 17 N. Y. Supp. 427. *Krauss v. Wallkill Valley R. Co.*, 52 N. Y. S. R. 838, 23 N. Y. Supp. 432, 69 Hun 482. *Hansen v. Chicago, M. & St. P. R. Co.*, 83 Wis. 631, 53 N. W. Rep. 909.

Plaintiff's intestate was killed while attempting to cross a track before an engine carrying a headlight which lighted the track for 150 to 200 feet in advance. It appeared that he could have both seen and heard the engine if he had looked and listened. The facts showed that he either did not see the engine, or seeing it, attempted to cross in front of it and fell on the track. *Held*, that in either event he was negligent, and a nonsuit was properly allowed. *O'Donnell v. New*

York C. & H. R. R. Co., 12 N. Y. S. R. 206 46 Hun 678, *mem.*; affirmed in 113 N. Y. 641, *mem.*, 21 N. E. Rep. 414, 22 N. Y. S. R. 997.

Plaintiff's intestate was killed while crossing defendant's tracks at a point where, for a long time, people had been crossing in large numbers daily without objection by defendant. The place was in constant use by the company as part of its switching yards, and there were generally several trains on the tracks, completely blocking the crossing, but the people were accustomed to crawl under, through, or between the cars. The deceased, who was familiar with the crossing, was attempting to pass through a narrow opening between cars standing on the crossing, and was crushed by their coming together. If she had looked she could have seen the cars, by the impact of which the opening was closed, coming down the track. Beyond the opening the way was blocked by several solid trains, and there was nothing to indicate that the opening was left to allow people to pass through it. *Held*, that whether the crossing was a legal highway or not, the deceased was guilty of contributory negligence preventing a recovery. *Flynn v. Eastern M. R. Co.*, 83 Wis. 238, 53 N. W. Rep. 494.

(3) *Presumption that deceased did not look*.—Where it is found that the person killed could, by looking, have seen the approaching train in time to have avoided injury, and that there was nothing to prevent him, before reaching the track, from seeing the train, it will be presumed that he either did not look or that he deliberately took the risk of attempting to cross, notwithstanding the danger. *Chicago & E. I. R. Co. v. Hedges*, 37 Am. & Eng. R. Cas. 516, 118 Ind. 5, 20 N. E. Rep. 530. *Ohio & M. R. Co. v. Hill*, 117 Ind. 56, 18 N. E. Rep. 461. *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358.—DISTINGUISHING *Brown v. New York C. R. Co.*, 32 N. Y. 597; *Stillwell v. New York C. R. Co.*, 34 N. Y. 29; *Beiseigel v. New York C. R. Co.*, 34 N. Y. 622; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.—APPLIED IN *Parsons v. New York C. & H. R. R. Co.*, 37 Hun (N. Y.) 128. DISTINGUISHED IN *Gillespie v. Newburgh*, 54 N. Y. 468; *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524; *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407. FOLLOWED IN *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440. QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Orms-*

bee v. Boston & P. R. Corp., 14 R. I. 102, 51 Am. Rep. 354. REVIEWED IN *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.

(4) *Rule applied to drivers of teams*.—Where a traveler upon a highway, in approaching a railroad track, neglects to look out from his covered carriage until his horse is upon the track, and is then struck and killed by a passing train, he is guilty of such contributory negligence as will defeat an action by his administrator to recover damages for his death; and an instruction that no failure on the part of the railroad company to do its duty could excuse the failure of deceased to use his sense of sight and hearing is proper. *New York, P. & N. R. Co. v. Kellam*, 32 Am. & Eng. R. Cas. 114, 83 Va. 851, 3 S. E. Rep. 703.—QUOTING *Dublin, W. & W. R. Co. v. Slatery*, L. R. 3 App. Cas. 1155; *Schofield v. Chicago, M & St. P. R. Co.*, 114 U. S. 615.—REVIEWED IN *Mark v. Petersburg R. Co.*, 88 Va. 1.—*Harris v. Minneapolis & St. L. R. Co.*, 37 Minn. 47, 33 N. W. Rep. 12.

A team collided with a railway train at a road crossing, and the driver was killed. The railroad and the highway were both below the general surface of the ground, and an approaching train could only be seen occasionally by one driving towards the crossing. The driver was familiar with the crossing, but, except that he checked his team for a moment, some four rods from the crossing, he did not appear to have observed any precaution. The engine whistle was duly sounded when the crossing was approached. *Held*, that the driver of the team was chargeable with negligence directly contributing to the collision, and that no action would lie by his administrator against the railroad company. *Haas v. Grand Rapids & I. R. Co.*, 8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216.—DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538; *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 Am. & Eng. R. Cas. 16, 62 Wis. 178, 51 Am. Rep. 718.

In an action for killing a father and his son, about six years old, the evidence for plaintiff showed that the father was driving two horses hitched to a wagon, on a highway, at a slow walk, and they were killed at a crossing by an extra train, not running on schedule time. There was a conflict of evidence as to whether the train could have

been seen, but it was agreed that the train approached without signals, but made plenty of other noise, and that it could have been both seen and heard; that he approached the crossing without stopping to look or listen, and that the rattling of his wagon tended to prevent his hearing the train. *Held*, that a demurrer to the evidence should have been sustained. *Henze v. St. Louis, K. C. & N. R. Co.*, 2 Am. & Eng. R. Cas. 212, 71 Mo. 636.

Plaintiff's intestate, who was driving with his ears covered, was killed at a crossing where he was familiar by a train running behind time. At points the view of the track was obstructed, but at one place, 150 feet from the track, the approaching train could be seen. On the part of plaintiff the evidence showed that the deceased approached the crossing, driving at a slow trot, and sitting sideways, and when within 25 or 30 feet of the track saw the train, and then tried to stop his team, and jumped to the ground, but was carried on the track and killed. The noise of the train could be distinctly heard for a distance of 1000 feet. *Held*, that a nonsuit should have been allowed on the ground of contributory negligence. *Salter v. Utica & B. R. R. Co.*, 75 N. Y. 273; *reversing* 13 Hun 187.—REVIEWING *Haight v. New York C. R. Co.*, 7 Lans. (N. Y.) 11.

T., plaintiff's intestate, was killed at a crossing on defendant's road. The road crossed the track at an acute angle. There was no obstacle to prevent seeing an approaching train for more than half a mile from the crossing. T. was driving a gentle horse, and the condition of the road was such as to prevent fast driving. The night was dark and misty, but it appeared by plaintiff's own witnesses that the headlight of the engine could have been seen at a distance much more than sufficient to have given him warning, and, had he been looking, to have enabled him to escape injury. *Held*, that the evidence was insufficient to make the question of contributory negligence one of fact; and that a refusal to nonsuit was error. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 23 Am. & Eng. R. Cas. 313, 98 N. Y. 198; *reversing* 31 Hun 397.—QUOTED in *Brickell v. New York C. & H. R. R. Co.*, 42 Am. & Eng. R. Cas. 107, 120 N. Y. 290, 24 N. E. Rep. 449, 30 N. Y. S. R. 932; *Flanagan v. New York, N. H. & H. R. Co.*, 29 N. Y. S. R. 543, 8 N. Y. Supp. 744.

Plaintiff's intestate was killed before it was light in the morning at a grade crossing where he was familiar, while driving a covered milk wagon; but it did not appear that it was not light enough for a train without a headlight to be seen, or that the engine had no headlight. No one saw the accident, and there was no direct evidence of the conduct of the deceased at the time. *Held*, that a nonsuit was properly allowed. *Glendening v. Sharp*, 22 Hun (N. Y.) 78.—QUOTING *Cordell v. New York C. & H. R. R. Co.*, 75 N. Y. 330.

195. Effect of obstructed view of track.—Plaintiff's intestate was driving, with a companion, and when within 200 feet of a crossing they stopped and looked in both directions for trains; but beyond that point the view of the track was obstructed until within 27 feet of it. A short time after the accident certain box cars were standing on a siding, but there was a conflict of evidence as to whether they were there at the time of the accident; but it was admitted that if they were there they completely obstructed the view. *Held*, sufficient evidence to justify a jury in finding that the deceased exercised due care. *Hermans v. New York C. & H. R. R. Co.*, 43 N. Y. S. R. 900, 63 Hun 625, *mem.*, 17 N. Y. Supp. 319; *affirmed* in 137 N. Y. 558, *mem.*, 33 N. E. Rep. 337, 50 N. Y. S. R. 932.

Plaintiff's intestate, who was driving, approached a crossing just after a train had passed, the noise of which was still audible, and was struck by another train. His view of the approaching train was obstructed by standing cars until he was too near the track to avoid the collision. *Held*, that his failure to see or hear the train was not contributory negligence. *Ingersoll v. New York C. & H. R. R. Co.*, 6 T. & C. (N. Y.) 416, 4 Hun 277, *mem.*; *affirmed* (P) 66 N. Y. 612, *mem.*—REVIEWING *Davis v. New York C. & H. R. R. Co.*, 47 N. Y. 403; *Mackay v. New York C. R. Co.*, 35 N. Y. 78; *Richardson v. New York C. R. Co.*, 45 N. Y. 849.

Deceased was killed at a city crossing where there were a number of tracks. There was much confusion and noise caused by passing trains and steam escaping from engines, as well as by other persons driving; and the view was obstructed both by trains and wagons. *Held*, that it could not be said as a matter of law that deceased was guilty of contributory negligence in failing to look and listen, as it was doubtful whether he

could have seen or heard if he had done so. *Enders v. Lake Shore & M. S. R. Co.*, 2 N. Y. Supp. 719.

Plaintiff's intestate was killed while attempting to cross where there was a double track. A train had just passed on the track first approached, and there was evidence tending to show that the smoke from it settled so that a train approaching over the other track could not be seen. It was a drizzly morning, and the train approached without signals. *Held*, that his conduct did not amount to contributory negligence as a matter of law. *Heaney v. Long Island R. Co.*, 9 N. Y. S. R. 707.—DISTINGUISHING *Donlon v. Long Island R. Co.*, 29 Hun (N. Y.) 674. QUOTING *Grippen v. New York C. R. Co.*, 40 N. Y. 34.

If the view of one who is about to cross a track is temporarily obstructed by smoke from passing trains, and he knows it, it is his duty to wait until the smoke has lifted; but in this case there was evidence showing that a heavy mist existed and had settled between the deceased and such smoke, such as would justify a jury in finding that the smoke would obstruct the view without the deceased knowing it. *Held*, under such circumstances that he was not guilty of contributory negligence in failing to look. *Heaney v. Long Island R. Co.*, 9 N. Y. S. R. 707.

196. Effect of defective condition of crossing.—Defendant was operating as lessee the road of another railroad corporation, which was built under the N. Y. Act of 1850 (Laws of 1850, ch. 140). The road was laid through a street in the city of U., which was not restored to its former state as required by said act (§ 28, sub. 5), the rails being left projecting about four and one half inches above the surface of the street, without any planking or filling between them. M., plaintiff's intestate, was peddling kindling wood in said street with a horse and wagon, which he left near the sidewalk while he stepped across the walk, about six feet from the wagon, to solicit a purchase. An approaching train frightened the horse, which ran diagonally across the railroad track. The hind wheel of the wagon caught upon and slid along the further rail. About the time the horse started, the attention of M. was called to the approaching train, then between 200 and 300 feet distant. He at once ran to catch his horse; he crossed the track, seized hold

of the harness of the horse, when the engine struck the hind wheel of the wagon, and M. was thrown upon the track and killed. The rails in use at the time of the accident were laid by defendant. An ordinance of the city prohibited defendant from running its trains through the city at a rate exceeding eight miles an hour; the train was running about twelve miles an hour. In an action to recover damages—*held*: (1) that the evidence justified a finding of negligence on the part of defendant, and of the absence of contributory negligence on the part of M.; (2) that in the absence of proof that the horse was vicious, unsafe, or unmanageable, it was not negligence *per se* for M. to leave his horse unfastened when he was near enough so that he might reasonably expect to control him, in an emergency, by his voice, or to reach him before he could escape; (3) that it could not be said, as matter of law, that he violated an ordinance of the city which forbade any person leaving a horse in the street unless securely tied; (4) that defendant could not escape liability for the condition of the road because it was lessee. *Wasmer v. Delaware, L. & W. R. Co.*, 1 Am. & Eng. R. Cas. 122, 80 N. Y. 212, 36 Am. Rep. 608.—DISTINGUISHING *Gray v. Second Ave. R. Co.*, 65 N. Y. 561.—DISTINGUISHED IN *Egan v. Forty-second St., M. & St. N. A. R. Co.*, 4 N. Y. Supp. 530. QUOTED IN *Northrup v. New York, O. & W. R. Co.*, 37 Hun (N. Y.) 295.

It seems that even if M. was chargeable with negligence in leaving his horse in the street, this could not defeat the action, as such negligence was not in any proper sense the immediate or proximate cause of the accident. *Wasmer v. Delaware, L. & W. R. Co.*, 1 Am. & Eng. R. Cas. 122, 80 N. Y. 212, 36 Am. Rep. 608.—QUOTED IN *Pullman Palace Car Co. v. Laack*, 41 Ill. App. 34. REVIEWED IN *Billman v. Indianapolis, C. & L. R. Co.*, 6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230.

197. Effect of excessive speed.—Although a railroad company is *per se* guilty of negligence, and also violates the law in running its train within an incorporated town faster than six miles an hour, recovery cannot be had of it for the death of one whose contributory negligence, in recklessly exposing himself before the train while so running, was unmistakably the efficient cause of his being struck by the

engine and killed. *Crawley v. Richmond & D. R. Co.*, 70 Miss. 340, 13 So. Rep. 74. *Baltimore & O. R. Co. v. State*, 69 Md. 551, 18 Md. L. J. 824, 16 Atl. Rep. 212.

Just before an accident the engine had passed over a crossing going east, and was returning, going west. Deceased stepped on the track just in front of the engine when there was nothing to obstruct the view. Just after he was struck, he said: "I was on the railway and did not know it was coming back until it struck and killed me." Held, contributory negligence, preventing a recovery, although there was evidence tending to show that the engine was running at fifteen miles per hour, when by the city ordinance they were prohibited from running faster than six miles per hour. *Texas & N. O. R. Co. v. Brown*, 2 Tex. Civ. App. 281, 21 S. W. Rep. 424.

Plaintiff's intestate was killed by a train running from 8 to 10 miles an hour, where a city ordinance restricted the speed to 6 miles per hour. It appeared that the deceased would have had time to cross without injury if the train had been running at a lawful speed; and that the accident occurred on a dark and misty evening; and that the intestate attempted to cross in a crowd of other teams which much obstructed his view, and that it was doubtful whether he could see the headlight, or if he did, could tell which way the train was going. Held, that the question of whether he used proper care was rightfully left to the jury. *Endress v. Lake Shore & M. S. R. Co.*, 19 N. Y. S. R. 481, 2 N. Y. Supp. 719; affirmed in 117 N. Y. 640, mem., 22 N. E. Rep. 1130, 27 N. Y. S. R. 977.

198. Effect of absence of gate, or confusing directions of gateman.—An open gate is an invitation to a traveler to go on, and this fact may properly be considered by the jury as affecting the question of contributory negligence. *Fitzgerald v. Long Island R. Co.*, 21 N. Y. S. R. 942; affirmed in 117 N. Y. 653, mem., 3 N. Y. Supp. 230, 22 N. E. Rep. 1133, 27 N. Y. S. R. 980.

Plaintiff's intestate was killed at a grade crossing while driving a milk wagon before daylight in the morning. When his wagon was more than half way over, the gateman called to him to stop, and shut the gates, but upon whipping up his horses, the gateman opened the gate in front and told him to go on, but he was struck by a train

which approached without signals. Held, that it could not be said as a matter of law that he was guilty of gross negligence. *Doyle v. Boston & A. R. Co.*, 145 Mass. 386, 5 N. Eng. Rep. 454, 14 N. E. Rep. 461.

199. Effect of absence of signals, generally.—Although a railway company may be negligent in failing to give proper warning of the approach of a train, a person injured cannot, nevertheless, recover unless it be affirmatively shown that he was free from contributory negligence, i.e., that he looked and listened. *Ohio & M. R. Co. v. Hill*, 117 Ind. 56, 18 N. E. Rep. 461.—QUOTED IN *Lewis v. Puget Sound Shore R. Co.*, 4 Wash. 188.

In an action for the killing of plaintiff's intestate at a crossing of a side track, if the only negligence shown on defendant's part was a failure to give the statutory signal, a verdict in favor of the plaintiff will be set aside where the evidence shows that deceased was killed in attempting to cross ahead of an approaching train at a place where the view before reaching the track was partially obstructed by a cattle-chute; that deceased was familiar with the locality and knew the use made of the side-track, and that if he had looked with proper care, before stepping upon the track, he could have seen the train at such distance as would have enabled him to avoid the injury. *St. Louis, I. M. & S. R. Co. v. Tippet*, 56 Ark. 457, 20 S. W. Rep. 161.

Plaintiff's intestate was killed at a crossing, and the negligence charged was that as he approached the crossing a train of 11 cars lay just at the side of the crossing, and were suddenly started without warning and killed him; but several of plaintiff's witnesses testified that the train was moving continually, and there was other evidence that the intestate was looking away from the train. Held, that a verdict for plaintiff was not supported by the evidence. *Mehegan v. New York C. & H. R. R. Co.*, 125 N. Y. 768, mem., 36 N. Y. S. R. 188, 3 Silv. App. 438.

In an action to recover for the killing of a person lawfully on the track, the court properly refused to instruct the jury that if the deceased could, by the exercise of ordinary care, have seen the approach of the train in time to avoid the accident, even if the necessary signals were not given, then it was immaterial whether such signals were given or not, for the plaintiff could not re-

cover. *Chicago & N. W. R. Co. v. Dunleavy*, 39 *Am. & Eng. R. Cas.* 381, 129 *Ill.* 132, 22 *N. E. Rep.* 15; affirming 27 *Ill. App.* 438.

Plaintiff's testator was killed while attempting to drive across defendant's track for the purpose of taking a ferry, at a crossing with which he was familiar. The weight of evidence showed that the flagman stationed there was absent, and that the train approached without giving signals. It seemed that when near the crossing testator looked, but after that his view was obstructed by the station house. The ferry boat was just ready to start, and he was called and signaled to come on. He started his horse on a trot, and when he was within two or three rods of the track, the engine appeared from behind the station house at an unusual hour and running very rapidly. At the same time two persons in different directions shouted to the testator, but he could not then check his horses, and he was struck by the train. *Held*, that it was error to grant a nonsuit. *Ernst v. Hudson River R. Co.*, 35 *N. Y.* 9, 32 *How. Pr.* 61, 3 *Abb. Pr. N. S.* 82; reversing 32 *Barb.* 159.—DISTINGUISHED IN *Wilcox v. Rome*, W. & O. R. Co., 39 *N. Y.* 358.

In an action by decedent's administrator, it was proved that the only outlet from the house whence decedent came was by way of the company's tracks that had long been, with their acquiescence, the common pathway of the public to and from the house and its vicinity; that decedent stepped off the side track onto the main track to avoid a material train, and was killed by a yard engine and tender not visible when he came onto the track, being around a bluff, but backing rapidly within city limits and against its ordinances in the direction decedent was walking; and that the engineer failed to look out, blow the whistle, or give any warning. *Held*, that the defendant's servants' negligence was the proximate cause of the killing, and plaintiff is entitled to recover, though decedent may not have been entirely free from fault. *Virginia Midland R. Co. v. White*, 34 *Am. & Eng. R. Cas.* 22, 84 *Va.* 498, 5 *S. E. Rep.* 573.

200. — failure to ring bell or blow whistle.—Where a statute requires a whistle to be blown or a bell to be rung on trains approaching a crossing, continuously for certain distances before the crossing is reached, a failure to do so is evidence

of negligence; and where there is evidence that death results from a failure to give such signals, the case should be left to the jury, though it appear that the person killed had his ears so muffled up as not to hear three or four short blows of the whistle. *Petrie v. Columbia & G. R. Co.*, 35 *Am. & Eng. R. Cas.* 430, 29 *So. Car.* 303, 7 *S. E. Rep.* 515.

Plaintiff's intestate, with two others, waited at a street crossing until a freight train had passed, and in attempting to cross was struck by a switch train on an adjoining track and intestate and one other killed. The evidence showed that a strong wind was blowing, and the bell on the switch train was not rung. The survivor testified that he neither saw nor heard the train until after the accident. *Held*, that the facts did not justify a peremptory instruction that plaintiff could not recover. *Whiton v. Chicago & N. W. R. Co.*, 2 *Biss. (U. S.)* 282.

In such case, the unlawful speed at which the freight train was running is too remote to constitute one of the causes of the accident, though the accident might not have happened had the freight train not passed. *Whiton v. Chicago & N. W. R. Co.*, 2 *Biss. (U. S.)* 282.

A boy seventeen years of age, returning to his home from his labor, driving a horse and cart on a public street, who stops several minutes within ten feet of where a railroad crosses such street, and at a place where the view of the track is obstructed by box cars left thereon, is not guilty of such contributory negligence as will preclude a recovery for his death, caused by the failure to ring the bell and sound the whistle, because of his failure to get down from his cart and lead his horse over the crossing, or to leave his horse and go in advance to the track and look up and down it for an approaching train. *Huckshold v. St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 659, 90 *Mo.* 548, 2 *S. W. Rep.* 794.—QUOTING *Henze v. St. Louis, K. C. & N. R. Co.*, 71 *Mo.* 636.

The deceased, who was attempting to cross the track at a street crossing, was not guilty of contributory negligence in omitting to stop and listen for the train, it not appearing from the evidence that he could have heard the train had he stopped to listen. Not seeing the train, nor hearing it, nor the sound of a bell, because none was

ring, the deceased had a right to presume that he could pursue his course without danger. *Donohue v. St. Louis, I. M. & S. R. Co.*, 28 Am. & Eng. R. Cas. 673, 91 Mo. 357, 2 S. W. Rep. 424, 3 S. W. Rep. 848.—APPLYING *Kennayde v. Pacific R. Co.*, 45 Mo. 255.—DISTINGUISHING *Rine v. Chicago & A. R. Co.*, 88 Mo. 392; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 25.—APPROVED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314.

While crossing a railroad track the plaintiff's intestate was killed by a train which had left a station on schedule time, and attained a speed of twenty miles an hour; the deceased was working at a steam-mill located near the track; when first seen by the engineer he was about 100 feet from the engine, and making no effort to get out of the way; the engineer put on brakes and shut off steam, but gave no signal by bell or whistle. *Held*, that the contributory negligence of the deceased relieved the company of responsibility. *Parker v. Wilmington & W. R. Co.*, 8 Am. & Eng. R. Cas. 420, 86 N. Car. 221.—QUOTING *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697.—DISTINGUISHED IN *Troy v. Cape Fear & Y. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521. REVIEWED IN *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.

A railway train approaching a station struck and killed H., driving a wagon across the track at a road crossing within the corporate limits of the town of P. The proof showed that all statutory precautions were observed, and every possible means employed by the company to prevent the accident, with a single exception, viz.: It did not appear that bell or whistle was sounded at short intervals continuously throughout the last mile before reaching the depot. There was proof tending to show that H. might have been warned of his danger, and the accident averted, if bell or whistle had been sounded as required by law. *Held*, that the company is liable, and that H.'s contributory negligence cannot defeat this liability, but should be considered in mitigation of damages. *Louisville & N. R. Co. v. Howard*, 90 Tenn. 144, 19 S. W. Rep. 116.

201. Persons laboring under physical infirmities.—The fact that the deceased was deaf made it all the more negligent to risk his life by standing upon the

railway track without exercising his sight to avoid danger from an approaching train. *Galveston, H. & S. A. R. Co. v. Ryon*, 80 Tex. 59, 15 S. W. Rep. 588.

Plaintiff's intestate, subject to epileptic fits, attempted to cross a railway at a point beyond a street crossing, where there was a ditch four feet deep, and where crossing was forbidden. In so doing he was seized with a fit and fell on the track, and was killed by a freight train backing slowly, with bell ringing. *Held*, that deceased was guilty of contributory negligence, and also a trespasser, and verdict for his administrator should be set aside. *Tyler v. Kelley*, 89 Va. 282, 15 S. E. Rep. 509.—REVIEWING *Norfolk & W. R. Co. v. Harman*, 83 Va. 553.

202. Question of deceased's negligence, when for jury.—Where one is killed in attempting to cross a track, and the question of his negligence in attempting to do so depends on the view which might be taken of the circumstances and his actions, so as to raise a doubt of deceased's negligence, the case should go to the jury. *McNeal v. Pittsburg & W. R. Co.*, 131 Pa. St. 184, 18 Atl. Rep. 1026.—DISTINGUISHING *Marland v. Pittsburgh & L. E. R. Co.*, 123 Pa. St. 487; *Carroll v. Pennsylvania R. Co.*, 12 W. N. C. 348.

In an action for causing the death of C., plaintiff's testator, who was killed at a railroad crossing, it appeared that the railroad track ran north and south, the highway east and west; at the crossing, and on both sides thereof there was a cutting for the railroad track; and one also for the highway east of the track, seven or eight feet deep, for a considerable distance, with a board fence, and other obstructions to view on the top of the embankment to the south. C. approached the crossing from the east, in a one-horse wagon. He was driving at a slow trot with one hand, holding a pail in the other; the train, by which he was killed, came from the south at a high rate of speed, and as plaintiff's evidence tended to show, without ringing a bell. C. was familiar with the crossing, and with the running of trains; he approached the crossing about the time trains were due both ways; the wind at the time was blowing from the north; C. was seen a moment before he was struck by the engine looking towards the north. *Held*, that the questions of negligence on the part of defendant, and contributory negligence on the part of C.

were of fact for the jury. *Kellogg v. New York C. & H. R. R. Co.*, 79 N. Y. 72.—FOLLOWING *Salter v. Utica & B. R. Co.*, 75 N. Y. 273.—DISTINGUISHED IN *Whalen v. New York C. & H. R. R. Co.*, 58 Hun 431, 35 N. Y. S. R. 556, 12 N. Y. Supp. 527. FOLLOWED IN *Smedis v. Brooklyn & R. B. R. Co.*, 8 Am. & Eng. R. Cas. 445, 88 N. Y. 13. REVIEWED IN *Greany v. Long Island R. Co.*, 24 Am. & Eng. R. Cas. 473, 101 N. Y. 419, 5 N. E. Rep. 425.

In an action for causing the death of O., plaintiff's intestate, it appeared that O. was going south upon the west sidewalk of a city street running north and south, which was crossed by the three tracks of defendant's railroad; the space between the middle and the south track was seven feet. At the crossing there were safety-gates, which were down as O. approached. When they began to rise he went on; he could see nothing south or west as he approached the middle track, his view being obstructed by cars standing thereon, one of which reached half across the sidewalk and projected two feet beyond the rails. O. passed out from behind this car into the space between the middle and south track, and was struck by the cross-beam of the tender of a locomotive on the latter, which was backing from the west; the cross-beam projected two feet beyond the track, thus leaving a space of but three feet between it and the car. O. had no knowledge of the locality; he was walking fast, with his head down, the sidewalk being rough; he did not look toward the west as he passed beyond the car; the bell on the locomotive was not rung; the gateman had begun to lower the south gate, which was half-way down when the accident happened; he shouted to O., who paid no attention. *Held*, that the question of contributory negligence was properly submitted to the jury; that it could not be held, as matter of law, that O., hearing no bell, and conscious of no danger, was bound to look to the west the instant he passed beyond the car; that while bound to use his eyes he was not bound to use them in a particular manner or at a particular instant of time; also that it was a question for the jury as to whether he heard the call of the gateman. *Oldenburg v. New York C. & H. R. R. Co.*, 124 N. Y. 414, 26 N. E. Rep. 1021, 36 N. Y. S. R. 402; affirming 33 N. Y. S. R. 663, 11 N. Y. Supp. 689, 29 N. Y. S. R. 836.—DISTINGUISHING *Woodard v. New York, L.*

E. & W. R. Co., 106 N. Y. 369; *Young v. New York, L. E. & W. R. Co.*, 107 N. Y. 500.—APPLIED IN *Schultz v. New York C. & H. R. R. Co.*, 69 Hun 515, 53 N. Y. S. R. 149. FOLLOWED IN *Northern Pac. R. Co. v. Amato*, 49 Fed. Rep. 881, 1 U. S. App. 113, 1 C. C. A. 468.

In an action for killing an engineer, it appeared that it was due to the negligence of a train dispatcher in not displaying a red flag as a danger signal at a certain station, whereby the train moved on instead of waiting for the second train to pass, and a collision ensued. But it appeared that the engineer knew that a train from the opposite direction was due according to schedule in a few minutes. *Held*, that it was a question for the jury to say whether the deceased ought not to have stopped in the absence of such signal. *Sutherland v. Troy & B. R. Co.*, 8 N. Y. Supp. 83, 28 N. Y. S. R. 201; reversed in 125 N. Y. 737, 35 N. Y. S. R. 853.

Plaintiff's intestate was killed at a point where two railroads crossed and where it was difficult to distinguish from the sound which way trains were going or on which track they were. The evidence showed that the deceased stopped some distance from the track where his view was unobstructed but could not see a train, and from that point to the track the view was obstructed. He was killed by a train that did not give the signals within the distance required by law. *Held*, that the case should have been submitted to the jury. *Cook v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 45.

In an action for killing plaintiff's husband at a crossing, the evidence showed that when he was 50 feet from the track, he looked for trains, but by reason of certain obstructions erected on the company's right of way, a view of only 125 feet of the track could be had; he attempted to cross without again looking, and was killed by a train running without giving signals. *Held*, that both the questions of negligence and contributory negligence should have been left to the jury. *Austin v. Long Island R. Co.*, 23 N. Y. Supp. 193, 53 N. Y. S. R. 746, 69 Hun 67.

The evidence showed that plaintiff's intestate was killed in attempting to drive across a track in company with a lady; that they both looked for trains, having stopped twice for the purpose; that stand-

ing trains on two other tracks obstructed their view. *Held*, that the question of contributory negligence should have been left to the jury. *Sauerborn v. New York C. & H. R. R. Co.*, 52 *N. Y. S. R.* 784, 23 *N. Y. Supp.* 478, 69 *Hun* 429.

Where deceased stood some time waiting for a long freight train to pass, and then passed rapidly around the end of the train, and was killed by an engine on another track, moving in the opposite direction, the question of his contributory negligence was properly left to the jury. *Pennsylvania R. Co. v. Werner*, 89 *Pa. St.* 59.—DISTINGUISHED IN *Aiken v. Pennsylvania R. Co.*, 41 *Am. & Eng. R. Cas.* 571, 130 *Pa. St.* 380; *Schmidt v. Philadelphia & R. R. Co.*, 149 *Pa. St.* 357.

The deceased, his wife, and another woman, came to a crossing over five tracks, and stopped, looked, and listened, but heard no trains. The woman crossed in safety, but deceased, just behind, was killed by a passing train. The evidence was conflicting as to whether the bell was rung, or the whistle blown. *Held*, that deceased was not required to stop, look, and listen after starting across the tracks; and that his contributory negligence was a question for the jury. *Pennsylvania R. Co. v. Garvey*, 108 *Pa. St.* 369.

d. Of Trespassers.

203. Rule of non-liability, generally.—Where a person, without right, with a full knowledge of the location, voluntarily places himself upon a railroad track at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, it is negligence *per se*, and no damages can be recovered for his death, except for wanton injury. *Pittsburgh, Ft. W. & C. R. Co. v. Collins*, 87 *Pa. St.* 405.—FOLLOWING *Mulherrin v. Delaware, L. & W. R. Co.*, 81 *Pa. St.* 367; *Little Schuylkill N. R. & C. Co. v. Norton*, 24 *Pa. St.* 465.

As a matter of fact at least it is negligence for one to go upon a railway track and stand there until he is knocked off by an engine. *Galveston, H. & S. A. R. Co. v. Ryan*, 80 *Tex.* 59, 15 *S. W. Rep.* 588.

In an action against a railway company, to recover for the death of plaintiff's intestate, through alleged negligence, the plaintiff showed that at the time of the accident, when the deceased was struck by the engine, he was a trespasser upon the right of

way of the defendant, which fact is of itself evidence of a want of ordinary care, and there was no evidence that the injury was wilfully or wantonly inflicted. *Held*, that the court properly instructed the jury to find for the defendant. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 *Ill.* 416, 18 *N. E. Rep.* 799; *affirming* 27 *Ill. App.* 22.

204. Walking on track in daytime.—Where a person is killed by an engine while wrongfully on a railroad track—as, when he is walking thereon for mere convenience or pleasure, not at a public crossing—he will be guilty of such gross negligence as to preclude a recovery by his personal representative against the company operating the engine or train, unless his death is caused wilfully or wantonly, or the company is chargeable with such gross negligence as is evidence of wilfulness. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 *Ill.* 416, 18 *N. E. Rep.* 799; *affirming* 27 *Ill. App.* 22. *Bresnahan v. Michigan C. R. Co.*, 8 *Am. & Eng. R. Cas.* 147, 49 *Mich.* 410, 13 *N. W. Rep.* 797.—FOLLOWING *Michigan C. R. Co. v. Campau*, 35 *Mich.* 468.—*Smith v. Minneapolis & St. L. R. Co.*, 25 *Minn.* 419, 4 *N. W. Rep.* 782.—FOLLOWING *Donaldson v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 293; *Brown v. Milwaukee & St. P. R. Co.*, 22 *Minn.* 165.—*Maloy v. Wabash, St. L. & P. R. Co.*, 84 *Mo.* 270. *McCarty v. Delaware & H. Canal Co.*, 17 *Hun* (N. Y.) 74. *Baltimore & O. R. Co. v. Sherman*, 30 *Gratt. (Va.)* 602.—DISTINGUISHED IN *Norfolk & W. R. Co. v. Carper*, 88 *Va.* 556. QUOTED IN *Norfolk & W. R. Co. v. Harman*, 83 *Va.* 553, 8 *S. E. Rep.* 251.

When a person voluntarily walks on and along the tracks of a railroad laid in a public thoroughfare which he knew was used as a switch-yard on which locomotives were passing to and fro night and day, where the walking on either side of said track was as good as on the track, and in doing so is run over by a passing train and killed, he has by the failure to exercise ordinary care and prudence, directly contributed to his own misfortune, and his representatives cannot recover from the company using said track damages therefor. *Louisville & N. R. Co. v. Ynistras*, 29 *Am. & Eng. R. Cas.* 297, 21 *Fla.* 700.—FOLLOWED IN *Florida Southern R. Co. v. Hirst*, 30 *Fla.* 1.

Plaintiff's intestate was killed while walking on defendant's track by an engine approaching him from behind. *Held*, that

he had no legal right on the track, though it was a pathway commonly used by him and others, and his own negligence appearing, a nonsuit was properly allowed. *Hick v. New York & S. B. R. Co.*, 10 N. Y. S. R. 398, 45 Hun 591.

Plaintiff's intestate was killed while walking on a track built over marshy ground with a ditch in which was water on either side, where there was no way of getting off except by jumping in or over the ditch. When he first saw the engine approaching, it was 922 feet behind him and 152 feet ahead of him was a platform where he could leave the track. By reversing the engine, the train could have been stopped in time to have avoided the collision. *Held*, that the question of contributory negligence was for the jury. *Kemer v. Long Island R. Co.*, 1 N. Y. Supp. 124, 15 N. Y. S. R. 884; *affirmed in* 113 N. Y. 669, 23 N. Y. S. R. 994.

In an action for killing plaintiff's husband on the track, the evidence showed that he was walking on defendant's trestle near a curve, and that after a train passed the curve it was impossible to stop it in time to avoid a collision; that the trestle was 8 or 10 feet high with a stream of clear water 8 or 10 feet wide and 4 or five feet deep beneath it, and where there was no water there was soft sand, though in some places it was overgrown with briars; that the deceased was a young and healthy laboring man and familiar with the neighborhood, and with the operation of trains. *Held*, that the evidence failed to show that he was in the exercise of due care, and that a nonsuit was properly allowed. *May v. Central R. & B. Co.*, 80 Ga. 363, 4 S. E. Rep. 330.

In an action for the death of a person caused by negligence the plaintiff should be nonsuited on the ground of contributory negligence where the evidence shows that the deceased was walking upon loose boards placed upon the ties along one side of defendant's track, which at this place was built on piles across mud flats, following a switch-train that had just preceded him; that the train started back after switching some cars, but deceased kept on until the engine was close upon him, when in attempting to cross to planking on the other side of the track, he slipped and fell under the wheels. *Lewis v. Puget Sound Shore R. Co.*, 4 Wash. 188, 29 Pac. Rep. 1061.—

QUOTING *Ohio & M. R. Co. v. Hill*, 117 Ind. 56, 18 N. E. Rep. 461; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 701.

205. — In the night-time.—A person who walks on a railroad track at night, in a deep cut four or five hundred yards long, within the corporate limits of a city or town, where there are no intersecting streets or crossings, is a mere trespasser, and being run over and killed by a train approaching from behind, his contributory negligence prevents a recovery of damages by his personal representative, unless it is shown that the person in charge of the train discovered him in time to avoid the injury, and failed to exercise due care and diligence to avoid it. *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137, 10 So. Rep. 141.

A. and B. started on a dark night to walk up a mile and a half of railroad track a few minutes after they knew that an express train coming from a direction opposite to that in which they were walking was due. After walking a short time they met the train. The engine had a bright headlight, but there was no whistle blown or bell rung. B., who was walking ahead, saw the engine just as it was upon him and stepped out of the way. It struck A., however, killing him. In an action to recover damages for A.'s death—*held*, that he had been guilty of such contributory negligence as precluded recovery. *State v. Baltimore & P. R. Co.*, 15 Am. & Eng. R. Cas. 409, 58 Md. 482. —DISTINGUISHED IN *Troy v. Cape Fear & Y. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 99, 6 Am. St. Rep. 521.

206. Sleeping on track.—The plaintiff's intestate was lying on the ground at a point where the defendant's track passes through a field in the country, with his body extended outward from the track between two projecting cross-ties, and his head resting on a cross-tie, close to the rail, on the left side of the track, looking in the direction in which the train was going. He was first discovered, when the engine was at a distance of about 180 feet, by the fireman, whose place was on that side. Every effort to stop the train was immediately made. The administrator sues to recover damages for the injuries resulting in the death of his intestate, who was struck by the train before it was stopped. *Held*, that the general affirmative charge in favor of the defendant was properly given.

Goodwin v. Central R. & B. Co., 96 Ala. 445, 11 So. Rep. 393.—*FOLLOWING Nave v. Alabama G. S. R. Co.*, 96 Ala. 264; *Glass v. Memphis & C. R. Co.*, 94 Ala. 581; *Columbus & W. R. Co. v. Wood*, 86 Ala. 164; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149.—*Gregory v. Southern Pac. R. Co.*, 2 Tex. Civ. App. 279, 21 S. W. Rep. 417.

207. Driving team on track.—One who, having got upon a track in the night at a highway crossing, continues to drive along the track for a distance of nearly two miles, there being nothing to prevent his leaving it, is guilty of such negligence as will defeat a recovery for his death, although his getting upon the track in the first instance was due to the negligence of the company. *McDonald v. Chicago, M. & St. P. R. Co.*, 75 Wis. 121, 43 N. W. Rep. 744.

208. Intoxicated trespassers.—Where one goes upon a track voluntarily for the purpose of walking thereon, while he is so intoxicated as to be unable to get out of the way of trains, and is killed, his own negligence will be deemed the proximate cause of the death, though it appears that the engine was running with a tender in front without any light or lookout. *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371, 5 Am. & Eng. R. Cas. 635. *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 726, 75 Mo. 575.

The conduct of the deceased in this case evinced a total want of that care which a man of common sense would take of himself, and was nothing short of gross negligence. He voluntarily got drunk, placed himself in a situation of peril, without the intervention of the railroad company, fell over an embankment into one of their cuts, and was killed. Under these facts, the railroad was not liable, and a nonsuit was right. *Berry v. Northeastern R. Co.*, 28 Am. & Eng. R. Cas. 575, 72 Ga. 137.

Where a person, while intoxicated, places himself in the dusk of the evening, on a railroad track in a city street where trains are constantly passing, and so remains until he is run over and killed, the deceased will be held to have been guilty of such gross negligence that no recovery can be had against the company, unless the agents of the company wilfully caused the death, or were guilty of such gross negligence as amounted in law to a wilful neglect of duty. *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408. *Mar-*

quette, H. & O. R. Co. v. Handford, 39 Mich. 537.

209. Deaf-mute trespasser.—A deaf mute walking on a railroad track was struck by an engine coming from the direction he was going. The engineer saw him about thirty yards ahead, crossing obliquely from the right to the left side of the track. No whistle was blown. The train was visible for nearly a mile from where he was struck. *Held*, that his own negligence contributed to his death. *Tyler v. Sites*, 88 Va. 470, 13 S. E. Rep. 978.

210. Duty of company after discovery of trespasser.—If it appear that the accident would not have occurred if the agents of the railroad company had used, in running the train which occasioned the killing, ordinary prudence and care in giving reasonable and usual signals of its approach, and keeping a proper lookout, the company is liable even if the deceased were guilty of the want of ordinary care and prudence in being on the railroad track at the time of the accident. *Baltimore & O. R. Co. v. State*, 33 Md. 542.—*DISTINGUISHED IN McMahon v. Northern C. R. Co.*, 39 Md. 438. *QUOTED IN Troy v. Cape Fear & Y. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521; *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667; *Schilling v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 60, 71 Wis. 255.

Although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased and, after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury. *Bell v. Hannibal & St. J. R. Co.*, 86 Mo. 599.—*REVIEWED IN Crow v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 357.—*Boutwemester v. Grand Rapids & I. R. Co.*, 31 Am. & Eng. R. Cas. 376, 67 Mich. 87, 10 West. Rep. 853, 34 N. W. Rep. 414. *Clark v. Wilmington & W. R. Co.*, 48 Am. & Eng. R. Cas. 546, 109 N. Car. 430, 14 S. E. Rep. 43.

The negligence of a traveler killed while walking upon a track without permission, and regardless of the danger-signals given by the engineer of the approaching train,

will bar a recovery by his administrator, unless it is established that the engineer saw and understood the danger to him, and recklessly ran the train upon him without doing what he could to stop and avoid the injury. *Bourmeester v. Grand Rapids & I. R. Co.*, 31 *Am. & Eng. R. Cas.* 376, 67 *Mich.* 87, 10 *West. Rep.* 853, 34 *N. W. Rep.* 414.—REVIEWED IN *Kansas Pac. R. Co. v. Whipple*, 37 *Am. & Eng. R. Cas.* 320, 39 *Kan.* 531, 18 *Pac. Rep.* 730.

Where by the uncontroverted evidence it appears that deceased was improperly on defendant's track; that he voluntarily exposed himself to the peril, and might, if he had used his eyes and ears, have seen and heard the approaching train long before it struck him; and the only material conflict of evidence was as to the giving of the signals upon the approach of the cars—held, that deceased having directly contributed to his own death, his administrator had no cause of action. *Baltimore & P. R. Co. v. State*, 54 *Md.* 648.

e. Of Employés.

211. In general.—To recover for the death of an employé it is necessary to prove that his death was caused by the negligence of the railroad, without fault or negligence on his part. *Sears v. Central R. & B. Co.*, 53 *Ga.* 630.

An employé of a contractor who, on his way to work and while passing through a narrow cut, steps between two parallel tracks in order to allow two trains to pass, and finding that there is not sufficient room between the tracks, attempts to cross one of the tracks to an open place in the cut and is struck and killed, is guilty of such contributory negligence as will bar an action to recover damages for his death. *Noyes v. Southern Pac. R. Co.*, (Cal.) 24 *Pac. Rep.* 927.

Although deceased at the time of his death was in the employ of the defendant company, yet as he was not only not on duty at the time he was killed, but was not at or near the scene of his duties, he occupied the footing, in every respect, with reference to the running of the company's trains, of the general public. The rule of contributory negligence applicable to the public under like circumstances was therefore applicable to him. *Savannah, F. & W. R. Co. v. Flannagan*, 39 *Am. & Eng. R.*

Cas. 661, 82 *Ga.* 579, 9 *S. E. Rep.* 471.—RECONCILING *Central R. Co. v. Henderson*, 69 *Ga.* 715.

There being no evidence showing that any officer of defendant ever saw the decedent walking between its tracks to and from his home, or had actual notice of such fact, or that there was any beaten track or traveled way along the side of or between said tracks, or that any other of defendant's employés used this route as a way to reach their homes, and it appearing that there were three other ways by which decedent could have reached his home, which ways he had often used, a verdict is properly directed for defendant. *O'Donnell v. Duluth, S. S. & A. R. Co.*, 89 *Mich.* 174, 50 *N. W. Rep.* 801.—DISTINGUISHING *Bourmeester v. Grand Rapids & I. R. Co.*, 63 *Mich.* 557.

Where a railroad company is charged with wilful neglect which causes the death of an employé the defense of contributory negligence cannot be considered. *Derby v. Kentucky C. R. Co.*, (Ky.) 4 *S. W. Rep.* 303. *McDonald v. International & G. N. R. Co.*, (Tex. Civ. App.) 21 *S. W. Rep.* 774.—FOLLOWING *East Line & R. R. Co. v. Rushing*, 69 *Tex.* 317, 6 *S. W. Rep.* 834. QUOTING *Green v. Erie R. Co.*, 11 *Hun* (N. Y.) 333.

If the deceased employé, being in dangerous proximity to the railroad track, was evidently ignorant or oblivious of peril from an approaching train and the engineer of the train saw his peril in time to avert injury, the failure to use the proper available means to avert it is gross negligence, or the equivalent of wilful and intentional wrong, and overcomes the defense of contributory negligence. *Louisville & N. R. Co. v. Trammell*, 93 *Ala.* 350, 9 *So. Rep.* 870.

Plaintiff's intestate was an employé in defendant's shops, and upon leaving for home in the evening attempted to cross where there were 16 tracks, but with others was temporarily delayed at one track by a long freight train which was passing, and as soon as it was off the crossing, in the language of a witness, he made a "dart" to cross and was struck and killed by a backing engine. Held, that he did not exercise due care, and that a verdict for plaintiff could not be sustained, though there may have been negligence on the part of the defendant. *Chicago, R. I. & P. R. Co. v. Fitzsimmons*, 40 *Ill. App.* 360.—DISTINGUISHING *Galena & C. U. R. Co. v. Loomis*,

13 Ill. 550; *Chicago & A. R. Co. v. Elmore*, 67 Ill. 176.

Plaintiff's intestate was an employé in defendant's yard, and upon leaving at the close of a day's work walked on the track, simply because there was snow on the ground and it was better walking on the track; and while thus walking he was struck by a rapidly backing engine and killed. It appeared that there was negligence on the part of the company, but that the negligence of the deceased was at least equal in degree. *Held*, under the rule of comparative negligence, that a recovery could not be had. *Chicago, B. & Q. R. Co. v. Olson*, 12 Ill. App. 245.

Plaintiff's intestate was an employé of a car-building company. Contrary to the direction of his employer, he crawled under some new cars which had left the company's yards as completed and stood upon the defendant's railway track ready for transportation. This he did after the conductor of one of defendant's trains examined the cars to see if any person was under or about them. The train was then coupled to the new cars and started up and deceased was killed. In an action for causing his death—*held*, that the defendant was not liable, the deceased being guilty of contributory negligence, and it was error to submit to the jury, in the absence of evidence, the question whether or not there was a custom for the employés of the car company to go under the cars for repairing them after they had been turned over to the railroad company as completed. *Coops v. Lake Shore & M. S. R. Co.*, 31 Am. & Eng. R. Cas. 379, 66 Mich. 448, 10 West. Rep. 174, 33 N. W. Rep. 541.

212. Brakemen.—(1) *In general.*—Where a brakeman on a railroad who was engaged in the performance of his duty received injuries and died from the effects thereof, and there was nothing to show that he was careless or that he ought to have done a particular act by way of precaution, the jury might infer that he was in the exercise of due care when the accident occurred. *Thyng v. Fitchburg R. Co.*, 53 Am. & Eng. R. Cas. 535, 156 Mass. 13, 30 N. E. Rep. 169.

Where a brakeman on a freight train which has stopped upon an unplanked bridge unnecessarily climbs down from the top of the car in the night-time, carrying a lantern in his hand, and without looking

falls through the bridge to the ground below and is killed, he is guilty of such contributory negligence as to bar an action against the company for damages for causing his death. *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb. 306, 49 N. W. Rep. 362.—**DISTINGUISHING** *Franklin v. Winona & St. P. R. Co.*, 37 Minn. 409.

In an action for killing plaintiff's intestate while coupling cars, the question whether intestate's foot got caught in the frog when the block had been taken out is for the jury. *Meek v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 932.

The fact that deceased had attempted to uncouple while the train was moving was not of itself evidence of negligence on his part contributing to his death, it being shown that it was a common practice. *Texas & P. R. Co. v. Robertson*, 82 Tex. 557, 17 S. W. Rep. 1041.

(2) *Illustrations.*—In an action for the death of a brakeman the negligence charged on the part of the company was in furnishing a defective wheel which had to be turned in setting a brake; while the company claimed that the deceased was guilty of contributory negligence in using a lever or club in setting the brake, which was both dangerous and against the rules of the company. A witness for the defense testified that on the morning of the accident he saw a brakeman at or near the place of the accident setting a brake with a club, and another witness testified that 10 hours after the accident he found a brakeman's club within 29 steps of where the brakeman's body was found. In rebuttal, plaintiff introduced a witness who testified that he saw the deceased just before the accident going toward the wheel, and when within four feet of it he had no club; and other witnesses testified that they walked up and down the track soon after the accident, but saw no club, though it was talked about and looked for. *Held*, not sufficient to show contributory negligence, or that the deceased used a club. *Leahy v. Southern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 230, 65 Cal. 150, 3 Pac. Rep. 622.

Plaintiff's intestate was killed while coupling cars at night, by one that had no bumper. *Held*, that he was not chargeable with contributory negligence because he did not examine the car and discover its defect before attempting to couple it. *Mahoney v. New York C. & H. R. R. Co.*, 15 N. Y. Supp.

501, 39 *N. Y. S. R.* 911; *affirmed in* 131 *N. Y.* 623, *mem.*

Plaintiff's intestate was killed by coming in contact with an overhead bridge. It appeared that he had been employed by the company over two months. The bridge was high enough to allow persons to stand on the top of ordinary cars and pass under, but the car on which the intestate was standing was 18 inches higher than ordinary cars, which fact was known to him. *Held*, that the action could not be maintained. *Lynch v. New York, L. E. & W. R. Co.*, 44 *N. Y. S. R.* 663, 63 *Hun* 635, 18 *N. Y. Supp.* 417.—REVIEWING *Fitzgerald v. New York C. & H. R. R. Co.*, 12 *N. Y. Supp.* 932, 36 *N. Y. S. R.* 755; *Williams v. Delaware, L. & W. R. Co.*, 116 *N. Y.* 628, 27 *N. Y. S. R.* 760.

Plaintiff's intestate was employed as a brakeman on a freight train and was killed on a moonlight night by striking an overhead bridge while standing on top of a car. The bridge was not high enough to enable a man to stand erect and pass under. He had passed under the bridge before and had been warned against its danger, and was told to stoop down just before approaching the bridge. *Held*: (1) that the accident was due to his own carelessness, though the company may have been negligent in attempting to run under such a bridge; (2) that the danger of the bridge was assumed by him when he entered the company's employ. *Clark v. Richmond & D. R. Co.*, 18 *Am. & Eng. R. Cas.* 78, 78 *Va.* 709, 49 *Am. Rep.* 394.—QUOTING *Baltimore & O. R. Co. v. Stricker*, 51 *Md.* 47; *Devitt v. Pacific R. Co.*, 50 *Mo.* 302. REVIEWING *Owen v. New York C. R. Co.*, 1 *Lans. (N. Y.)* 108.—DISAPPROVED IN *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36. NOT FOLLOWED IN *Baltimore & O. & C. R. Co. v. Rowan*, 23 *Am. & Eng. R. Cas.* 390, 104 *Ind.* 88. QUOTED IN *Goodman v. Richmond & D. R. Co.*, 81 *Va.* 576; *Richmond & D. R. Co. v. Burnett*, 88 *Va.* 538. REVIEWED IN *Williamson v. Newport News & M. V. Co.*, 34 *W. Va.* 657.

On the disputed facts disclosed in the plaintiff's case it appeared that there was a switch-stand erected in the defendants' yard close to the track, the deceased being aware of his position and proximity to the track. On the day in question the deceased was engaged as a brakeman on a train passing through the yard. His position as brakeman should have been on top

of the car, but for some reason which did not appear, he was on the side of the car, holding on to the ladder by which brakemen mount to the top of the car, and his attention being drawn towards the end of the train he did not see the switch-stand, when he was struck by it and thrown under the wheels of the car and killed. *Held*, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly withdrawn from the jury. *Ryan v. Canada Southern R. Co.*, 26 *Am. & Eng. R. Cas.* 344, 10 *Ont.* 745.—QUOTING *Skipp v. Eastern Counties R. Co.*, 9 *Ex.* 223; *Hall v. Union Pac. R. Co.*, 16 *Fed. Rep.* 744.

213. Car inspectors.—The deceased, at the time of the injury, was engaged in his duty of inspecting cars then standing in the yard kept for that purpose, and was under a standing car examining the same, which, by being suddenly struck by other cars in motion, caused the injury resulting in his death. Defendant, in taking some of its cars to the yard, there to be left, detached them from the engine propelling them before entering the yard, and suffered the cars, without any brakeman to control their momentum, to enter the yard and strike the cars then standing on the track, and thereby caused the injury. Deceased, who was engaged as car inspector about the yard, placed no signal on the track to notify the switchman or any one else that he was engaged in inspecting the cars, and no warning was given the deceased by bell, whistle, or otherwise, of the approaching cars. Defendant asked a witness what the custom was, at the time of the accident, in letting cars into the yard on tracks, and permitting them to run against standing cars, which the court refused to allow. *Held*, that the question was proper, as, if such was the custom, the answer would have aided the jury in determining the degree of care the deceased observed, and whether he was guilty of such negligence on his part as to prevent a recovery. *Pennsylvania Co. v. Stoelke*, 8 *Am. & Eng. R. Cas.* 523, 104 *Ill.* 301.—DISTINGUISHED IN *North Chicago Rolling Mill Co. v. Johnson*, 114 *Ill.* 57.

214. Car repairers.—Plaintiff's husband was a car repairer of some years' ex-

perience, but not with defendants; but was familiar with their yard and how cars were moved in and out. Defendants' car inspector called him while passing by to look at some work that had been done on a car which stood on a track in the yard, and just as he was in the act of stooping to look at it, an engine struck the car and killed him. The evidence tended to show that there was a brakeman on a car attached to the colliding engine, but it was impossible for him to see the deceased. *Held*, that the company was not liable. *Hallihan v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 117, 71 *Mo.* 113.—APPROVED IN *Taylor v. Missouri Pac. R. Co.*, 86 *Mo.* 457.

Plaintiff's intestate was employed in defendant's repair shops, but at the time of his death was engaged in making slight repairs on a car which stood on a track. It was usual to display a red flag when working about cars on the track, but the reason given for not displaying it on this occasion was that the parties thought it would only take a few minutes to complete their work. An engine was seen approaching on the track, and the deceased directed another employé to stop it, and it was brought to a standstill a few feet from the car. In a few minutes a switchman, who knew of the directions to stop the engine, signaled it to advance, and it ran against the car and killed deceased while he was at work under it. *Held*, that the questions of negligence and contributory negligence were properly left to the jury. *Pool v. Southern Pac. R. Co.*, 7 *Utah* 303, 26 *Pac. Rep.* 654.

215. Conductors.—Where a freight conductor knows that a certain bridge over which he has to run his train is being repaired, and the "slow" sign is displayed, the company is not liable for the death of the conductor by reason of not giving the trainmen further notice, where the conductor fails to act upon the information that he has, and the warning given, and is killed while running his train over the bridge at an immoderate rate of speed. *St. Louis, I. M. & S. R. Co. v. Morgart*, (*Ark.*) 8 *S. W. Rep.* 179.

Where the conductor in charge of a railroad train knew every circumstance which tended to render the operation of his train hazardous, and if, in his judgment, it was not being operated in the safest possible manner, he had full authority to direct that such changes be made in the manner of its

operation as would render it safe—*held* that, if by its negligent operation he was killed, his administrator could not recover against the railroad company. *Lane v. Central Iowa R. Co.*, 69 *Iowa* 443, 29 *N. W. Rep.* 419.—FOLLOWED *Dewey v. Chicago & N. W. R. Co.*, 31 *Iowa* 373.

That the deceased was the conductor and superior officer of the train, and directed the line of conduct which resulted in his death, would estop his administrator from recovering against the company on the ground of negligence on the part of its employés. *Dewey v. Chicago & N. W. R. Co.*, 31 *Iowa* 373, 2 *Am. Ry. Rep.* 369.—FOLLOWED IN *Lane v. Central Iowa R. Co.*, 69 *Iowa* 443.

The deceased, at the time of the injury, was climbing over the top of a car when the train was under way, it having just started from the station. It did not appear that his doing so had any necessary connection with his duties as conductor. *Held* (Miller, J., dissenting), that the evidence established contributory negligence. *Gibson v. Erie R. Co.*, 63 *N. Y.* 449, 20 *Am. Rep.* 552; *reversing* 5 *Hun* 31.—FOLLOWED IN *Williams v. Delaware, L. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 628, 22 *N. E. Rep.* 1117, 27 *N. Y. S. R.* 760. QUOTED IN *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 *Mich.* 265; *Dering v. New York C. & H. R. Co.*, 50 *N. Y. S. R.* 832; *Overby v. Chesapeake & O. R. Co.*, 37 *W. Va.* 524.

216. Engineers.—In a suit by the representative of an engine driver to recover for killing the driver by the explosion of an engine in his charge, plaintiff cannot recover if it appears that the explosion was the result of the carelessness of the engine driver in not keeping sufficient water in the boiler, and in carrying more steam than, by the rules prescribed, he was allowed to carry. *Illinois C. R. Co. v. Houck*, 72 *Ill.* 285.—FOLLOWED IN *Illinois C. R. Co. v. Keen*, 72 *Ill.* 512. REVIEWED IN *Bucklew v. Central Iowa R. Co.*, 64 *Iowa* 603.

Where deceased, an engineer for a street-railroad company, knew of the proximity of telegraph poles to the track, and though warned against them, persisted in putting his head out of the cab window, and looking backward while the engine was going forward, so that his head was crushed, he is guilty of contributory negligence, and his administrator cannot recover. *Helfrich v. Ogden City R. Co.*, 7 *Utah* 186, 26 *Pac. Rep.*

295.—FOLLOWING *Quibell v. Union Pac. R. Co.*, 7 Utah 122, 25 Pac. Rep. 734.

In an action for the death of an engineer, the defense being contributory negligence, it appeared that the engineer had, on frequent occasions other than the one in question, run his engine at a greater speed than was permitted by the rules of the company, and that other engineers had done the same thing, and that in addition to these rules, warning had been both posted and given to the effect that engineers must not exceed the rate of speed prescribed by the rules of the company. *Held*, such proof of contributory negligence as to defeat a recovery. *Sutherland v. Troy & B. R. Co.*, 74 Hun 162, 26 N. Y. Supp. 237, 56 N. Y. S. R. 397.

A company is not relieved of liability for the death of an engineer because he stood at his post when a collision seemed inevitable, when by jumping he might have saved his life. *Central R. Co. v. Crosby*, 74 Ga. 737.

A company is not relieved from liability for the death of an engineer caused by a defect in the track due to the company's negligence, because the evidence shows that he knew that the air-brake was out of order, and that the accident might not have happened had it been in order. *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 18 Am. & Eng. R. Cas. 23, 78 Mo. 195.—QUOTING *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 393.

In an action by a wife for the wrongful death of her husband, an engineer in defendant's employ, where he pulled his freight train onto a switch to allow a passenger train, then due, to pass on the main track, and not being able to see the rear of his train for obstructions and because of a curve in the track, stepped onto the main track, at a call from the rear brakeman, and directed the fireman to pull the train forward so as to clear the main track, and while so standing on the track he was struck and injured by a rapidly moving hand-car operated by section men who knew that the train men were at their accustomed work with the train, and who could have seen deceased on the track had they watched in advance of them, there is abundant evidence to show that they did not manage the hand-car as prudent persons would do under such circumstances, this being the standard by which the question of negligence on their part should be deter-

mined. *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62, 11 S. W. Rep. 308.—REVIEWED IN *Parker v. Hannibal & St. J. R. Co.*, 109 Mo. 362.

217. Firemen.—Where a fireman is killed by coming in contact with a pipe projecting from a water-tank, and it appears that it was so constructed that he might have passed it in safety by the use of due diligence, there can be no recovery for his death. *Atlanta & W. P. R. Co. v. Webb*, 61 Ga. 586.

A fireman was negligent in leaving an ash-pan open which caused fire to drop in the box of the driving-wheel and to ignite the grease therein. He leaned out of the engine to extinguish it and was killed by striking a bridge that he knew stood very near the track. *Held*, that his own negligence was the cause of the accident, and the company was not liable. *Sheeler v. Chesapeake & O. R. Co.*, 81 Va. 188.—QUOTING *Owen v. New York C. R. Co.*, 1 Lans. (N. Y.) 108.—REVIEWED IN *Williamson v. Newport News & M. V. Co.*, 34 W. Va. 657.

218. Flagmen.—A flagman on a freight train who, pursuant to a rule of the company, has placed a torpedo on the track as a signal to a following passenger train to stop, is not in law negligent in going into the caboose, by direction of the conductor, to obtain necessary sleep, and his widow may maintain an action for his death caused by a collision between such passenger train and the caboose, the question of decedent's contributory negligence being for the jury. *Mills v. East Tenn., V. & G. R. Co.*, 87 Ga. 102, 13 S. E. Rep. 205.—QUOTING *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 390; *Prather v. Richmond & D. R. Co.*, 80 Ga. 436. REVIEWING *Georgia R. & B. Co. v. McDade*, 59 Ga. 73.

219. Laborers, section hands, etc.—(1) *When action barred by contributory negligence.*—The deceased, who was a railroad hand, stood in the middle of the track while an engine was backing toward him at the rate of one to three miles per hour, and when it was near, attempted to jump on the footboard; but the board was slightly broken, and the hand-rail had been removed the night before, and he fell and was killed. *Held*, that a verdict in favor of the plaintiff should be set aside. *Cunningham v. Chicago, M. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 217, 5 McCrary (U. S.) 465, 17 Fed. Rep. 882.

Plaintiff's intestate was a stone-mason and employed in preparing and placing a large stone to be used in a bridge. It lay in a cut very near the track, but a construction train passed several times without touching it. The men in charge warned the intestate and others to keep out of the way of the train, but on the next passage of the construction train, a standard at the side of a car had slipped down through its socket and struck the stone and threw it against the intestate causing injuries from which he died. It appeared that the other men had left the cut, and that the intestate saw the standard and had expressed his belief that it would strike the stone. *Held*, that he was guilty of contributory negligence as a matter of law. *Columbus & W. R. Co. v. Bradford*, 38 *Am. & Eng. R. Cas.* 214, 86 *Ala.* 574, 6 *So. Rep.* 90.

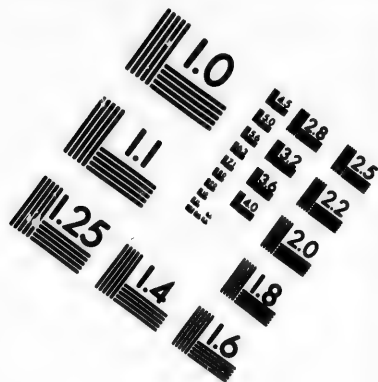
A track repairer was struck and killed by moving cars of another company, at a point where defendant's road connected with the other road. It was at a point where tracks were numerous, and engines constantly in motion, with which deceased was very familiar. Deceased stopped on the track, close in front of the moving cars, with his back to them, with his cap close over his ears. There was but slight negligence, if any, on the part of those moving the train. *Held*, that deceased was guilty of such gross negligence as to prevent a recovery. *Chicago & N. W. R. Co. v. Sweeney*, 52 *Ill.* 325.—DISTINGUISHED IN *Chicago, R. I. & P. R. Co. v. Dignan*, 56 *Ill.* 487.

A section hand in the employ of a railway company, while obeying directions to go down the road-track, walked on the track, after riding for a space on the tender, until it stopped. For some cause he halted upon the track and stooped down for some purpose not clearly stated a very short distance from the tender. While in that position the train with tender in front, which had stopped, was again put slowly in motion and run over the section hand, killing him. The train was moving when the accident occurred at a place where neither a bell nor whistle was required by law to be sounded. No defect was shown either in the road-bed, track, or cars, nor was there any evidence of incompetence on the part of those operating the train. In a suit against the railway company for damages, brought by the surviving parents of the deceased—*Held*, that the section hand was guilty of

contributory negligence barring a recovery. *Trinity & S. R. Co. v. Mitchell*, 72 *Tex.* 609, 10 *S. W. Rep.* 698.

Deceased, with three others and a foreman, was employed with a hand-car in clearing snow from the track near Limehouse station. The foreman saw a freight train approaching, at speed, a quarter of a mile off, upon which he left the men, telling them "to clear," and walked towards it, waving a flag. Two of the men stepped aside when it came up, but deceased and the other man ran in front of it along the track, until it drove the hand-car against and killed them both. *Held*, clearly a case of contributory negligence on the part of deceased, and a nonsuit was proper. *Plant v. Grand Trunk R. Co.*, 27 *U. C. Q. B.* 78.—FOLLOWING *Skelton v. London & N. W. R. Co.*, L. R. 2 C. P. 631.

(2) *When not chargeable with contributory negligence.*—In an action for negligently causing the death of A., it appeared from the evidence that A. and others in the employment of a union railway company were at work at a certain point on the railroad track of said union company over which trains could pass at that point; that a train of cars owned and run by defendant was backing at the time; that the bell of the locomotive was ringing; that there were four or five cars in the train and no method of communicating with the engineer from the rear of the train; nor was there any brake in working order on the car farthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train; nor was any person in advance of the train to warn others of its approach. The locomotive was in charge of the fireman, the engineer being absent to procure a drink. The other persons employed with B., at work on the track, stepped off, and some one called to him, "look out," when B., instead of stepping back, stepped forward and was struck and killed. The fireman and one brakeman were the only persons in charge of the train. This instruction was asked and refused: "If, at the time deceased was killed, it was his duty to be engaged upon the track at that place, and he might have seen the approach of the train by exercise of reasonable care, as by looking up, then the failure to do so, if he did so fail, was negligence on his part; and if such negligence contributed to his in-



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jury then the jury should find for the defendant." *Held*: (1) that there was no error in this ruling; (2) that this evidence was sufficient to sustain a finding against the railway company. *Indianapolis, B. & W. R. Co. v. Carr*, 35 Ind. 510, 4 Am. Ry. Rep. 495.

Plaintiff's intestate was killed while engaged in working upon a track used jointly by his employer and defendant, by a car set in motion by one of defendant's trains, without a brakeman thereon in a position to enable him to perceive danger, as required by its rules. The company employing deceased had a similar rule. *Held*, that deceased had a right to rely on the observance of the rule, and therefore, his omission to pay attention to the movements of the approaching trains was not as a matter of law contributory negligence. *Noonan v. New York C. & H. R. R. Co.*, 16 N. Y. Supp. 678, 42 N. Y. S. R. 41; *affirmed in* 131 N. Y. 594. — *REVIEWING* *Murphy v. New York C. & H. R. R. Co.*, 118 N. Y. 527, 23 N. E. Rep. 812.

In an action for killing plaintiff's husband by a switch engine while he was repairing the track, there was evidence tending to show that the engine would have been safer if it had been provided with a sloping tank instead of a square one. *Held*, that evidence that he could see that the engine had a square tank would not bar a recovery where there was nothing to show that he knew that it was more dangerous than a sloping tank. *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. Rep. 838.

(3) *Question of contributory negligence for jury.*—Plaintiff's intestate was killed by a passing train while repairing defendant's track. It seemed that he and others were working under a boss who had instructed the men to go on with their work and pay no attention to trains. *Held*, sufficient to warrant the submission of the question of his contributory negligence to the jury. *Chicago, St. L. & P. R. Co. v. Gross*, 133 Ill. 37, 24 N. E. Rep. 563; *affirming* 35 Ill. App. 178.

Plaintiff's intestate, who had been employed for about two weeks in a yard, where there were numerous tracks and constantly moving trains, was killed by coming in contact with a signal-post while ascending the outside ladder of a car. The post was four feet from the rail. There was evidence

tending to show that the post was too near the cars to be practically safe for operatives, unless aware of the danger. *Held*, that upon the evidence, the question of defendant's negligence in locating and maintaining the post was for the jury (Gilfillan, C. J., dissenting); and also that the court was not warranted in holding, as a matter of law, that the deceased was guilty of contributory negligence in not observing that the post was so near the cars as to be dangerous, and in not appreciating and avoiding the danger. But the evidence did not so clearly preponderate in favor of the verdict as to warrant a reversal of the order of the trial court granting a new trial. *Johnson v. St. Paul, M. & M. R. Co.*, 41 Am. & Eng. R. Cas. 293, 43 Minn. 53, 44 N. W. Rep. 884.

Plaintiff's intestate was employed by one who had a contract to lay water-pipes in defendant company's yard. He was engaged in digging a trench between two tracks that were about nine feet apart, and as a passenger train approached on one of the tracks its employes called to the intestate to guard against danger, and in stepping back from the train he came near the other track and was struck and killed by a backing freight train thereon. *Held*, that the question of his negligence was for the jury. *Collins v. New York, N. H. & H. R. Co.*, 23 J. & S. 31, 8 N. Y. S. R. 164; *affirmed in* 112 N. Y. 665, *mem.*, 20 N. E. Rep. 413, 20 N. Y. S. R. 977.

In such case the deceased could not be termed a mere licensee, and the company owed him ordinary care in the management of its trains. *Collins v. New York, N. H. & H. R. Co.*, 8 N. Y. S. R. 164, 23 J. & S. 31; *affirmed in* 112 N. Y. 665, *mem.*, 20 N. E. Rep. 413, 20 N. Y. S. R. 977. — *APPLYING* *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119.

Defendant's intestate was employed to attend a guy-rope attached to a hoisting-bucket used in unloading coal from defendant's vessel, and in some way the rope caught him and lifted him some 15 feet, when a boy 16 years old, who was temporarily in charge of the engine, let him down so rapidly that he fell in the hold and was killed. *Held*, that it was proper to leave the question to the jury whether permitting the boy to run the engine was the proximate cause of the injury, notwithstanding the intestate may have been negligent in

permitting himself to be caught in the rope. *Sweeney v. New York Steam Co.*, 25 N. Y. S. R. 598, 6 N. Y. Supp. 528; affirmed in 117 N. Y. 642, mem., 22 N. E. Rep. 1131, 27 N. Y. S. R. 977, mem.

220. Switchmen.—Negligence on the part of plaintiff's intestate is not a defense unless it causes or contributes to the injury. So, where a switchman riding on an engine running at an improper rate of speed is killed by colliding with cars negligently left on the track, the improper speed will not bar a recovery when it does not in any way contribute to the death. *Lockhart v. Little Rock & M. R. Co.*, 40 Fed. Rep. 631.

If a switchman, required by his duties to cross the railroad tracks, while attempting to do so in the daytime, when he knows that a locomotive is expected soon to pass, which could be seen approaching for a considerable distance, turns his back to the engine without looking until just as it strikes and kills him, he is not in the exercise of due care such as will enable his widow to maintain an action, under Mass. St. of 1887, ch. 270, § 2, for causing his death. *Sullivan v. Old Colony R. Co.*, 153 Mass. 118, 26 N. E. Rep. 240.

M., plaintiff's testator, a switchman in defendant's employ, while in the discharge of his duties, was standing on the top of a car loaded with coal. There was a trap in the bottom of the car to dump the coal, which was held in its place by a chain; this chain broke and let down the trap and M. passed through it with the coal, receiving injuries causing his death. In an action to recover damages it appeared that about two weeks before the accident a link in the chain was broken, and other employes engaged with M. united the parts of the chain by fastening the separated links together with a wire wound around them; about two days before the accident it was discovered that the trap could not be drawn up sufficiently close to prevent the coal from running out and, to prevent this, boards were put over the trap by the employes in M.'s presence, and his attention was called by one of the employes to its condition. There were cars in perfect condition in the yard where M. was at work ready for use, and M. had the selection of the cars to be used; he had been directed by the trainmaster to examine the traps to see that they were all fastened so as to be safe, to send the cars with broken chains to the shop for

repairs, and to use none in an imperfect condition. *Held*, that the submission of the defendant's negligence to the jury was error. *Shields v. New York C. & H. R. R. Co.*, 133 N. Y. 557, 30 N. E. Rep. 596, 44 N. Y. S. R. 72; reversing 60 Hun 586, 39 N. Y. S. R. 750, 15 N. Y. Supp. 613.

X. EVIDENCE.

1. In General.

a. Admissibility and Relevancy.

221. What evidence is admissible, generally.—It being necessary for plaintiff to prove that, at the time of the collision which caused his intestate's injuries and death, the hand-car was under the control of the foreman of the squad of laborers, he may prove that the foreman exercised control and authority; and a witness may so testify as a fact. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. Rep. 577.

Under an averment that defendant negligently "conducted itself in and about the carrying of deceased," it is competent to show that the defendant was remiss in employing an incompetent engineer, or in retaining him in its service with knowledge of his incompetency. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

In an action for damages for death caused by negligence, it is not error to admit evidence of the condition of the remains of deceased. *Leahy v. Southern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 230, 65 Cal. 150, 3 Pac. Rep. 622.

Where the declaration alleges that the locomotive by which an employe was killed was not supplied with proper brakes, evidence respecting its brakes, as compared with those of other locomotives belonging to the same company, was admissible. *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

Where one walking upon a railway track was killed by a train, evidence tending to show whether or not the deceased was a trespasser upon the track was properly admitted to aid the jury in determining the measure of care required by defendant, and the ultimate fact of negligence. *Murphy v. Chicago, R. I. & P. R. Co.*, 38 Iowa 539.

In an action for wrongfully causing the death of an employe, evidence is admissible which tends to show that the president and

directors of the company reside in other states and give very little personal attention to the operating of the road; as is also evidence tending to show incompetency on the part of conductors and engineers of colliding trains. *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512.

The action being for negligence in causing the death of plaintiff's intestate by running a locomotive over him at a street crossing, the accident having happened in the dark, immediately after another train, with a bright headlight, had passed the crossing, it was proper, under the circumstances, to admit evidence as to how long the eye requires, after looking at a brilliant light, to recover its natural power of sight. *Shaber v. St. Paul, M. & M. R. Co.*, 2 Am. & Eng. R. Cas. 185, 28 Minn. 103, 9 N. W. Rep. 575.

Where the roadbed of a railroad is laid near to a dwelling-house, and the child of the owner gets upon the track and is killed by the train, plaintiff may show, as an element of negligence on the part of the company, a failure to fence its track as required by the statute, even though the primary object of the requirement was merely protection of cattle and other stock. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 9 Am. Ky. Rep. 261.—FOLLOWING *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. 287. REVIEWING AND FOLLOWING *Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis. 186.

Under a general allegation of negligence causing the death of a girl seven years old, by being knocked down and run over by defendant's car, which was drawn by horses, evidence that there were no guards in front of the car is admissible to prove negligence or misconduct tending to produce the injury. *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *affirming* 3 E. D. Smith 103.—QUOTED IN *Paducah & M. R. Co. v. Hoeh*, 12 Bush (Ky.) 41. REVIEWED IN *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25.

In an action for causing the death of a switchman, after it has been shown by evidence that he was killed while making a coupling at night while a large and powerful freight engine was attached to the train, it is proper to introduce other evidence that a switch-engine was more suited to the work in question and, therefore, less dangerous. *Missouri Pac. R. Co. v. Lamothe*, 76 Tex. 219, 13 S. W. Rep. 194.

Where death is caused to a passenger by the horses attached to a horse-car "running away," it is proper to prove facts tending to show that the driver was incompetent. *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32.

In an action to recover for the death of an engineer, plaintiff's evidence showed that it was caused by a switch being left open, which threw the engine off the track; and there was sufficient evidence to justify the inference that it was due to the negligence of the switch-tender, and that he was retained in the company's service after it had knowledge of his negligence. *Held*, that it was error to reject evidence offered by the company tending to show that the switch had been changed by some one else when the switchman was not present. *Bawlec v. New York & H. R. Co.*, 62 Barb. 623; *affirmed* in 59 N. Y. 356, 7 Am. Ry. Rep. 114.

Plaintiff was walking with her husband along defendant's track at a point where it had been constructed over low ground, and there was a ditch on either side filled with water; he was killed by a passing train. *Held*, that evidence was admissible that plaintiff was sick at the time and that her husband was caring for her, as tending to explain why he did not escape from the track. *Remer v. Long Island R. Co.*, 1 N. Y. Supp. 124, 15 N. Y. S. R. 884; *affirmed* in 113 N. Y. 669.

Plaintiff's testator was killed at a small station after leaving the train and while walking on the track. It was claimed that there was no path in the direction in which he wished to go, except over private property, and that it was the custom of persons to walk up the track. *Held*, that evidence as to whether or not there was a footpath, and as to the custom of walking on the track, and as to whether a ticket agent was kept at the station, or a flagman at the crossing, was properly allowed for the purpose of showing the exact condition of affairs at the place. *Reid v. New York, N. H. & H. R. Co.*, 44 N. Y. S. R. 688, 63 Hun 630, 17 N. Y. Supp. 801; *affirmed* in 136 N. Y. 638, *mem.*, 32 N. E. Rep. 1014, 49 N. Y. S. R. 913.

222. What evidence is inadmissible.

—Where the action is under the statute for the benefit of the next of kin, evidence of the good or bad reputation of such next of kin is inadmissible for the purpose of affecting the amount of damages. *Hardy v.*

Minneapolis & St. L. R. Co., 36 *Fed. Rep.* 657.

Evidence that at a former trial the defendant relied upon a different defense to the charge of negligent killing, from that relied upon in the present trial, is inadmissible. *Harris v. Central R. Co.*, 30 *Am. & Eng. R. Cas.* 581, 78 *Ga.* 525, 3 *S. E. Rep.* 355.

Where an accident happens, resulting in a personal injury, the proper inquiry is not whether the accident might have been avoided, but whether, in the light of all the existing circumstances, the railroad company used reasonable care and diligence to guard against danger. *Beatty v. Central Iowa R. Co.*, 8 *Am. & Eng. R. Cas.* 210, 58 *Iowa* 242, 12 *N. W. Rep.* 332.

Where the action is under New York Act of 1847, as amended in 1849, it is error to admit in evidence what the president of the company said while attempts were being made to settle the claim, as tending to show harsh and oppressive treatment of the plaintiff, where the answer admits negligence causing the death. *Green v. Hudson River R. Co.*, 32 *Barb. (N. Y.)* 25; *affirmed in* 30 *How. Pr.* 593, n.

The witness stated that the switch shanty was sixty or seventy feet east of the switch; that the engine went about one hundred feet before it struck deceased, and that from the time the engine started there was no obstruction between it and the deceased; that he, the witness, was about fifty or sixty feet north and east of where the deceased was killed, and that it was daylight, and he could see the accident plainly. The court, in its discretion, properly sustained an objection to a question whether the deceased could have seen the approaching engine if he had looked. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 *Ill.* 48, 32 *N. E. Rep.* 398.

A child twenty-one months old was killed on the track. Afterward, persons placed a coal-bucket on the track where the accident occurred, and walked up the track, and were permitted to testify as to how far they could see it, as tending to prove that the persons running the train might have seen the child in time to stop the train. *Held*, error. *Chicago & A. R. Co. v. Logue*, 47 *Ill. App.* 292.

In an action for the death of the plaintiff's intestate, caused by the falling of a train on which he was employed, through a

bridge, one of plaintiff's witnesses offered a piece of timber sawed from the piling of a part of the bridge which did not go down at the time of the accident. *Held*, that the evidence was not admissible to show that the timbers of the bridge which caused the accident were decayed and unsound, but that it was admissible to show that the caps or timbers resting on the piling were not bolted thereto. *Mann v. Sioux City & P. R. Co.*, 46 *Iowa* 637, 16 *Am. Ry. Rep.* 146.—*FOLLOWING Locke v. Sioux City & P. R. Co.*, 46 *Iowa* 109.

In an action for the death of an employé caused by his coming in contact with a cattle-guard fence while hanging on a ladder on the side of a moving car, it was alleged that the defendant negligently placed the fence which struck the decedent, too close to the track. *Held*, that it was improper to admit in evidence a rule of the company for the guidance of its track repairers, providing that no materials or tools should be placed within five feet of the rails. *McKee v. Chicago, R. I. & P. R. Co.*, 48 *Am. & Eng. R. Cas.* 154, 83 *Iowa* 616, 50 *N. W. Rep.* 209.—*REVIEWED IN* *Murphy v. Wabash R. Co.*, 115 *Mo.* 111.

In an action for personal injuries occasioned to the plaintiff's intestate while wrongfully on one of the defendant's trains, by being pushed therefrom while it was in motion by one of defendant's servants—*held*, that there was no error in the refusal to permit the plaintiff to show that the defendant had been notified by the railroad commissioners to report accidents of this kind, as required by Mass. Pub. St. ch. 112, § 208, and had failed to report this one. *Devoy v. Boston & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 488, 156 *Mass.* 161, 30 *N. E. Rep.* 557.

223. Relevancy.—In an action against a railroad company for negligence in killing a man by their engine at the crossing of a public road, evidence that such road had been made by the company was irrelevant. The cause of action did not include negligence in the construction of the public road. *Pennsylvania R. Co. v. Weber*, 72 *Pa. St.* 27.

In an action against a railway company to recover damages for injuries that resulted in the death of plaintiff's minor son, the only connection in which the minority of the deceased can be considered is on an inquiry as to whether the railway company

which employed him had used such care as his age and inexperience would render necessary. When the action is for the loss of services of the child the rule is different. *Texas & N. O. R. Co. v. Crowder*, 70 *Tex.* 222, 7 *S. W. Rep.* 709.

224. Materiality.—Evidence to the effect that the company offered to pay the deceased's funeral expenses is not material. *Campbell v. Chicago, R. I. & P. R. Co.*, 45 *Iowa* 76.

The fact that the engine doing the mischief was in charge of an incompetent person at the time is immaterial, where it is shown that it was properly handled and was run at a proper rate of speed and the usual signals given. *Armil v. Chicago, B. & Q. R. Co.*, 28 *Am. & Eng. R. Cas.* 467, 70 *Iowa* 130, 30 *N. W. Rep.* 42.

Negligence in permitting an engine to stand on a track in the street is immaterial, where the manner of moving it was the proximate cause of the injury. *Armil v. Chicago, B. & Q. R. Co.*, 28 *Am. & Eng. R. Cas.* 467, 70 *Iowa* 130, 30 *N. W. Rep.* 42.

In an action to recover for the death of a fireman, caused by the tender's leaving the track at a certain place, it was immaterial whether the rails were properly spiked at other places, or at that place, unless the failure so to spike them caused or contributed to the accident. *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 *Iowa* 561, 31 *N. W. Rep.* 868.

Where one is killed at a crossing of a road, openly and notoriously used as a highway by the public, and recognized by the company as such by permitting the public to cross the track and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally laid out or established. *Lillstrom v. Northern Pac. R. Co.*, 53 *Minn.* 464, 55 *N. W. Rep.* 624.—FOLLOWING *Kelly v. Southern Minn. R. Co.*, 28 *Minn.* 58, 9 *N. W. Rep.* 588.

Evidence of an agreement between the plaintiff and her attorney as to the terms upon which the suit is to be prosecuted, and the amount of his compensation, is inadmissible, in the absence of any issue making such evidence material. *Cook v. New York C. R. Co.*, 5 *Lans. (N. Y.)* 401.

Where the mother has already testified that she had not consented to the employment of her minor son, who was killed while in the employ of the company as a

brakeman, and given testimony that she remonstrated with him about his accepting the employment, what she said to him would have been immaterial as to the fact of consent and inadmissible to charge the company with notice of her objection because not made in the presence or with the knowledge of any of its officers. If the issue had extended out to her entire conduct during the employment, and the inference could have been reasonably drawn therefrom, the facts of her remonstrance with the son and the manner thereof would have been proper as explanatory of her conduct. *Hamilton v. Galveston, H. & S. A. R. Co.*, 4 *Am. & Eng. R. Cas.* 528, 54 *Tex.* 556.

Where a personal representative sues for the benefit of the next of kin, under the Illinois statute, it is necessary to show that there are next of kin, but not their names. So whether the deceased was lawfully married to one who is named in the declaration as his widow, is inadmissible. As to who the rightful distributees are does not affect the right to recover, and only becomes material upon distribution of the damages. *Conant v. Griffin*, 48 *Ill.* 410.

In an action under that statute, where the declaration averred that one Ann Barber was the widow and Frank Barber the son of the deceased, and proof was offered by the defendant to show that Ann was not the wife nor Frank the son of deceased, but that another woman, who was then offered as a witness, was the wife of deceased at the time of the commencement of the suit, which evidence the court refused to admit—held, that it was necessary to aver the names of the persons, widow, or next of kin, the requirement of the statute being met by the allegation that such persons survived, regardless of what were their names. Who was the true widow, or next of kin, was a question wholly immaterial; and that such proof offered by the defendant tended to prove plaintiff's case by showing that deceased did leave a widow; and being offered to attack the validity of the marriage, it was inadmissible for such purpose. *Conant v. Griffin*, 48 *Ill.* 410.

In an action to recover for the death of plaintiff's child, seven years old, caused by a running train, plaintiff offered to prove that there was a patent brake in use on other roads, but not used by defendant, as tending to show that by the use of such brakes the

train might have been stopped at the speed it was going within the distance that the child could be seen. The court said that if defendant gave evidence as to distances and the speed of the train so as to make the use of such brake material, he would allow plaintiff to recall the witness. The company did give evidence as to the distances and speed of the train, materially different from that given by plaintiff; whereupon he renewed the offer, but the evidence was rejected. *Held*, erroneous. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 *Barb.* 92; *appeal dismissed* (?) 55 *N. Y.* 641, *mem.*

The plaintiff, had he been permitted to give proof as to the brakes when he first offered it, could not have been limited to a single witness; and when he yielded to the suggestion of the court, to omit examining on that subject for the present, could not have intended, nor been understood as intending, to waive the right to go fully into the subject of the brakes. And the judge very properly reserved the right to admit or reject the evidence, as he should find it to be or not to be material to the issue. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 *Barb.* 92; *appeal dismissed* (?) 55 *N. Y.* 641, *mem.*

The rejection of the evidence as to the use of the patent brakes must be deemed to have been upon the ground that it was immaterial to the issue; and so considering it, the decision was erroneous. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 *Barb.* 92; *appeal dismissed* (?) 55 *N. Y.* 641, *mem.*

225. As to signals, flagmen, etc.—In an action for causing the death of a traveler at the crossing of a highway at grade, on the issue whether the bell upon the locomotive engine was rung upon approaching the crossing it is not competent for the defendant to show that the bell was generally rung there, or for the plaintiff that it was usual to omit ringing it there, and in either case to ask the jury to infer that the bell was then rung or was not then rung. *Tuttle v. Fitchburg R. Co.*, 45 *Am. & Eng. R. Cas.* 148, 152 *Mass.* 42, 25 *N. E. Rep.* 19.

Where the deceased was not killed at any crossing, and saw the engine coming, it is a matter of no consequence that the bell was not rung. *Rine v. Chicago & A. R. Co.*, 25 *Am. & Eng. R. Cas.* 545, 88 *Mo.* 392.—**DISTINGUISHED IN** *Donohue v. St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.*

673, 91 *Mo.* 357. **RECONCILED IN** *Keim v. Union R. & T. Co.*, 90 *Mo.* 314.

Where the action is for death of a switchman while making a coupling, and the complaint does not allege that the death was due to the failure or inability of the engineer to see the signals given, the admission of evidence that engineers are controlled entirely by signals when switching is not reversible error. *Missouri Pac. R. Co. v. Lamothe*, 76 *Tex.* 219, 13 *S. W. Rep.* 194.

On the trial of an action for death at a street crossing, it is proper to allow plaintiff to prove that the company had no flagman at such crossing, without proof that the city authorities had ever notified the company that a flagman was necessary. *Chicago, B. & Q. R. Co. v. Perkins*, 125 *Ill.* 127, 14 *West. Rep.* 400, 17 *N. E. Rep.* 1; *affirming* 26 *Ill. App.* 67.

226. Customs of defendants or their employees.—Evidence of a custom of the defendant in allowing shippers of live stock to ride upon its engines and cars containing stock to the stock-yards, is admissible, as tending to show the authority of the servants of the railway company to thus carry the deceased, and that the latter was at the time a passenger for reward. *Lake Shore & M. S. R. Co. v. Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.

In an action for the death of plaintiff's intestate at a place where there were several tracks used by the defendant company jointly with other companies, evidence of the rule and regulations of the other companies in regard to the switch, and of the usual and customary mode of running trains there, is admissible for the purpose of shedding light on the conduct of the deceased at the time he was killed, and as bearing on the averment of his exercise of ordinary care. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 *Ill.* 48, 32 *N. E. Rep.* 398.

It was proper for the plaintiff to show that it was customary to cut moving trains at the station where the decedent was killed. As bearing on the question of negligence, and tending in some degree to show whether or not the decedent was negligent, it was competent to prove that he was or was not doing his work in the usual and customary way. *Pennsylvania Co. v. McCormack*, 53 *Am. & Eng. R. Cas.* 107, 131 *Ind.* 250, 30 *N. E. Rep.* 27.

Evidence as to a custom of switchmen in yards other than defendant's of getting on and off footboards of moving engines was admissible, it seems, as bearing on the question of the negligence of the conduct of the deceased in this case. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.

Where it appears that the defendant had for two years previous to the accident operated its trains upon the left-hand side of its double track, an offer of plaintiff to prove a universal custom for other railroads to operate trains upon the right-hand track is properly excluded as irrelevant. The liability of the defendant cannot be made to depend upon the question whether the deceased did or did not know of the way in which it operated its road. *Holmes v. South Pac. C. R. Co.*, 97 Cal. 161, 31 Pac. Rep. 834.

On the trial of an action against a railway for causing the death of plaintiff's intestate, the court allowed the plaintiff to prove that persons were in the habit of crossing the railway track at the place where the deceased was killed, which proof was admitted before the defendant showed that there was no public crossing at the place of the accident. *Held*, that there was no error in admitting the evidence at the time it was offered. *Lake Shore & M. S. R. Co. v. Bodemer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692; *affirming* 33 Ill. App. 479.

227. Rate of speed.—The evidence showing that the hand-car on which the intestate was riding, at the time of its collision with an approaching train, was moving on a down grade very rapidly without the application of external force, it is permissible for the plaintiff to prove, as relevant to the question of negligence, the usual rate of speed at which such cars are run. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. Rep. 577.

Testimony showing how far a train ran after striking deceased is competent, as tending to show that the train was running at a greater speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control. *Pennsylvania Co. v. Conlan*, 6 Am. & Eng. R. Cas. 243, 101 Ill. 93.

The fact that the train was running at a greater speed than allowed by ordinance

may be considered by the jury in determining whether defendant was guilty of such negligence as caused the death, if the deceased was lawfully on the track at the time, or otherwise was in the exercise of ordinary care. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 Ill. 416, 18 N. E. Rep. 799; *affirming* 27 Ill. App. 22.

In an action for death occurring at a public crossing in the country, and charged to have resulted from the negligence of defendant in managing its train, the rate of speed of the latter is a proper matter to be taken into consideration in determining whether the defendant was guilty of negligence at the crossing; and this, too, is the case irrespective of any rules of defendant relating to the rate of speed at such crossing. *Steph v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229.

It was proper to prove the rate of speed at which the train was running, as tending to show whether or not the deceased exercised due care, and whether other alleged acts or omissions on the part of the defendant's servants caused the injury. *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575; *affirming* 28 Ill. App. 73.

In an action for the death of a fireman, evidence that the train was run at a dangerous rate of speed was improperly admitted, where negligence of that kind was not pleaded. *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 Iowa 561, 31 N. W. Rep. 868.

The declaration alleged that the train which collided with a wagon in which the person killed was riding at the time of the accident, while crossing the track, was running at a high and dangerous rate of speed. *Held*, that the plaintiff had the right to prove the rate of speed of the train under the allegation. *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575; *affirming* 28 Ill. App. 73.

228. Similar accidents in the past.

—Where the action is to recover for the death of an employé caused by the negligence of a switchman, and plaintiff's evidence shows that the same switchman had caused an accident on a former occasion by misplacing a switch, and that he was retained in the service of the company, the company should be allowed to prove that after the previous accident an investigation was had, and a report made that the switchman was free from negligence. *Baulec v. New York & H. R. Co.*, 62 Barb. 623, 5

Lans. 436, 12 *Abb. Pr. N. S.* 310; *affirmed in 59 N. Y.* 356.

In an action to recover for the death of plaintiff's intestate at a crossing, the admission of evidence that other persons had been killed at the crossing is error, where the negligence charged is the manner of running the train, and a failure to give signals. *Burke v. New York C. & H. R. R. Co.*, 49 *N. Y. S. R.* 370, 66 *Hun* 627, 20 *N. Y. Supp.* 808.

Action for damages resulting from the negligence of defendant in obstructing a highway crossing with snow thrown from the railroad track, causing the death of plaintiff's intestate. *Held*, that evidence of the difficulties experienced by other travelers in attempting to pass the crossing prior to the accident, and while the highway was in substantially the same condition, was admissible. *Phelps v. Winona & St. P. R. Co.*, 32 *Am. & Eng. R. Cas.* 56, 37 *Minn.* 485, 35 *N. W. Rep.* 273, 5 *Am. St. Rep.* 867.

229. To show contributory negligence on part of deceased.—Where one driving on a street is killed in attempting to cross a track, and the company raises the question of the want of care on his part, it is proper to admit proof of the location of cars and buildings on the company's land, as tending to show whether his view of an approaching train was obstructed or not. *Atchison, T. & S. F. R. Co. v. Feehan*, 47 *Ill. App.* 66.

Where an employé is killed while operating defective machinery, the questions whether he knew that the machinery was defective and unsafe, and whether he thereafter voluntarily assumed the risk, are for the jury; and evidence tending to show that the employés regarded the machinery as unsafe is admissible. *Toledo, St. L. & K. C. R. Co. v. Bailey*, 43 *Ill. App.* 292.—*FOLLOWING* *Chicago & A. R. Co. v. Shannon*, 43 *Ill.* 343.

In an action for the killing of an employé in a railroad yard by a switch-engine which, it was alleged, was running at an unlawful rate of speed, evidence that it was the custom in that yard to run the switch-engines faster than the lawful rate, and that the deceased well knew it, was admissible on the question of contributory negligence. *Abbott v. McCadden*, 81 *Wis.* 563, 51 *N. W. Rep.* 1079.

In an action for death at a crossing the liability of the railroad cannot be lessened

if it were negligent, and the deceased was not negligent at the time of his death, by the fact that he had been careless in crossing the track at some other time. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 *Am. & Eng. R. Cas.* 89, 66 *Mich.* 150, 9 *West. Rep.* 903, 33 *N. W. Rep.* 161.

The deceased not having been killed while jumping on or off cars, his previous habit of doing so at the public crossing where he was killed is not relevant evidence. *Georgia Midland & G. R. Co. v. Evans*, 87 *Ga.* 673, 13 *S. E. Rep.* 580.

In an action to recover for killing a person, where the negligence of the deceased was involved, the company inquired of a witness as to the habits of the deceased in general, without specification as to the sort of habits sought to be proved. *Held*, that the court was justified in rejecting the offered testimony. *Chicago, R. I. & P. R. Co. v. Bell*, 70 *Ill.* 102.

The defendant, in order to show that the deceased was not observing due care at the time he was killed, asked a witness to state if he ever saw the deceased get on, or attempt to get on, trains, and counsel stated that he expected to prove by this and another witness that the deceased was in the habit of jumping on trains. *Held*, that the evidence sought and proposed was inadmissible, as its effect was clearly to raise a collateral and immaterial issue. *Peoria & P. U. R. Co. v. Clayberg*, 15 *Am. & Eng. R. Cas.* 356, 107 *Ill.* 644.

230. Character and habits of deceased, to show due care.—In an action for negligently causing the death of plaintiff's husband, it is error to admit testimony that deceased was considered to be a careful man, the question being whether he was free from negligence at the time the accident occurred. *Elliot v. Chicago, M. & St. P. R. Co.*, 38 *Am. & Eng. R. Cas.* 62, 5 *Dak.* 523, 41 *N. W. Rep.* 758, 3 *L. R. A.* 363.—*APPLYING* *Chase v. Maine C. R. Co.*, 77 *Me.* 62; *Morris v. East Haven*, 41 *Conn.* 252; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 *Md.* 504, 49 *Am. Rep.* 628, *n.*; *McDonald v. Savoy*, 110 *Mass.* 49.—*Atlanta & W. P. R. Co. v. Newton*, 45 *Am. & Eng. R. Cas.* 211, 85 *Ga.* 517, 11 *S. E. Rep.* 776.

Where there is no doubt as to how one killed at a crossing approached the track, and where the direct evidence of witnesses shows contributory negligence on his part, evidence of his general careful and cautious

habits is not admissible. *Chicago, St. P. & K. C. R. Co. v. Anderson*, 47 Ill. App. 91.

In an action for the death of a brakeman, where there was no witness to the transaction, evidence of the prior habits of the deceased as to care, prudence, and sobriety is admissible, as tending to prove that he was not guilty of contributory negligence; but where there were witnesses who saw the transaction such evidence is not admissible. *Chicago, R. I. & P. R. Co. v. Clark*, 15 Am. & Eng. R. Cas. 261, 108 Ill. 113.—DISTINGUISHED IN *Gardner v. Chicago, R. I. & P. R. Co.*, 17 Ill. App. 262. FOLLOWED IN *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159.—*Gardner v. Chicago, R. I. & P. R. Co.*, 17 Ill. App. 262.—DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113.—*McNulta v. Lockridge*, 32 Ill. App. 86.

Where an accident occurs to a party at a railroad crossing whereby he is killed, and no one is a witness of the accident, it is error to allow evidence of the general character of the deceased for carefulness in order to negative contributory negligence. *Chase v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 356, 77 Me. 62, 52 Am. Rep. 744.—FOLLOWING *Scott v. Hale*, 16 Me. 326.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

Where the engineer and fireman are killed by the explosion of the boiler of an engine, and there are no other persons cognizant of the manner in which the engineer was managing the locomotive at the time, in an action to recover for the killing of the engineer it is competent to admit evidence tending to show that the deceased was a competent and careful engineer for the purpose of rebutting any presumption arising of a want of skill on his part. So, also, it is competent to show the habits of the deceased in respect of care and caution, as tending to raise the presumption that he was in the exercise of due care and caution. *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. Rep. 1089.—FOLLOWING *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113.

Proof that the deceased was a sober, industrious man, possessed of all his faculties, also tends to prove that he was at the time of the accident in the exercise of proper care. In the absence of direct proof the jury may infer ordinary care and diligence

on the part of the deceased from all the circumstances of the case, his character and habits, and the natural instincts of self-preservation. It may also be shown that the deceased at the time of the injury was sober and on his proper way home, and was at a place where he had a right to be, in connection with proof of the negligence of the defendant. *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. Rep. 358. *Houston & T. C. R. Co. v. Waller*, 8 Am. & Eng. R. Cas. 431, 56 Tex. 331.

b. Presumptions and Burden of Proof.

231. What will be presumed, generally.—There is a presumption that every intestate leaves next of kin, and the party who wishes to negative the presumption must aver and prove it. *Warner v. Western N. C. R. Co.*, 25 Am. & Eng. R. Cas. 432, 94 N. Car. 250.

Where the evidence shows that plaintiff is a widow, it sufficiently implies that her husband, father of the son killed, is dead. *Goins v. Chicago, R. I. & P. R. Co.*, 47 Mo. App. 173; see 37 Mo. App. 676.

Where an action is brought in Missouri by a husband and wife, residents of Texas, for the death of their minor son, who was also a resident of Texas, the laws of Missouri and not of Texas will determine the question of the minority of the son. In the absence of any evidence to the contrary, it will be presumed that the age of majority is the same in Texas as it is in Missouri. *Philpott v. Missouri Pac. R. Co.*, 27 Am. & Eng. R. Cas. 323, 85 Mo. 164.—QUOTED IN *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269.

Two railway companies jointly used the same yards, and one of the companies was sued in damages for a death resulting from negligence in the care of the yards. The defendant company, on the trial, did not offer any evidence of its contract with the other company relative to the use, management, and control of the yards. *Held*, that as to its control of the yards every presumption should be indulged against the defendant on account of its failure to produce such evidence; and that proof by employees working in the yards that they were sometimes paid by the one company and sometimes by the other was sufficient to show that defendant did have a joint control of the yards. *Missouri Pac. R. Co. v.*

Bond, 2 *Tex. Civ. App.* 104, 20 *S. W. Rep.* 930.

232. Presumption of negligence on part of defendant.—In a suit by a widow for the homicide of her husband, who was an engineer, two things are necessary to a recovery: (1) absence of negligence on his part contributing to the occasion or cause of his death; and (2) negligence on the part of the company or some other agent or employé. When it is shown that the deceased was without fault, the presumption of negligence on the part of the road arises. It may, however, be rebutted by proof. If neither the company nor the employés were negligent, there can be no recovery. *Central R. & B. Co. v. Roach*, 8 *Am. & Eng. R. Cas.* 79, 64 *Ga.* 635.

In an action for damages for the killing of a person by being run over by a street-car, the simple fact that there was an accident resulting in death does not raise the presumption that the driver of the car was negligent, but there must be proof of negligence. *Mascheck v. St. Louis R. Co.*, 3 *Mo. App.* 600; *reversed* in 71 *Mo.* 276.—REVIEWED IN *Kennedy v. St. Louis R. Co.*, 43 *Mo. App.* 1.

233. Presumption that deceased exercised due care.*—The law, out of regard to the instinct of self-preservation, presumes that a person who has suffered death by a railroad accident was at the time of the accident in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury. *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 18 *Am. & Eng. R. Cas.* 23, 78 *Mo.* 195. *Cleveland & P. R. Co. v. Rowan*, 66 *Pa. St.* 393. *Parsons v. Missouri Pac. R. Co.*, 94 *Mo.* 286, 6 *S. W. Rep.* 464, 12 *West. Rep.* 615.

Where there is no eye-witness to the accident it will be presumed, in the absence of any evidence to the contrary, that the deceased used ordinary care and caution, which presumption is sufficient to permit the plaintiff to recover upon showing negligence on the part of the defendant. *Adams v. Iron Cliffs Co.*, 41 *Am. & Eng. R. Cas.* 414, 78 *Mich.* 271, 44 *N. W. Rep.* 270.

In an action by a widow against a railroad company for causing the death of her husband by a locomotive, as he was crossing their track on a street in a carriage, she

made out a *prima-facie* case of negligence, without proving affirmatively that he had "stopped, and looked, and listened." *Held*, that the presumption in law was that he had stopped, looked, and listened, and the burden of proving contributory negligence was on defendants. *Weiss v. Pennsylvania R. Co.*, 79 *Pa. St.* 387.—FOLLOWING *Pennsylvania R. Co. v. Weber*, 76 *Pa. St.* 157.

In such case a witness for the defendants testified that the deceased could have seen the train coming if he had looked. *Held*, that this did not justify the court in instructing the jury to find for defendants. *Weiss v. Pennsylvania R. Co.*, 79 *Pa. St.* 387.

234. Burden on plaintiff to show negligence on part of defendant.—One who claims damages for the death of another under *Mo. Rev. St.* 1879, § 2121, must, both by his pleading and his proof, bring himself within its terms. *McIntosh v. Missouri Pac. R. Co.*, 103 *Mo.* 131, 15 *S. W. Rep.* 80.—FOLLOWING *Barker v. Hannibal & St. J. R. Co.*, 91 *Mo.* 86.

Where plaintiff sues for negligently causing death the burden of proof is upon him to establish that the wrongful act, neglect, or default of defendant was the actual cause of the death. *Schoen v. Dry Dock, E. B. & B. R. Co.*, 26 *J. & S.* 149, 31 *N. Y. S. R.* 400, 9 *N. Y. Supp.* 709. *Schultz v. Pacific R. Co.*, 36 *Mo.* 13.—OVERRULED IN *Proctor v. Hannibal & St. J. R. Co.*, 64 *Mo.* 112. QUOTED IN *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 *Mo. App.* 621. REVIEWED IN *Miller v. Missouri Pac. R. Co.*, 109 *Mo.* 350.

The burden is upon plaintiff to show that the death of the deceased occurred through the wilful act or omission of the defendant in order to recover exemplary damages. *Houston & T. C. R. Co. v. Baker*, 11 *Am. & Eng. R. Cas.* 667, 57 *Tex.* 419.

But the statute does not require direct evidence. *Doyle v. Boston & A. R. Co.*, 145 *Mass.* 386, 5 *N. Eng. Rep.* 454, 14 *N. E. Rep.* 461.

There may be cases in which the proof of the injury under certain circumstances, necessarily raises a presumption of negligence on the part of the defendant. *Baltimore & O. R. Co. v. State*, 21 *Am. & Eng. R. Cas.* 202, 63 *Md.* 135.

Where suit is brought to recover for the death of a person at a highway crossing, the burden is on the plaintiff to show that the

* Presumption of due care on part of persons negligently killed, see note, 16 *L. R. A.* 261.

bell was not rung, nor the whistle sounded 80 rods before reaching the crossing, as the statute requires, and the evidence of two men, one that he did not hear any bell, but admitting that he did not notice anything at the time, and the other that he did not hear any bell, is not sufficient to shift the burden of proof. *Hubbard v. Boston & A. R. Co.*, 159 *Mass.* 320, 34 *N. E. Rep.* 459.

If the plaintiff fails to sustain the burden of proving negligence on the part of the defendant, no inference can be drawn, adverse to the defendant, from the fact that the engineer and fireman who were in charge of the engine at the time of the accident were in court, and were not called as witnesses by the defendant. *Tully v. Fitchburg R. Co.*, 14 *Am. & Eng. R. Cas.* 682, 134 *Mass.* 499.

An action in the name of the state was brought against a railroad company to recover damages for a death by negligence of defendant. The deceased was found under the cars, mortally wounded. There was no testimony showing in what manner he got under the cars. Whether he was attempting to get on them while in motion or fell while attempting to cross the track was not explained by the evidence. The cars were on a siding, and going at the rate of one mile an hour. *Held*: (1) that the jury were properly instructed that "under the pleadings and evidence in the cause the plaintiff was not entitled to recover;" (2) that the burden was upon plaintiff in the first instance to prove negligence or want of ordinary care on the part of defendant's agents causing the accident. *State v. Baltimore & O. R. Co.*, 10 *Am. & Eng. R. Cas.* 723, 58 *Md.* 221.—REVIEWED IN *Baltimore & P. R. Co. v. State*, 75 *Md.* 152.

235. Plaintiff must affirmatively show due care on part of deceased.

—In suits for personal injuries, caused by negligence, plaintiff must allege and prove that he was at the time in the exercise of due care; and where the action is for causing death the burden is upon the administrator suing to show that the deceased exercised ordinary care to avoid the injury. *Illinois C. R. Co. v. Nowicki*, 148 *Ill.* 29, 35 *N. E. Rep.* 358. *Indiana, B. & W. R. Co. v. Greene*, 25 *Am. & Eng. R. Cas.* 322, 106 *Ind.* 279, 55 *Am. Rep.* 736, 6 *N. E. Rep.* 603.—DISTINGUISHING *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 *Ind.* 110.—FOLLOWING *Cincinnati, H. & I. R. Co. v. Butler*, 103

Ind. 31. DISTINGUISHED IN *Evansville & T. H. R. Co. v. Crist*, 116 *Ind.* 446, 19 *N. E. Rep.* 310, 2 *L. R. A.* 450.—*Patterson v. Burlington & M. R. Co.*, 38 *Iowa* 279.—FOLLOWING *Donaldson v. Mississippi & M. R. Co.*, 18 *Iowa* 289; *Greenleaf v. Illinois C. R. Co.*, 29 *Iowa* 46; *Baird v. Morford*, 29 *Iowa* 536; *Reynolds v. Hindman*, 32 *Iowa* 149; *Muldowney v. Illinois C. R. Co.*, 32 *Iowa* 178.—FOLLOWED IN *Bonce v. Dubuque St. R. Co.*, 53 *Iowa* 278; *Murphy v. Chicago, R. I. & P. R. Co.*, 45 *Iowa* 661.—*Curran v. Warren C. & M. Co.*, 36 *N. Y.* 153, 34 *How. Pr.* 250.—FOLLOWING *Holbrook v. Utica & S. R. Co.*, 12 *N. Y.* 236.—*Schappert v. Ringler*, 13 *J. & S. (N. Y.)* 345. *Krauss v. Wallkill Valley R. Co.*, 23 *N. Y. Supp.* 432, 52 *N. Y. S. R.* 838, 69 *Hun* 482. *Sutherland v. Troy & B. R. Co.*, 74 *Hun* 162, 26 *N. Y. Supp.* 237, 56 *N. Y. S. R.* 397.

That is, the facts and circumstances proved must show that he was in the exercise of such care. *Chicago & A. R. Co. v. Adler*, 39 *Am. & Eng. R. Cas.* 666, 129 *Ill.* 335, 21 *N. E. Rep.* 846; *affirming* 28 *Ill. App.* 102.

It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn, but the burden is upon plaintiff to satisfy the jury that there was no contributory negligence on the part of deceased. *Hart v. Hudson River Bridge Co.*, 84 *N. Y.* 56.—QUOTED IN *Bailey v. Rome, W. & O. R. Co.*, 55 *Hun* 509, 29 *N. Y. S. R.* 755, 8 *N. Y. Supp.* 780.—*Shea v. Boston & M. R. Co.*, 154 *Mass.* 31, 27 *N. E. Rep.* 672.

The burden is on the plaintiff to show the defendant's negligence, or that the deceased was without fault. *Prather v. Richmond & D. R. Co.*, 80 *Ga.* 427, 9 *S. E. Rep.* 530.

But the plaintiff is not obliged to repel any presumption arising from the mere fact of the collision, that the deceased did not look or listen, or if he did, rode heedlessly and purposely to his death. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 *Am. & Eng. R. Cas.* 89, 66 *Mich.* 150, 9 *West. Rep.* 903, 33 *N. W. Rep.* 161.

Under *Ga. Code*, § 3033, for negligently causing death, when the defendant company shows itself without fault by proving that its agents exercised reasonable care and diligence, there can be no recovery; and an instruction which places the burden to show contributory negligence on the company

is error. *Central R. Co. v. Moore*, 61 Ga. 151.

When the railroad company had showed that deceased had actual knowledge of the danger to which he was exposed, the burden of proof was upon the representatives of the deceased to show some excuse for his conduct in exposing himself to danger. In the absence of such excuse there could be no recovery, as the deceased had clearly been guilty of contributory negligence. *Coates v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 265, 62 Iowa 486, 17 N. W. Rep. 760.

Where a railroad company sets up as a defense contributory negligence of the deceased, and states facts which clearly show that contributory negligence did exist, a failure to deny such allegations is an admission of their truth and justifies the court in giving a peremptory instruction to find for the company. *White v. Louisville & N. R. Co.*, (Ky.) 22 S. W. Rep. 219.

If all the circumstances attending an accident are in evidence, the mere absence of evidence of fault on the part of the person injured may justify an inference of due care; but where there is an entire absence of evidence as to what the person killed was doing at the time of the accident, it is not enough to show that one conjecture is more probable than another, in order that his administrator and next of kin may recover. There must be some evidence to show that he was in the exercise of due care. *Tyndale v. Old Colony R. Co.*, 53 Am. & Eng. R. Cas. 467, 156 Mass. 503, 31 N. E. Rep. 655.—REVIEWED IN *Maher v. Boston & A. R. Co.*, 158 Mass. 36.

Where the undisputed testimony on the part of the plaintiff shows that the deceased was killed while attempting to cross the track in front of an approaching train which he could have seen had he looked for it, it was not error to enter a compulsory nonsuit. *Blight v. Camden & A. R. Co.*, 143 Pa. St. 10, 21 Atl. Rep. 995.—FOLLOWING *Carroll v. Pennsylvania R. Co.*, 12 W. N. C. 348, 2 Pennyp. 159.

Plaintiff's witness testified that deceased, before crossing the track, stopped and looked both ways, started to cross, and just as he had gotten over the last rail was struck by the approaching train and "whipped out of sight." This witness further testified that he went home by a circuitous route and went to bed, without

looking for deceased, who had been his neighbor and friend for many years, and without saying a word to any one about the accident. It further appeared that an approaching train could be seen from either side of the track for several hundred feet before it reached the crossing. *Held*, in view of the incredible nature of the evidence of plaintiff's witness, the only person who claimed to have seen the accident, that the complaint should have been dismissed for plaintiff's failure to sustain the burden of proof resting on her to show the freedom of deceased from contributory negligence. *Rainey v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 80, 52 N. Y. S. R. 677, 68 Hun 495.

236. Direct evidence of due care by deceased not required.—In an action against a railway company for causing death, plaintiff is not bound to show by direct evidence that the deceased was free from negligence; and where there was no eyewitness to the killing the fact that the deceased exercised ordinary care at the time of the injury may be shown by circumstantial evidence or proof of facts and circumstances from which that fact may be reasonably inferred. It is not necessary that the absence of contributory negligence shall be shown beyond cavil or question. *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. Rep. 358.—REVIEWING *Way v. Illinois C. R. Co.*, 40 Iowa 345.—*Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa 661.—FOLLOWING *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280; *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14; *Muldowney v. Illinois C. R. Co.*, 32 Iowa 176.—FOLLOWED IN *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278.—*Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 303.

Yet if the facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion thereof which is consistent with proper care and prudence, the inference of negligence is the only one to be drawn, and defendant is entitled to a nonsuit. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 23 Am. & Eng. R. Cas. 313, 98 N. Y. 198; reversing 31 Hun 397.—FOLLOWED IN *McDermott v. Third Ave. R. Co.*, 44 Hun 107, 8 N. Y. S. R. 458. QUOTED IN *Wall v. Delaware, L. & W. R. Co.*, 54 Hun 454, 28 N. Y. S. R. 132, 7 N. Y.

Supp. 709; *Beckwith v. New York C. & H. R. Co.*, 28 N. Y. S. R. 130, 7 N. Y. Supp. 721; *Haywood v. New York C. & H. R. Co.*, 35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177.—*McDermott v. Third Ave. R. Co.*, 8 N. Y. S. R. 458.—FOLLOWING *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 198. QUOTING *Hallahan v. New York, L. E. & W. R. Co.*, 102 N. Y. 199, 1 N. Y. S. R. 367.

237. Plaintiff need not affirmatively show due care on part of deceased.—A passenger who loses his life through the negligence of a railroad company need not, in an action by his administrator, be shown not to have been negligent. *McKimble v. Boston & M. R. Co.*, 21 Am. & Eng. R. Cas. 213, 139 Mass. 542, 2 N. E. Rep. 97. *McKimble v. Boston & M. R. Co.*, 24 Am. & Eng. R. Cas. 463, 141 Mass. 463, 5 N. E. Rep. 804.

It is not necessary to prove affirmatively that a person killed when crossing a railroad on a public highway had stopped and looked up and down the railroad; whether he used the proper precautions is to be determined by all circumstances of the case. *Pennsylvania R. Co. v. Weber*, 72 Pa. St. 27, 6 Am. Ry. Rep. 240. *Hendrickson v. Great Northern R. Co.*, 49 Minn. 245, 51 N. W. Rep. 1044.

Contributory negligence on the part of the deceased is defensive matter, and the burden of proving it rests on the defendant, unless the plaintiff's own testimony inculpates the deceased. *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.—ADHERED TO IN *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413. FOLLOWED IN *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376.—*Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 52 N. W. Rep. 840.

And where the evidence is conflicting, a demurrer to it, at the close of the case, is properly refused. *King v. Missouri Pac. R. Co.*, 98 Mo. 235, 11 S. W. Rep. 563.

In an action to recover for the killing of a person at a crossing, the burden of proof is on the company, under Mass. Pub. St. ch. 112, §§ 163, 213, to prove that the deceased was guilty of gross and wilful negligence; and proof that the deceased attempted to pass in front of a train which he saw, or that he was familiar with the place and attempted to pass without stopping to look for trains, is not conclusive.

Manley v. Boston & M. R. Co., 159 Mass. 493, 34 N. E. Rep. 951.

238. Burden on plaintiff to show both negligence of defendant and due care of deceased or guardian.—The plaintiff has the burden of establishing all three of the elements necessary to constitute the cause of the action—the negligence, the consequent death, and ordinary care on the part of the deceased. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. Rep. 398.—APPLYING *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534; *Chicago, M. & St. P. R. Co. v. Dowd*, 115 Ill. 659; *Pennsylvania Co. v. Marshall*, 119 Ill. 399; *North Chicago Rolling Mill Co. v. Morrissey*, 111 Ill. 646; *Chicago & A. R. Co. v. Murray*, 62 Ill. 326.

Negligence is not to be presumed, but must be affirmatively proven by the party alleging it, and in the manner alleged; and the burden of proof is upon the plaintiff to show that the defendant is entirely responsible for the injury complained of by reason of and in consequence of the neglect charged in the declaration, and that the plaintiff's intestate did not contribute towards it. *Mynning v. Detroit, L. & N. R. Co.*, 23 Am. & Eng. R. Cas. 317, 59 Mich. 257, 26 N. W. Rep. 514. *Kelly v. Hendrie*, 26 Mich. 255, 5 Am. Ry. Rep. 440. *Dobbins v. Brown*, 119 N. Y. 188, 28 N. Y. S. R. 957; reversing 15 N. Y. S. R. 1010, 1 N. Y. Supp. 360.

In an action to recover for the death of a person caused by a collision between a train of defendants and a street passenger car in which the deceased was traveling, plaintiffs, in order to recover, must show (1) that the death resulted directly from the negligence of defendants' servants; (2) that the servants of the carrier company were guilty of no negligence. *Philadelphia & R. R. Co. v. Boyer*, 2 Am. & Eng. R. Cas. 172, 97 Pa. St. 91.—DISTINGUISHED IN *Bunting v. Hogsett*, 139 Pa. St. 363. OVERRULED IN *Dean v. Pennsylvania R. Co.*, 39 Am. & Eng. R. Cas. 697, 129 Pa. St. 514.

In an action against a street-railroad company for killing a child of very tender years, as it was attempting to cross the street, the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the company in the management of the car, and that the person having care of the child took all proper precaution for its

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239. Burden on defendant to show absence of negligence.—When a person is killed by the running of a train, the presumption that the death was caused by the negligence of the company arises, and the burden of rebutting it rests upon the company. *East Tenn., V. & G. R. Co. v. Hartley*, 73 Ga. 5. *McLean v. Burbank*, 11 Minn. 277 (Gil. 189).

The company must show all ordinary and reasonable care by its officers and agents, or that the deceased's own negligence was the cause of the death, or that by ordinary care he could have avoided the consequences of the negligence of the company. *Brunswick & W. R. Co. v. Hoover*, 74 Ga. 426.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

Proof that one company has run its trains over the track of another company for several years is *prima-facie* evidence of a contract between the companies; and where a person is killed on the track by the company having the running privilege, if the company owning the track denies its liability on the ground that the other company is a trespasser, the burden is on it to show such fact. *Pennsylvania Co. v. Ellett*, 35 Ill. App. 278.

In an action for the death of a passenger caused by the train being derailed and precipitated through a bridge, if the plaintiff has introduced evidence sufficient to raise a presumption of negligence on the part of the company, the burden of proving that the accident was not caused by any negligence or want of skill rests with the defendant; but it need not prove that nothing about its entire track was defective, but only that, as to the matters which the circumstances indicated were the cause of the accident and injury, it had exercised due care. *Pershing v. Chicago, B. & Q. R. Co.*, 34 Am. & Eng. R. Cas. 405, 71 Iowa 561, 32 N. W. Rep. 488.

In an action for the death of a passenger by an explosion, on proof of the injuries, the burden is upon defendants to show that the explosion was not due to the negligence of the company or its employes; and whether or not the *prima-facie* case of plaintiff has been fully answered by evidence from defendants tending to show

they were not in fault, is a question to be submitted to the jury. *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. St. 61, 12 Atl. Rep. 824.—DISTINGUISHED IN *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343. QUOTED IN *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103. REVIEWED IN *Farley v. Philadelphia Traction Co.*, 132 Pa. St. 58; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244.

In an action for killing a child the burden is upon the defendant to show that its road, machinery, and equipments were in good order and conformed to the present state of the art. *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368.

Tenn. Code, § 1169, affirms the common law principle that the killing of a person being proved the burden is on the company to show that it was guilty of no negligence, that the accident was unavoidable, and also expressly puts the burden on the company of proving that it has complied with the requirements of sections 1166 *et seq.* as to signals, lookout, etc.; and to do so it must necessarily show that it had all the requisite means to be thus employed. *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368.—FOLLOWING *Horne v. Memphis & O. R. Co.*, 1 Coldw. (Tenn.) 77.

At a station, a locomotive kept on the main track, but the cars took a switch and turned the locomotive over and killed the engineer. *Held*, that this being an unusual accident, cast the burden upon the company of explaining it. *Areson v. Long Island R. Co.*, 10 N. Y. S. R. 331, 45 Hun 592.

c. Admissions and Declarations.

240. Admissions of deceased.—Where the action is for injuries causing the death of a passenger, it is competent for the defendant to prove declarations made by the intestate soon after the accident and before death, to the effect that he jumped off the car platform before the car had lessened its speed. *Lax v. Forty-second & G. S. F. R. Co.*, 14 J. & S. (N. Y.) 448.

In an action by a father for the death of his minor son, evidence offered by the defendant of the declarations of the son made the day after the accident, is properly ex-

cluded, on the ground that the son, being a minor, could not destroy the cause of action by his own admissions; though if he had lived and the action had been by him for personal injuries, the admissions might have been evidence against him. *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371.

In an action by a widowed mother to recover for the wrongful death of her minor son, alleged to have been caused by the defendant company putting him to labor in which he was unskilled, the declaration of the son to the effect that he was skilled in such labor is not admissible against the mother. *Pennsylvania Co. v. Long*, 15 Am. & Eng. R. Cas. 345, 94 Ind. 250.

241. Declarations.—Where the question is in respect to the fault of the husband of plaintiff, for whose homicide she sued, or that of the engineer, warnings of the engineer to the conductor, who was the deceased husband, in regard to his imprudence in transactions similar to that which resulted in his death, are admissible in evidence. *Central R. & B. Co. v. Sears*, 59 Ga. 436.

On the trial of an action for a homicide caused by alleged negligent running of defendant's train, the admission of sayings, after the homicide, of one alleged to have been the engineer of the train, over the objection that he was not shown to have been a servant of the company, and the submission to the jury to find whether he was the engineer or not, was not error. *Atlanta & W. P. R. Co. v. Newton*, 45 Am. & Eng. R. Cas. 211, 85 Ga. 517, 11 S. E. Rep. 776.—FOLLOWED IN *Central R. & B. Co. v. Kent*, 87 Ga. 402.

In an action for the death of an employé from an accident due to the alleged negligence of the company, evidence, on the part of the plaintiff, of declarations as to defects in the engine, made by officers of the company after the accident, and not in contradiction of prior testimony of such officers, is not admissible. *Erie & W. V. R. Co. v. Smith*, 125 Pa. St. 259, 17 Atl. Rep. 443.

In suit by a widow, as administratrix, for injuries to an intestate causing his death, declarations of plaintiff during her husband's lifetime as to the circumstances of the accident are admissible for the defense to contradict her testimony at the trial, but not for the purpose of proving negligence of the deceased, plaintiff not having been

the party interested adversely to defendant at the time of such declarations. *Fitzgerald v. Weston*, 52 Wis. 354, 9 N. W. Rep. 13.

242. Res gestæ.—Where the action is by the personal representative, statements made by the deceased after the injury as to how it occurred are not admissible against the plaintiff, either as dying declarations, or as part of the *res gestæ*. *Chicago & N. W. R. Co. v. Howard*, 6 Ill. App. 569.

Where the action is under the Pa. Act of April 15, 1851, as amended April 26, 1855, by a father to recover for the death of his son, the admission of the son, made soon after the accident, that it was caused by his jumping from the car, is admissible both as part of the *res gestæ* and as an admission against interest. *Stein v. Railway Co.*, 10 Phila. (Pa.) 440.—QUOTING *Enos v. Tuttle*, 3 Conn. 250. REVIEWING *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558; *Shields v. Boucher*, 1 De G. & Sm. 40; *Steele v. Thompson*, 3 P. & W. (Pa.) 34; *Walton v. Green*, 1 C. & P. 621; *Gilchrist v. Bale*, 8 Watts 355.

In an action for the death of J., plaintiff's intestate, it appeared that about midnight a freight train passed a street crossing on defendant's road, followed, about fifty feet distant, by an engine going backward. Shortly after their passage J. was found lying near the track fatally injured. No one saw the accident. Plaintiff's theory was that J., who was an educated deaf mute, well acquainted with the locality, approached the track on his way home, waited for the freight train to pass, and then in attempting to cross was struck by the engine. A witness for plaintiff was permitted to testify to declarations made by J. by means of signs about thirty minutes after the accident, to the effect that there was a long train; that he waited for it to go by, and was struck by an engine which followed. *Held*, error. *Waldele v. New York C. & H. R. R. Co.*, 19 Am. & Eng. R. Cas. 400, 95 N. Y. 274; reversing 29 Hun 35, 61 How. Pr. 350.—REVIEWING *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Luby v. Hudson River R. Co.*, 17 N. Y. 131; *Hamilton v. New York C. & H. R. Co.*, 51 N. Y. 100; *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Casey v. New York C. & H. R. R. Co.*, 78 N. Y. 518; *Swift v. Massachusetts Mut. L. Ins. Co.*, 63 N. Y. 186; *Schnicker v. People*, 88 N. Y. 192.

d. Documentary Evidence.

243. City ordinances.—Where one is killed by a locomotive in an incorporated city, ordinances of that city, requiring railroad companies to keep flagmen at certain street crossings, and regulating the rate of speed at which trains shall pass such crossings, were properly admitted in evidence when, in connection with other testimony, they bore on the question of the company's negligence at the place of killing. *Western & A. R. Co. v. Meigs*, 74 Ga. 857. *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391.

But it is not competent to give in evidence, upon the question of negligence, a city ordinance limiting the speed of trains within certain specified limits, which does not include the place where the accident occurred. *Calligan v. New York C. & H. R. Co.*, 59 N. Y. 651.—DISTINGUISHED IN *McGuire v. Ogdensburgh & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313.

In an action for killing a person on the track, not at a street crossing, the plaintiff, to prove negligence, offered in evidence a section of an ordinance "that the bell of each locomotive engine be rung continually while running within said city." There was no allegation in the declaration that there was such a requirement of the city code, and its violation. *Held*, that the evidence was properly excluded for want of such allegation. *Blanchard v. Lake Shore & M. S. R. Co.*, 126 Ill. 416, 18 N. E. Rep. 799; *affirming* 27 Ill. App. 22.

A declaration in a suit to recover for the killing of plaintiff's intestate contained five counts, the third of which charged negligence in the running of the defendant's train at a greater speed than that limited by an ordinance of the city where the injury occurred; the fourth charged a neglect of the company to ring the bell, as required by another ordinance. Under these the ordinances were admitted in evidence, but the court afterward withdrew such counts from the jury and proceeded with the case under one of the other counts, and no motion was made to exclude the ordinances. *Held*, that they were properly admitted at the time they were given in evidence. *Lake Shore & M. S. R. Co. v. Bodemer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596; *affirming* 33 Ill. App. 479, 29 N. E. Rep. 692.

244. Letters.—Where a father sues

for the death of his intestate son, letters written by the son to the father tending to show the good character of the former, and his affection for his father and relatives, and his good intentions in their behalf, are not admissible. *Quinn v. Power*, 29 Hun (N. Y. 183.)

245. Photographic views.—In an action for the death of plaintiff's intestate at a highway crossing, in which the leaving of cars standing on the side tracks so as to obstruct the view of approaching trains was claimed as a ground of negligence, the defendant offered in evidence photographic views of the locality where the accident happened, taken by an amateur artist some two months thereafter. The party who took such views had never visited the scene of the occurrence before, and there was no proof that they correctly represented things as they were when the accident happened. *Held*, no error in the court to refuse them in evidence. *Cleveland, C. & St. L. R. Co. v. Monaghan*, 140 Ill. 474; *affirming* 41 Ill. App. 498, 30 N. E. Rep. 869.

246. Plat of street.—In an action for an injury resulting in death caused by a collision of a cable car with a horse car, a plat of the streets, etc., is properly admissible in evidence when a surveyor testifies that it is a correct survey of the intersection of the two roads, and that it is a ground plan of streets and intersections of streets, and also that it shows the position of the car tracks that cross, etc. *Chicago City R. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. Rep. 796.

247. Proceedings at coroner's inquest.—The coroner's inquisition is admissible in evidence, and though not conclusive, is competent evidence to be considered by the jury; but depositions taken upon the inquest are not admissible. *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 506.—FOLLOWING *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172; *United States Life Ins. Co. v. Vocke*, 129 Ill. 557; *Gooding v. United States Life Ins. Co.*, 46 Ill. App. 307.—APPLIED IN *Chicago, M. & St. P. R. Co. v. Staff*, 46 Ill. App. 499.

Conclusions drawn by a coroner's jury from the facts before them as to the negligence of the defendant in causing the death are not admissible in evidence in a subsequent action against the defendant. Such

* See also *post*, 252.

inquest is only evidence as to how the death was produced. *Chicago, M. & St. P. R. Co. v. Staff*, 46 Ill. App. 499.—APPLYING *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172; *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 506.

A statement in the inquest that the death was caused by a certain switch-stand being negligently placed too near the track, being only an expression of opinion from the facts, and being outside the province of the inquest, is not admissible in a subsequent action against the company. *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 506.

248. Records.—In an action under Mass. Pub. St. ch. 112, § 212, for causing the death of the plaintiff's intestate at a crossing at grade of a highway, a record of the county commissioners showing that defendant's lessor, seventeen years before the accident, had brought a petition against another railroad corporation for damages for taking a part of the petitioner's land and occupying a part of its location, and reciting that the acts of the respondent would make the crossing so unsafe as to require the presence of a flagman, is rightly rejected. *Tyler v. Old Colony R. Co.*, 157 Mass. 336, 32 N. E. Rep. 227.

249. Written agreements.—In an action for the death of plaintiff's intestate, where the defense is a violation of the company's rules, it is proper to refuse as evidence an agreement made by intestate with a company other than the defendant, where the agreement contains none of defendant company's rules. *McDermott v. Iowa Falls & S. C. R. Co.*, 85 Iowa 180, 52 N. W. Rep. 181.—DISTINGUISHING *Sedgwick v. Illinois C. R. Co.*, 73 Iowa 160, 34 N. W. Rep. 790. FOLLOWING *Day v. Mill-Owners' M. F. Ins. Co.*, 75 Iowa 700, 38 N. W. Rep. 113; *Stanbrough v. Daniels*, 77 Iowa 565, 42 N. W. Rep. 443.

A carrier cannot stipulate against its own negligence. A contract of exemption from damages is properly excluded in an action against a railroad for killing a passenger. *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 292.

v. Depositions. Testimony on Former Trial.

250. Depositions.—In an action for killing plaintiff's intestate the court allowed a statement of the facts connected with the accident, made by one of defendant's wit-

nesses soon after its occurrence and printed in a newspaper, to be read to the jury and commented on by counsel as evidence for the purpose of contradicting the evidence given at the trial by the same person. The newspaper account was attached to the deposition of another witness. Subsequently the court withdrew the statement from the jury so far as it had been admitted as evidence of the witness and binding on the company, but told the jury that the statement might be looked to as evidence so far as admitted by the witness to be correct as part of his testimony. *Held*, that it was reversible error to admit the statement for any purpose. *East Tenn., V. & G. R. Co. v. Eanes*, 8 Baxt. (Tenn.) 221.

A man whilst crossing the track of a railroad at a public crossing at night was struck by the tender of a switch-engine and fatally injured. Suit was brought alleging negligence on the part of the railroad company in various respects, and especially in the absence of sufficient lights. The answer of the company set up intoxication on the part of the man killed, making him unconscious of the danger; and that he recklessly attempted to cross the track in front of an approaching engine. *Held*: (1) The depositions of witnesses as to the arrangement of lights, etc., on another occasion, but on the same sort of a night, were admissible if that arrangement had not been materially changed since the accident; but if such change had taken place, then those depositions would be irrelevant and inadmissible. (2) Where there was conflicting testimony as to whether a change of the lights, etc., had taken place, the court should not have excluded the deposition, but should have instructed the jury to disregard the evidence if they found that the surroundings had, in fact, undergone a material change. *Houston & T. C. R. Co. v. Waller*, 8 Am. & Eng. R. Cas. 431, 56 Tex. 331.

In an action under Lord Campbell's Act, an order was made for the examination before the trial, *de bene esse*, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of the deceased. It was proper that the examination should be used at the trial provided the plaintiff was unable to procure the attendance of the witness. *Elliott v. Canadian Pac. R. Co.*, 12 Ont. Pr. 593.

251. Testimony of witness at former trial.—Where a parent began

suit against a railroad for damages for a personal injury to her, and subsequently died from the results of the injury, and a suit for the homicide was brought by her child, answers of the decedent to interrogatories taken during her life in the suit by her, were admissible in the action by the child. *Atlanta & W. P. R. Co. v. Venable*, 67 Ga. 697.

Upon the trial of an action brought by an administrator to recover damages for the death of his intestate, caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

252. Testimony of witnesses at coroner's inquest.*—In an action against a railway company to recover damages for the killing of plaintiff's intestate through alleged negligence, the deposition of a witness taken before the coroner upon an inquest upon the body of the deceased, the witness being dead, is not admissible in evidence on the question of negligence. *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172.

Unless it appears that plaintiff had an opportunity to cross-examine the witness; and a recital in the offer of evidence that the respective counsel in this case were present at the inquest, is not sufficient to prove that plaintiff had such opportunity, in the absence of a showing in whose behalf, in what capacity, or for what purpose the respective counsel were present. *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. Rep. 331.

Such deposition is not admissible on behalf of the plaintiff, though the defendant was represented by counsel at the inquest. *Cook v. New York C. R. Co.*, 5 Lans. (N. Y.) 401.—APPROVED IN *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172.

Such deposition cannot competently be admitted, even though offered at a second trial of the cause, after it has been admitted without objection at the first trial. *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.

In such an action the evidence of a witness before the coroner's inquest is properly excluded, where he admits making state-

ments different from those made at the trial, but explains them. *Atchison, T. & S. F. R. Co. v. Feehan*, 47 Ill. App. 66.

f. Weight and Sufficiency of Evidence.

253. Sufficiency of evidence, generally.—Where the evidence introduced by the plaintiff proves, or tends to prove, facts from which the inference of fact might be drawn for or against the negligence of the defendant, and for or against the contributory negligence of the deceased, and neither inference can be held as a legal conclusion from the facts proved, it is for the jury to determine from the evidence whether, as matter of fact, there was negligence on the part of the defendant, or contributory negligence on the part of the deceased, and it is error for the court to grant a nonsuit. *Noyes v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 591, 92 Cal. 285, 28 Pac. Rep. 288.

An action for the homicide of a husband by the negligent running of rail cars, is an action sounding in tort, and not an action *ex contractu*; but in determining whether the railroad company is liable, the relations of the deceased to the railroad whether as an employé, or passenger, or stranger, are essential elements in deciding whether the killing was wrongful. *Western & A. R. Co. v. Strong*, 52 Ga. 461, 8 Am. Ry. Rep. 13.

It was not necessary in order to recover damages from a railroad for the killing of plaintiff's husband by the company's agent, that the plaintiff should establish the allegations as to the unfitness of the defendant's agent and the *scienter* of the defendant, these matters not being the gist of the action. *Christian v. Columbus & R. R. Co.*, 90 Ga. 124, 15 S. E. Rep. 701.

That bars were down or boards were off a fence along a railroad, through which horses probably came upon the track, where they were run into by the cars, throwing the train off and killing the plaintiff's decedent, an employé of the company, would not of itself constitute any ground for the plaintiff's recovery against the company. *Dewey v. Chicago & N. W. R. Co.*, 31 Iowa 373, 2 Am. Ry. Rep. 369.

The next of kin entitled to recover, under the Texas statute, for the death of another person, can only recover on facts that would entitle the deceased to a recovery had he survived. *Artus v. Missouri Pac. R. Co.*,

* See also *ante*, 247.

37 *Am. & Eng. R. Cas.* 288, 73 *Tex.* 191, 11 *S. W. Rep.* 177.—APPLYING *Houston & T. C. R. Co. v. Smith*, 52 *Tex.* 185; *Houston & T. C. R. Co. v. Richards*, 59 *Tex.* 376; *Hughes v. Galveston, H. & S. A. R. Co.*, 67 *Tex.* 596; *Galveston City R. Co. v. Hewitt*, 67 *Tex.* 480; *Galveston, H. & S. A. R. Co. v. Ryon*, 70 *Tex.* 56.

A railroad company when sued for causing the death of a passenger denied its liability on the ground that there was not sufficient evidence to show that the person killed was plaintiff's intestate. The evidence showed that a man, woman, and three small children were riding in the car, apparently as one family; that baggage had been checked in the name of the deceased, in which were found various articles marked in the name of the deceased, among others a document reciting the birth of three children corresponding in age to about the age of those on the train; that the man and woman were killed in the collision, but the three children escaped, and the oldest one gave his family name as that of the deceased; and that no one ever claimed the children. *Held*, sufficient to identify the person killed as plaintiff's intestate. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

In an action by an administrator to recover for the death of his intestate, the company denied the legality of the appointment of the administrator on the ground that the intestate left no estate. The records of the probate court making the appointment were introduced, which recited, among other things, that the intestate left "an estate of personal articles;" but the father testified that his son died leaving no estate. *Held*, that the record of the court made a *prima-facie* case, and that the evidence of the father was not conclusive as against it. *Union Pac. R. Co. v. Dunden*, 34 *Am. & Eng. R. Cas.* 88, 37 *Kan.* 1, 14 *Pac. Rep.* 501.

In an action for killing plaintiff's husband, there was some evidence tending to support each of the theories that the deceased was killed either by stepping off the train before it had reached the station, or by being thrown under the cars in attempting to alight while they were moving slowly, by direction of the train employes; or that he was intoxicated and had lain down on the track and was run over by the train; or that he was killed by some third

person and his body thrown on the track to be run over. *Held*, that it was the province of the jury to apply the evidence, and to decide upon the cause of death, and it was error to withdraw the case from the jury. *Kelly v. Hannibal & St. J. R. Co.*, 70 *Mo.* 604.—QUALIFIED IN *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 422, 94 *Mo.* 255, 13 *West. Rep.* 233, 7 *S. W. Rep.* 1.

254. Must show killing by company's negligence.—(1) *General rules.*—Where one is wrongfully on the grounds of a railroad company there can be no recovery for his death unless he used extraordinary care to prevent injury; and in such cases there must be proof that the accident resulted from the wanton and wilful misconduct of the defendant. *Chicago & A. R. Co. v. McKenna*, 14 *Ill. App.* 472.

Where the action is for negligently causing death, and plaintiff's evidence shows that the deceased was killed while standing on the track, and there is no evidence that the accident could have been avoided, or that the train employes failed to use every means to avoid it, a demurrer to plaintiff's evidence should be sustained. *Bell v. Hannibal & St. J. R. Co.*, 86 *Mo.* 599.

Where a party accidentally falls in front of a car and is killed and there is no evidence showing negligence on the part of the company, the death is regarded as accidental, and the company is not liable. *Dorman v. Broadway R. Co.*, 117 *N. Y.* 655, *mem.*, 27 *N. Y. S. R.* 841, 2 *Sibb.* 420, *reversing* 25 *N. Y. S. R.* 1009, 5 *N. Y. App.* 769.

To authorize an inference of negligence on the part of an employer, causing the death of an employe, facts must appear which establish such neglect of duty, or omission of care on the part of the former, as to have rendered the accident a possible one to the latter while in the performance of his work. *Borden v. Delaware, L. & W. R. Co.*, 131 *N. Y.* 671, 30 *N. E. Rep.* 586, 43 *N. Y. S. R.* 935; *affirming* 61 *Hun* 620, 40 *N. Y. S. R.* 985, *mem.*, 17 *N. Y. Supp.* 596.

The action being for the homicide of an employe of the company, and the evidence not showing affirmatively whether the employe was free from negligence or not, and no negligence on the part of the company adequate to have caused the homicide under the circumstances being shown, the most reasonable and probable cause of the

disaster being an accident to the employé by which his life became suddenly exposed to a danger incident to his employment, there was no error in granting a nonsuit; and whether the employé was an experienced or inexperienced person was immaterial, under the facts in evidence. *Kendrick v. Central R. & B. Co.*, 89 Ga. 782, 15 S. E. Rep. 685.

In trespass for the death of plaintiff's son while operating a shunting appliance on a shifting engine, there being no evidence to justify a finding that the death was the result of negligence on the part of the defendant it was not error to direct a verdict for the defendant. *Hartman v. Pennsylvania R. Co.*, 144 Pa. St. 345, 22 Atl. Rep. 701.

(2) *Illustrations.*—A boy seven years old was found lying severely injured by the side of a railroad track within the limits of a city, shortly after a train had passed the spot. He died during the night of the day on which he was injured. The circumstances indicated that he had been run over by the train, but there were no eye-witnesses to the fact. No evidence was produced to show how the accident occurred; but there was proof tending to show that the train passed the place of the accident at greater speed than was allowed by the city ordinance, and without sounding the whistle or ringing the bell as required by the rules of the company. *Held*, that conceding there was negligence on the part of its employés, the defendant could not be held liable, in the absence of proof connecting the injury with that negligence, and showing that the injury sustained was the direct consequence of it. *Cumberland & P. R. Co. v. State*, 73 Md. 74, 20 Atl. Rep. 785.

Defendant company maintained a bridge over its track for the use of the public on a highway; and it was charged with negligence in failing to provide the approach with proper railings, whereby plaintiff's intestate fell from the bridge at night and was killed. The evidence showed that he was in a village on the day preceding his death, and his road home would require him to pass the bridge, and the next morning he was found nearly dead on the track; but there was no evidence that he had been on the bridge or had fallen from it, except that of his medical attendant, who testified that he seemed to be suffering from "shock concussion," and that the injury was such as might have been caused by falling from

the abutment of a bridge, or from a car, or by a blow, but the probability was that it was a fall. *Held*, not sufficient to show negligence on the part of the company. *Gardnier v. New York C. & H. R. R. Co.*, 3 N. Y. S. R. 693; reversing 36 Hun 647, *mem.*

The evidence showed that the deceased was sitting on the side of an open car as it was passing a curve, and that he fell off and was killed. The curve was not a sharp one, and the car was not running to exceed four miles per hour; and there was evidence that the jar was not more than that experienced ordinarily under the same circumstances. There was no evidence showing improper management of the car or any defect therein or in the track. *Held*, that the evidence failed to account for the cause of the accident, or to charge the defendant with negligence. *Muller v. Second Ave. R. Co.*, 16 J. & S. (N. Y.) 546.

Evidence showing that the plaintiff, while standing on a side track of the defendant's railway in front of a car loaded with lumber belonging to him, which had been left there to be unloaded, was run over and killed by such car, which was struck and set in motion by other cars which had been standing on the same track, but not showing what force set the other cars in motion, what the grade of the side track was, the customary manner in which such track had theretofore been used, or that any employé of the defendant was about such side track when the accident happened or before—*held*, not to raise a sufficient presumption of negligence on the part of the defendant to require the submission of that question to the jury. *Milner v. Chicago, M. & St. P. R. Co.*, 68 Wis. 184, 31 N. W. Rep. 479.

About 3 P. M., B. crossed the railway near a station by a level crossing. On each side of the line was a large swing gate, as well as a wicket for foot passengers. An express train was due at 2.30, but was about forty minutes late, and another train was due at 3.15. The swing gates were shut, but no attempt was made to prevent B. from crossing. While B. was in the place between the up and down lines, a person on the platform called out, "Look out for the train." B. became confused, ran forward, and was killed by the train. There was evidence that the whistle had been sounded; and the train was visible for 200 yards from the crossing. *Held*, that there was

no evidence of negligence on the part of the railway company. *Curtin v. Great Southern & W. R. Co.*, 22 L. R. Ir. 219, 6 Ry. & C. T. Cas. lxix.

Deceased was a passenger on defendant's railway for W. station, and was, as the conductor said, "pretty drunk," when he got on the train. He went out of the car door at that station, and next morning was found about 100 yards beyond it, about four feet from the rail, with his legs cut through at the knee-joints and his left foot crushed, of which injuries he died that afternoon. There was contradictory evidence as to whether the train stopped long enough at the station, for which there were only two passengers, to enable persons to alight; but one passenger said he got off leisurely, and the person to whom deceased had been talking on the car said he thought deceased had left the train, and that he told the conductor so after the train started. The conductor and baggage master also got off there to see the station master and returned to the cars. There was no further proof of the manner in which deceased met with the accident. Held, that there was no evidence of negligence on defendant's part to go to the jury, and a nonsuit was ordered. *Giles v. Great Western R. Co.*, 36 U. C. Q. B. 360.

255. What is sufficient proof of negligence, generally.—The appellate court will not interfere with a verdict for plaintiff in an action for negligently causing the death of an employé, where the jury seems to have been correctly instructed and the verdict is supported by evidence. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 40 Ill. App. 369.—FOLLOWING *Pennsylvania Co. v. Marshall*, 119 Ill. 399.—*Spearman v. California St. R. Co.*, 8 Am. & Eng. R. Cas. 192, 57 Cal. 432.

Where the action is to recover for the death of an engine driver, caused by the explosion of his boiler, and there is sufficient evidence to justify a finding that the company knew, or ought to have known, that it was defective, and that the deceased did not know of its general defects, and had reason to believe that such as he did know of had been remedied, a judgment for plaintiff should not be disturbed. *Toledo, St. L. & K. C. R. Co. v. Bailey*, 43 Ill. App. 292.

In an action for the death of one employed as "wiper" in defendant's round-house and yard, and who was killed while on

an engine in the discharge of his duties, by a collision with a runaway freight train, evidence that the deceased was free from negligence; that the crew of the freight train were incompetent and negligent, and that such incompetence should have been known to defendant, and that such crew and deceased were not fellow-servants, warrants a recovery. *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218.

The trial court properly refuses to direct a verdict for defendant company where the evidence shows that plaintiff's daughter was killed while crossing defendant company's tracks, on her way home from school; that a train was passing the crossing; that deceased waited for its passage and then attempted to cross the track, and was struck by a train backing in the opposite direction from the one that had just passed; that no signal, other than the ringing of the engine bell at the other end of the train, was given, and that deceased could not see the approaching train, her view being obscured by the train whose passage she had awaited. *Louisville, N. A. & C. R. Co. v. Rush*, (Ind.) 26 N. E. Rep. 1010. *Enders v. Lake Shore & M. S. R. Co.*, 2 N. Y. Supp. 719, 19 N. Y. S. R. 481; affirmed in 117 N. Y. 640, mem. *White v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 24, 62 Hun 620, 16 N. Y. Supp. 788.

A verdict in favor of plaintiff should not be set aside in an action for killing a car repairer, where the evidence shows that while he was on his knees between two cars, trying to make a coupling and to remove a broken beam, an engineer in charge of a switch-engine negligently backed it, and pushed the forward car against him and caused instant death. *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 363, 26 Pac. Rep. 981.

A train, after running upon a man, was stopped; the injured man was found upon the pilot of the engine in an apparently lifeless condition, and was removed by the employés of the company and locked up in a warehouse overnight. On opening the warehouse in the morning he was found to have come to life during the night and to have afterwards died from hemorrhage of an artery which had been severed by the collision. Held, that it became the duty of the company's agents in charge of the train to remove the injured person immediately after the accident, with a proper regard to

his safety and to the laws of humanity; and in making such a removal, its agents must be regarded as acting in the course of their employment; and that in removing and locking him up, although he was apparently dead, negligence was committed whereby his death was caused, and the company was liable. *Northern C. R. Co. v. State*, 29 Md. 420.—DISTINGUISHED IN *Baltimore & O. R. Co. v. State*, 41 Md. 268; *Adkins v. Atlanta & C. A. L. R. Co.*, 31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep. 849. REVIEWED IN *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358.

In an action by parents for the killing of their child by a switch-engine, it appeared that at the time of the accident the engine was being used to take certain of defendant's employes home for supper; that it had been so used for a considerable time with the knowledge of the yard-master, and that the superintendent had seen it while being so used, although it did not appear from his testimony that he understood it to be used solely for that purpose. *Held*, that there was sufficient evidence to enable the jury to infer that the engine was being employed in such service with the knowledge and acquiescence of the defendant. *Reilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cas. 81, 94 Mo. 600, 13 West. Rep. 658, 7 S. W. Rep. 407.

An extra train was directed to run to a certain station, but the engineer of a shifting engine at that station was not notified, and, upon his seeing the approaching train, reversed the lever, put on steam and abandoned his engine, which ran into the extra train and killed the fireman. *Held*, that the evidence warranted a finding that the uncontrolled condition of the engine was the result of the company's negligence in not notifying the engineer of the shifting engine. *Nary v. New York, O. & W. R. Co.*, 29 N. Y. S. R. 630, 55 Hun 612, mem., 9 N. Y. Supp. 153; affirmed in 125 N. Y. 759, mem., 36 N. Y. S. R. 1010.—APPLYING *Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332. DISTINGUISHING *Weber v. New York C. & H. R. R. Co.*, 58 N. Y. 451; *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 528; *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219.

A brakeman was killed while a train was descending a mountain grade by the force of its own gravity; and the evidence tended to show that it was due to insufficient

brakes or means to check the speed; that the brakemen did what they could with the brakes provided. *Held*, sufficient evidence of negligence to justify a submission of the case to the jury. *Wooden v. Western N. Y. & P. R. Co.*, 43 N. Y. S. R. 218, 16 N. Y. Supp. 840.

A person having arrived at a station proceeded to cross the rails to a platform on the opposite side by a path which the company had always allowed passengers to use. While in the act of crossing she was killed by a train which had been suddenly and without warning driven backwards along the line of rails which she was so crossing. *Held*, that there was evidence of negligence. *Rogers v. Rhymney R. Co.*, 26 L. T. 879, 21 W. R. 21.

256. What is not sufficient proof of negligence.—The plaintiff contended that the defendant was negligent in not ringing the bell or sounding the steam whistle; and that the speed was unreasonable. The only witness upon the first point testified that he did not remember whether or not he heard the bell or whistle. The only evidence as to the rate of speed came from two witnesses. One, who saw the train stop, testified that it stopped forty or fifty yards from the crossing where the intestate was struck. The other witness testified that he noticed that the train, after it had stopped, was about three hundred yards from the place of the accident. *Held*, that there was not sufficient evidence of negligence on the part of the defendant to warrant a verdict against it. *Tully v. Fitchburg R. Co.*, 14 Am. & Eng. R. Cas. 682, 134 Mass. 499.

In an action for the death of plaintiff's child, eight years old, plaintiff's witnesses testified that the first thing they saw was that defendant's cars were just turning the corner from one street into another and going at the rate of six or seven miles an hour; that they heard some one hallooing, and, looking, saw the cars and the child just as they came in contact, and that the driver was applying the brake. *Held*, not sufficient evidence of defendant's negligence to justify a submission to the jury. *Squire v. Central Park, N. & E. R. R. Co.*, 4 J. & S. (N. Y.) 436.—FOLLOWED IN *Halpin v. Third Ave. R. Co.*, 8 J. & S. (N. Y.) 175.

The air-brakes of a passenger train on the defendant's road being out of order, deceased, whose regular employment was

braking on a freight train, was put upon the train to use the hand-brakes. It was night when the run was made, and the platforms were covered with ice. While the train was descending a grade the deceased was thrown off and killed. *Held*, that there was no evidence of negligence that would warrant the submission of the case to the jury. *Adkins v. Atlanta & C. A. L. R. Co.*, 31 *Am. & Eng. R. Cas.* 281, 27 *So. Car.* 71, 2 *S. E. Rep.* 849. —*QUOTING Hooper v. Columbia & G. R. Co.*, 21 *So. Car.* 547.

A passenger, whose train, from which he had alighted at a junction, was shunted to an unusual siding, out of sight from the platform, on a dark night, was killed while crossing the main line. *Held*, that, although there was no accommodation by a bridge for the passengers, and no servant of the company at hand to direct them, there was no evidence of positive negligence on the part of the company. *Falkiner v. Great S. & W. of Ireland R. Co.*, 5 *Ir. R. C. L.* 213. See also *Schadewald v. Milwaukee, L. S. & W. R. Co.*, 55 *Wis.* 569, 13 *N. W. Rep.* 458.

257. Showing the fact of killing, merely.—In a suit to recover for a personal injury resulting in death it is not enough for the plaintiff to prove the injury, but he must also prove negligence on the part of the defendant. If it is alleged that a whistle was not sounded, the burden of proving that fact is on the plaintiff, and the defendant is not bound to prove that the whistle was sounded. *Illinois C. R. Co. v. Cragin*, 71 *Ill.* 177.

An order of nonsuit is proper in a suit for killing a brakeman on a freight train, tried on the theory that he was killed by coming in contact with a ledge of rocks left too near the track, while descending a car ladder, where the proofs show that he was killed on a dark night, and found some time afterward in the cut under the rocks, but with no evidence of how he came to his death, except a cut on the side of his head that would be next to the rocks while descending the ladder, and his coupling-stick, that was found on a projecting rock some ten feet above the body. *Wintuska v. Louisville & N. R. Co.*, (Ky.) 20 *S. W. Rep.* 819.

Deceased was found under the cars of defendant mortally wounded. There was no evidence as to how he got there—whether he was attempting to get on the cars while in motion, or fell while attempting to cross

the track. The cars were on a siding and moving at the rate of one mile an hour. *Held*, that the jury were properly instructed that the plaintiff was not entitled to recover. *State v. Baltimore & O. R. Co.*, 10 *Am. & Eng. R. Cas.* 723, 58 *Md.* 221.

A., a man of intemperate habits, was found dead at the close of a sleety and rainy night, on a bridge belonging to a railroad company constructed across a street. The bridge had a platform on one side of the track, which was a continuation of a platform used for freight. It was little used by passengers. A. was accustomed to cross the bridge very often, and was last seen on the night in question at the station on one side of the bridge, drunk. His body was found in the morning alongside of the platform on the bridge jammed between two cross-ties, over which no planks had been placed. In an action against the railroad company to recover damages for A.'s death—*held*, that there was no evidence of negligence on the part of the company, and that therefore the defendant was entitled to judgment. *State v. Philadelphia, W. & B. R. Co.*, 15 *Am. & Eng. R. Cas.* 481, 60 *Md.* 555.

Although no one saw the accident, in the absence of proof of circumstances from which a legitimate inference of negligence on the part of defendant can be drawn, and of evidence exonerating the deceased from contributory negligence, no case is made out for submission to a jury. *Borden v. Delaware, L. & W. R. Co.*, 131 *N. Y.* 671, 30 *N. E. Rep.* 586, 43 *N. Y. S. R.* 935; *affirming* 61 *Hun* 620, 40 *N. Y. S. R.* 985, 17 *N. Y. Supp.* 596.

258. Conjecture as to manner or circumstances of death not enough.

—If, in an action for causing the death of an employé, the evidence introduced is of such a nature that the questions how the accident happened and whether the deceased was using due care can be answered only by conjecture, the action cannot be maintained. *Irwin v. Alley*, 158 *Mass.* 249, 33 *N. E. Rep.* 517. *Corcoran v. Boston & A. R. Co.*, 12 *Am. & Eng. R. Cas.* 226, 133 *Mass.* 507.—*FOLLOWED IN* *Riley v. Connecticut River R. Co.*, 15 *Am. & Eng. R. Cas.* 181, 135 *Mass.* 292. *NOT FOLLOWED IN* *Burns v. Chicago, M. & St. P. R. Co.*, 69 *Iowa* 450. *REVIEWED IN* *Bromley v. Birmingham Mineral R. Co.*, 95 *Ala.* 397; *Maier v. Boston & A. R. Co.*, 158 *Mass.* 36.—*Chandler*

v. New York, N. H. & H. R. Co., 159 Mass. 589, 35 N. E. Rep. 89.—DISTINGUISHING *Maguire v. Fitchburg R. Co.*, 146 Mass. 379; *Maier v. Boston & A. R. Co.*, 158 Mass. 36.—*Ellison v. Truesdale*, 49 Minn. 247, 51 N. W. Rep. 918. *Borden v. Delaware, L. & W. R. Co.*, 131 N. Y. 671, 30 N. E. Rep. 586, 43 N. Y. S. R. 935; *affirming* 61 Hun 620, 40 N. Y. S. R. 985, 17 N. Y. Supp. 596. *Bullard v. New York, L. E. & W. R. Co.*, 126 Pa. St. 141, 19 Atl. Rep. 35. *Wakelin v. London & S. W. R. Co.*, 29 Am. & Eng. R. Cas. 425, 12 App. Cas. 41, 55 L. T. 709.—APPLYING *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1169.—*Badgerow v. Grand Trunk R. Co.*, 19 Ont. 191. *Farmer v. Grand Trunk R. Co.*, 21 Ont. 299.

In an action brought under article 65 of the Md. Code, for the alleged killing of one who was not a passenger nor in the service of the company, the court is justified, where the circumstances of the killing are altogether conjectural, in withdrawing the case from the jury. *State v. Philadelphia, W. & B. R. Co.*, 15 Am. & Eng. R. Cas. 481, 60 Md. 555.

Where a sick man, able to walk, was put into an omnibus, and a man, not identified by size, appearance, or otherwise, as the same man, was found on the streets soon afterwards, very sick, and was taken to the hospital, where he died, and the driver of the omnibus shortly afterward disappeared, a jury cannot infer from these facts alone that the passenger is dead, and that the driver was guilty of negligence causing his death; and in such a case it is not error to sustain a demurrer to the evidence at the close of plaintiff's case. *Adams v. St. Louis Transfer Co.*, 5 Mo. App. 593.

Plaintiff's intestate was killed while working under one who had a contract for painting the superstructure of defendant's elevated railroad. The evidence showed that the deceased could have seen a train when it was a considerable distance away, but there was no evidence that those in charge of the train saw him until he was struck. *Held*, not sufficient to charge the company. *Pallett v. Kings County El. R. Co.*, 10 N. Y. Supp. 691, 32 N. Y. S. R. 954; *affirmed in* 126 N. Y. 630, *mem.*

No one saw the infliction of the injuries from which the deceased died, but it was not denied that the injuries were caused by coming in contact with a passing train. The uncontradicted evidence of the engi-

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neer and fireman of the train was to the effect that they were both at the time keeping a careful and vigilant lookout, and neither of them saw the deceased on or near the track. The accident occurred at a place where people were in the habit of crossing, but not at a place where the company was required to ring a bell or sound a whistle. *Held*, that there was not sufficient evidence of negligence to justify a submission of the case to the jury. *North-eastern C. R. Co. v. State*, 6 Am. & Eng. R. Cas. 66, 54 Md. 113.—FOLLOWED IN *Baltimore & P. R. Co. v. State*, 75 Md. 152.

259. Showing that company's negligence was proximate cause.—(1) *General rules.*—To hold a company responsible for the death of one killed by its cars, the evidence must show that the company's negligence was the proximate cause of the accident. *Wakelin v. London & S. W. R. Co.*, 12 App. Cas. 41.—APPROVING *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1169.—QUOTED IN *New Brunswick R. Co. v. Vanwart*, 17 Can. Sup. Ct. 35; *Hollinger v. Canadian Pac. R. Co.*, 21 Ont. 705; *Follet v. Toronto St. R. Co.*, 15 Ont. App. 346.

In an action for negligence it is necessary for the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the injury complained of; yet it is not necessary that this be done by positive and direct evidence. Proof of circumstances from which the inference may be fairly drawn is sufficient; but when the inferences to be drawn are not certain and uncontrovertible, they should be left to the jury. *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622.—APPLIED IN *Murphy v. Coney Island & B. R. Co.*, 36 Hun (N. Y.) 199. DISTINGUISHED IN *Suiter v. New York, L. E. & W. R. Co.*, 7 N. Y. S. R. 687. FOLLOWED IN *Newell v. Ryan*, 40 Hun 286. QUOTED IN *Northrup v. New York, O. & W. R. Co.*, 37 Hun 295; *Boss v. Providence & W. R. Co.*, 21 Am. & Eng. R. Cas. 364, 15 R. I. 149.

Under Texas statutes, as they were in 1884, a railway company was not liable in damages for the death of a person killed on its track, unless it was shown by the evidence that the death was caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of the road, or by the unfitness, gross negligence, or carelessness of its servants or agents. *Dallas City R. Co. v. Beeman*, 74 Tex. 291, 11 S. W. Rep. 1102.

The finding of a dead body of a man on the land near a railroad crossing at night, where the crossing was guarded by gates and a gateman, the man having been killed by a train which carried the usual headlight but did not make use of the ordinary signals, is evidence tending to prove negligence on the part of the company, but in the absence of evidence tending to connect such negligence with the accident, the company cannot properly be held liable. *Wake-lin v. London & S. W. R. Co.*, 29 *Am. & Eng. R. Cas.* 425, 12 *App. Cas.* 41, 55 *L. T.* 709.

(2) *Illustrations*.—Plaintiff's intestate was injured in jumping from a train, at the instance of a conductor, to avoid a collision. The evidence showed that soon after the injury the intestate began to fail in health, and continued to for about one year, when he died. The medical witnesses differed as to the cause of the death. There was evidence showing that he had been injured by a falling derrick some three years before, but there was other evidence that he had fully recovered from this accident, and was in perfect health at the time of the railroad injury. *Held*, that the evidence was sufficient to support a finding that the death was caused by the injuries complained of. *Sorenson v. Northern Pac. R. Co.*, 36 *Fed. Rep.* 166.

The deceased was seriously bruised by falling walls and roof, and the physician who attended him testified that there were serious internal injuries in the region of the liver and abdomen. He had been a stout man, and lived only a month after the accident. *Held*, that the jury were warranted in finding that he had died from the injuries received in such accident. *Walsh v. Missouri Pac. R. Co.*, 102 *Mo.* 582, 14 *S. W. Rep.* 873, 15 *S. W. Rep.* 757.

Plaintiff's intestate, who was very much intoxicated, was put off a train in a cut, and after proceeding some distance along the track either fell or lay down on the track and was killed by a passing train. There was evidence tending to show that he had lost his ticket, but a companion tendered the fare to the conductor before he was put off, but it was refused and a ticket demanded. *Held*: (1) that he was wrongfully removed from the train; (2) that the question as to whether his death was caused by such wrongful removal should have been left to the jury. *Guy v. New York, O. & W. R. Co.*, 30 *Hun (N. Y.)* 399.

Plaintiff's child was injured when it was twenty-two months old, and lived for a month after the injury. At the time it was injured it was in good health, and was picked up after the collision unconscious, with one leg broken. The broken limb was set, and the child received proper medical attention and nursing, but a cough soon set in, and the child manifested great pain, nervousness, irritability, sleeplessness, and lack of appetite. These symptoms increased until eight days before its death, when it grew much worse, and was alternately hot and cold. The physicians removed the bandages a few days before death. *Held*, that the jury were justified in finding that the injuries inflicted by defendant were the cause of death. *Jucker v. Chicago & N. W. R. Co.*, 2 *Am. & Eng. R. Cas.* 41, 52 *Wis.* 150, 8 *N. W. Rep.* 862.

260. Showing sudden starting of train.—Plaintiff's intestate, a small boy, was killed at a station. The preponderance of the evidence was with the plaintiff that he had gone to the station to take passage on a train, and was thrown down and killed by a sudden movement of the train just as he was stepping on; while the company offered evidence tending to show that he was stealing a ride, and had got on the train some distance from the station, and in some way fell off just before the train stopped. *Held*, sufficient evidence of negligence to charge the company. *Myers v. Long Island R. Co.*, 10 *N. Y. S. R.* 430, 45 *Hun* 591.—*REVIEWING Bartholomew v. New York C. & H. R. R. Co.*, 102 *N. Y.* 716, *mem.*, 2 *N. Y. S. R.* 490.

261. Showing use of excessive speed.—Where a train which killed a person was traveling at the unusual speed of thirty-five or forty miles an hour, in a crowded city, over street crossings, upon unguarded tracks so connected with a public street, and so apparently in the continuation of a public street, as to be regarded by many as located in a public street, along a portion of such track where persons were known to be passing and crossing every day, in violation of a city ordinance as to speed, and without warning of the approach of the train by the ringing of a bell, and the track was straight and unobstructed, such conduct tends, at the least, to show such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness, and also to show

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that if there was a failure to discover the danger of the deceased, such failure was owing to recklessness of the company's servants in the management of its train. *Lake Shore & M. S. R. Co. v. Bodemer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692; affirming 33 Ill. App. 479.

Where the injury to the deceased was caused by cars jumping from the track and demolishing the house in which he was sleeping, and it appeared that the train was running in violation of the city ordinance, at a speed of fifteen or twenty miles an hour, the jury are warranted in finding that the injury was due to the excessive speed of the train. *Walsh v. Missouri Pac. R. Co.*, 102 Mo. 582, 14 S. W. Rep. 873, 15 S. W. Rep. 757.

In an action for causing the death of plaintiff's daughter, it appeared that the accident occurred on a bridge 138 feet long; that the engineer had an unobstructed view of the bridge from a point 1168 feet distant; that he saw the deceased and her companions on the bridge when the train was about 960 feet from them; that the train was running at the rate of twenty-five to thirty miles an hour and could only be stopped in about 1000 feet; that if it had been running at the statutory rate of six miles per hour (the locality being within the limits of a city) it might have been stopped within 600 or 700 feet; and that the engineer, as soon as he saw the persons on the bridge, sounded the danger signals and the brakes were set. *Held*, that the unlawful rate of speed was material, and that the evidence sufficiently showed negligence on the part of the engineer. *Hooker v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 498, 76 Wis. 542, 44 N. W. Rep. 1085.

In an action against a company for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy; that it was going at a rate of over thirty miles an hour; and that no bell was rung or whistle sounded until a few seconds before the accident. *Held*, that the company was liable in damages. *Grand Trunk R. Co. v. Beckett*, 16 Can. Sup. Ct. 713; affirming 13 Ont. App. 174, which affirms 8 Ont. 601.

262. Showing failure to give signals.—Under N. H. Act of 1885, ch. 98, § 4, requiring the whistle to be sounded within

80 rods of crossings, in an action for causing death at such crossing, proof that the whistle was not sounded is sufficient evidence to support a verdict finding the company negligent and liable. *Evans v. Concord R. Corp.*, (N. H.) 21 Atl. Rep. 105.

Where a person is killed on the track at night and no witness saw it, the company is not liable on proof showing that the train was running without a headlight and no bell was rung, as the law requires, where it appears that the deceased was familiar with the surroundings, and that the train made other noises that could have been heard, and that a switchman had lights which could have been seen. *Gulf, C. & S. F. R. Co. v. Riordan*, (Tex. Civ. App.) 22 S. W. Rep. 519.

Where a person crossing the track at a station is killed by an incoming train which he could not see, owing to the position of another train, and which, according to some of the evidence, gave no signal of its approach, the evidence of negligence should be submitted to the jury. *Slattery v. Dublin, W. & W. R. Co.*, 10 Ir. C. L. 256.

The train which caused the death was backing up without a bell being rung or other signal given, in charge of a brakeman, who was on a platform between two cars, where he could not see persons on the track or have notice to apply the brakes in case of danger. Persons were at all times crossing the tracks, several hundreds crossing daily. *Held*, that the evidence justified the submission of the question of defendant's negligence to the jury. *Barry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; affirming 28 Hun 441.—**DISTINGUISHING** *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 243.

Plaintiff's intestate was killed at a crossing where a view of approaching trains was obstructed, and where, at the time, a box-car extended nearly to the middle of the crossing. Intestate was driving, and the engineer on the train testified that he did not know of his presence until he saw his horse pass the car. It appeared that as he was passing the car he rose up to ascertain, if possible, if a train was approaching, and the evidence tended to show that no signals were given. *Held*, sufficient evidence to justify a finding that the deceased exercised due care, and that the company was negligent. *Perkins v. Buffalo, R. & P. R.*

Co., 32 *N. Y. S. R.* 41, 10 *N. Y. Supp.* 356, 57 *Hun* 586, *mem.*; *affirmed in* 125 *N. Y. 776, mem.*, 36 *N. Y. S. R.* 1011.

Plaintiff's intestate was killed at a crossing where two tracks were maintained and where the view of approaching trains was much obstructed. The evidence showed that the intestate was driving slowly, and that the train was not in sight when he passed certain points where a view of the track could be had. Another road existed on the opposite bank of a river, about one eighth of a mile distant, and it was difficult to tell by sound on which road a train was running. There was evidence tending to show that signals were not given as the train approached, and it was made absolutely certain that they were not given eighty rods from the crossing as required by statute. *Held*, that a verdict for plaintiff should not be disturbed. *Cook v. New York C. & H. R. R. Co.*, 35 *N. Y. S. R.* 525, 59 *Hun* 617, 15 *N. Y. Supp.* 45; *affirmed in* 128 *N. Y. 635, mem.*, 40 *N. Y. S. R.* 977, *mem.*

In an action to recover for killing plaintiff's intestate at a street crossing of defendant's railroad, it appeared that defendant's locomotive engine was running backwards at a rapid rate of speed through a city at an early hour in the morning while it was quite dark, without having a light upon the rear end, or giving any signal of its approach other than the noise attendant upon its running. *Held*, that the court was authorized to submit, and the jury to find that defendant was negligent in the operation and management of the engine. *Zoliewski v. New York C. & H. R. R. Co.*, 1 *Misc. (N. Y.)* 438, 51 *N. Y. S. R.* 54, 21 *N. Y. Supp.* 916.

Positive evidence that a bell was rung on a train as it approached a crossing cannot be overcome by mere negative evidence of a failure to hear it, without showing that the witness had his attention directed to the fact at the time. So in an action for causing death at a crossing, where one witness testifies for the plaintiff that he stood within three or four feet of the track and that he did not hear the bell ring, it is not sufficient to establish the fact that it did not ring where the engineer and fireman of the train both positively testify that the bell was rung. *Rainey v. New York C. & H. R. R. Co.*, 23 *N. Y. Supp.* 80, 68 *Hun* 495, 52 *N. Y. S. R.* 677.

263. Showing failure to slacken speed or stop train.

—In an action by a wife for the killing of her husband, where it appears from plaintiff's evidence that the servants of the defendant operating the train saw the deceased upon the track at such a distance that they could, by the prompt use of the appliances at their command, have stopped the train and avoided the injury, which they failed to do, a demurrer to the evidence is properly overruled. *Pope v. Kansas City Cable R. Co.*, 43 *Am. & Eng. R. Cas.* 290, 99 *Mo.* 400, 12 *S. W. Rep.* 891.—FOLLOWING *Jennings v. St. Louis, I. M. & S. R. Co.*, 99 *Mo.* 394, 11 *S. W. Rep.* 999; *Sullivan v. Missouri Pac. R. Co.*, 97 *Mo.* 113; *Kelly v. Union R. & T. Co.*, 95 *Mo.* 279; *Guenther v. St. Louis, I. M. & S. R. Co.*, 95 *Mo.* 287.

A brakeman of a railroad company, in the course of his employment, got his foot jammed between the rails. An engine and several cars were backing towards him. He cried out, but they did not stop, and he was run over and killed. In an action by his administrator, the negligence alleged was the failure on the part of the servants in charge of the engine and cars in question to hear and heed the defendant's cries in time to avoid the accident. *Held*, that the evidence failed to show any such negligence, and that the plaintiff was not entitled to recover. *Ford v. Central Iowa R. Co.*, 17 *Am. & Eng. R. Cas.* 599, 69 *Iowa* 627, 21 *N. W. Rep.* 587, 29 *N. W. Rep.* 755.

Plaintiff brought suit for the death of her husband, who was killed by the defendant's passing train. The evidence showed that the deceased kept, in the town of Renick, a hotel situated about one hundred feet north of the depot; that defendant's tracks were between the hotel and the depot, and a plank walk, used by the public, led from the hotel over the tracks to the platform of the depot; that deceased, in managing his business, was in the habit of going to the depot on the arrival of all passenger trains stopping at the station; that, at the time of the accident, an excursion train approached from the west on the time of the regular mail train, which latter usually ran over the crossing from the hotel at a speed of three or four miles an hour, and stopped at the platform just east of the crossing. The facts further showed that the excursion train, as it approached the crossing, sounded its whistle and rang its bell, but continued

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204. Showing failure to maintain gates.—Where a railroad company is sued for negligently causing death at a crossing it is not sufficient to establish the cause of action to merely prove that it violated a city ordinance requiring it to maintain gates at the crossing; but such evidence is admissible as bearing upon the question of negligence. *Rainey v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 677, 68 Hun 495, 23 N. Y. Supp. 80.

205. — carelessness in permitting steam to escape.—In an action for a negligent killing a finding of the jury that defendant was guilty of negligence is sustained by evidence that defendant's trainmen carelessly permitted steam to escape from its engine, whereby a team driven along the highway became frightened and ran away, and deceased was thrown out of his wagon and killed by defendant's engine at a crossing on defendant's track. *St. Louis, I. M. & S. R. Co. v. Roberts*, 56 Ark. 387, 19 S. W. Rep. 1055.

206. — failure to use best appliances.—In an action for the death of an engineer caused by the explosion of his locomotive, there being no evidence of negligence by the company in the selection of its employes, and the evidence being conflicting as to the soundness of the engine when purchased, even though it was repaired one month prior to the explosion—*held*, that the evidence was legally sufficient to go to the jury. *Cumberland & P. R. Co. v. State*, 45 Md. 229.

B., plaintiff's intestate, was killed by the explosion of a powder-house alleged to have been caused by sparks escaping from one of defendant's engines. In an action to recover damages the negligence charged was in not using the safest engines, i.e., those the best calculated to prevent the escape of sparks. These facts appeared: The engine and its appliances were in perfect condition; it was of a kind formerly in general use. The mill had been in the same location for many years, and defendant's road had been operated since 1876 with the same kind of locomotives without causing injury to the mill. Another kind had come into general use, but there was no proof showing that they were safer or less likely to cause fire; it simply showed that they emitted fewer but larger sparks. The new kind was brought into use, not because they were considered safer, but because of greater efficiency and economy in the use of fuel. *Held* (Andrews, C. J., O'Brien and Maynard, JJ., dissenting), that the evidence failed to show negligence on defendant's part, and so was insufficient to sustain a verdict for plaintiff. *Babcock v. Fitchburg R. Co.*, 140 N. Y. 308, 55 N. Y. S. R. 640, 35 N. E. Rep. 596; reversing 51 N. Y. S. R. 115, 67 Hun 469.—QUOTING *Steinweg v. Erie R. Co.*, 43 N. Y. 123.

207. — defective track or switch.—An action for the death of a person not a passenger, brought under Mo. Rev. St. 1889, § 4425, must rest on some negligence, etc., of the engineer in running the locomotive, etc., and a recovery cannot be had on general negligence, such as defects in the track, etc. Such general negligence can only aid as it may serve to make out negligence in the engineer, who must be shown to have known of such general negligence and its effect in making his conduct dangerous. *McKenna v. Missouri Pac. R. Co.*, 54 Mo. App. 161.

In an action for the death of one of defendant's engineers, caused by the derailment of his engine, there was evidence tending to show that at the place of the accident there was a depression in the track which caused such a rocking and swaying of trains passing over it as to attract the attention of and alarm persons on the trains; that the defect had existed for three days at least; and that a conductor had called the attention of the section boss to it. *Held*, that it could not be said that a verdict against defendant was without support on the ground that there was no evidence of defendant's negligence. *Worden v. Humes-ton & S. R. Co.*, 76 Iowa 310, 41 N. W. Rep. 26.

In an action for personal injury to plaintiff's intestate while employed as a brakeman on defendant's railroad, based upon the negligence of defendant in maintaining a "split-switch" in a defective condition, whereby the defendant's foot was caught between the rails while coupling and he was thrown down and injured, the jury found specially that the defendant was not negligent in maintaining such a switch at the point in question, but that the switch was not constructed as such switches generally are, and that it was out of repair, the rails being too far apart, and returned a general verdict for the plaintiff. The evidence showed that at the point of the switch the rails could be set within two and one half inches of each other or less, and the danger complained of could be avoided, whereas the rails of the switch in question were about three and three fourths inches apart, and were likely to catch the foot and hold it fast. *Held*, that the evidence warranted the jury in finding that plaintiff's intestate was injured through the negligence of the defendant. *Brooke v. Chicago, R. I. & P. R. Co.*, 81 Iowa 504, 47 N. W. Rep. 74.

The evidence tended to show a faulty construction of the defendant's roadbed at the place of the accident; that many of the ties were in bad condition and not suitable for use, and that the provision for the passage of water under the bridge was insufficient; that the deceased had not been informed of anything that required unusual care at the place of the accident, though he had been warned to guard against danger at two other places; that he seemed to have managed his engine with reasonable care; that before the place of the accident was

reached the deceased had applied the air-brakes, but had released them when the level track, within a short distance of the bridge, was reached; that he was in his proper place, looking ahead when the accident occurred, but a fog prevented him from seeing the ice on the track until too late to check the train and avoid the collision in which he was killed. *Held*, that the jury were justified in returning a verdict against the defendant for damages for the death of the engineer. *Scagel v. Chicago, M. & St. P. R. Co.*, 83 Iowa 380, 49 N. W. Rep. 990.

A passenger was killed in a collision of a train with a hand-car which the track-master suffered to be on the track through a mistake in time, occasioned by his failure to observe the hour indicated by his watch. *Held*, sufficient evidence of negligence to justify a submission of the case to the jury. *Commonwealth v. Vermont & M. R. Co.*, 108 Mass. 7, 7 Am. Ry. Rep. 394.

In an action by a widow for the death of her husband, a brakeman, it was shown by the plaintiff that the deceased was engaged at night in switching cars on a track where there was a rail so worn for the space of from four to six feet as to make a depression for that distance of an inch and a quarter, so that a car passing over it would be jolted or jarred, and that deceased fell from the car on which he was riding at his post of duty, striking the ground at a point consistent with the theory that he was thrown from the car by the jar in passing over the depression in the rail, and that he was dragged some distance and was killed, though nobody saw the accident. *Held*, that the evidence was sufficient to authorize the case to go to the jury. *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 673, 13 S. W. Rep. 714.

In an action to recover for the death of a fireman caused by his train leaving the track at a curve, witnesses examined the track 33 days after the accident and testified to slight variations in the degrees and lines of the curves, and others that the ballasting was defective, but there was no direct evidence that these defects caused the accident. *Held*, that the evidence did not establish such negligence as to make the company liable; the deceased being an employé, the burden was on plaintiff to establish negligence. *Erie & W. V. R. Co. v. Smith*, 125 Pa. St. 239, 17 Atl. Rep. 443.

In an action for the death of a child at a planked crossing, which defendant was required to maintain, the evidence showed that just before the accident the child was seen stooping as if doing something with her shoe or foot, and a moment or two afterwards was struck by an engine and the body torn in pieces, but one foot was found between one of the rails and the planking in a worn space. How the foot got there did not appear, whether it resulted from the blow of the engine, or was caught by accident, or inserted by the child for play; but it did appear that if the foot was inserted there was nothing to show that there would be any difficulty in releasing it. There was no charge as to mismanagement of the train. *Held*, that the evidence was sufficient to require a submission to the jury as to whether the accident was caused by the company's negligence. *Brown v. Pennsylvania R. Co.*, 15 Phila. (Pa.) 321.—REVIEWING *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Moore v. Pennsylvania R. Co.*, 11 W. N. C. (Pa.) 310.

268. Showing wilful or malicious killing.—Proof that the immediate cause of a brakeman's death was the formation of ice on the edge of cars where he was required to stand while handling the brakes, and that no salt or sand or other preparation to remove the ice had been furnished by the company, will not support an action for wilful killing. *O'Bannon v. Louisville & N. R. Co.*, (Ky.) 6 S. W. Rep. 434.

Suit was brought against a railroad for the death of a freight conductor who was killed by being knocked from the top of a train while passing under an overhead bridge. It appeared that a man could safely stand on top of the cars in general use by the company and safely pass the bridge, but at the time of the accident there was one car in the train belonging to another company considerably higher. The case was tried on the theory that the conductor was on the top of this high car. The declaration charged wilful neglect on the part of the corporation as producing the death. *Held*, that the facts proven did not support the charge of wilful killing. *Derby v. Kentucky C. R. Co.*, (Ky.) 4 S. W. Rep. 303.

After a switchman had given the signal to back he stepped between two cars, as was his duty, to uncouple, when his foot was caught and he was dragged some dis-

tance. Another employé saw him, and gave the engineer the signal to stop. There was evidence that the switchman was killed by a forward movement after the signal was given, and that he would not have been killed if the train had continued to back. *Held*, sufficient evidence to justify a finding of wilful killing. *Louisville & N. R. Co. v. Hurst*, (Ky.) 20 S. W. Rep. 817.

On the sudden stopping of a train one of the employés was thrown to the ground and was not seriously injured, but was caught under the wheels by his coat. Another employé signaled the train south, which would have released the injured employé, but instead, the train was moved north, which killed him. *Held*, not sufficient evidence to support a verdict for malicious killing, in the absence of proof to show that the engineer saw the signal, the employé who gave the signal being twelve cars in the rear of the locomotive, with twenty-four men standing on the intervening cars, and the conductor, who was nearer, giving a different signal about the same time. *Simmons v. Louisville & N. R. Co.*, (Ky.) 18 S. W. Rep. 1024.

269. Showing due care on part of deceased.—(1) *In general.*—Where the action is for causing death, to warrant the submission of the case to the jury, it is not enough merely to show the negligence of the defendant, but there must also be evidence of due care on the part of the deceased, such as to warrant the jury in finding the absence of contributory negligence. *Peaslee v. Chatham*, 69 Hun (N. Y.) 389.—QUOTING *Cordell v. New York C. & H. R. R. Co.*, 75 N. Y. 330; *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y. 248.

Where a person has been killed at a railroad crossing, and there are no witnesses of the accident, to authorize a recovery against the railroad company the circumstances must be such as to show that the deceased exercised proper care for his own safety. Where the circumstances point just as much to negligence on his part as to its absence, or point in neither direction, a recovery cannot be had against the railroad company. *Cordell v. New York C. & H. R. R. Co.*, 75 N. Y. 330.—APPLIED IN *Parsons v. New York C. & H. R. R. Co.*, 37 Hun (N. Y.) 128. FOLLOWED IN *Becht v. Corbin*, 92 N. Y. 658. NOT FOLLOWED IN *Burns v. Chicago, M. & St. P. R. Co.*, 69 Iowa 450. QUOTED IN *Bromley v. Bir-*

mingham Mineral R. Co., 95 Ala. 397; *Wendell v. New York C. & H. R. Co.*, 14 Am. & Eng. R. Cas. 663, 91 N. Y. 420; *Glendenning v. Sharp*, 22 Hun (N. Y.) 78; *Peaslee v. Chatham*, 69 Hun 389; *Craig v. Manhattan R. Co.*, 13 Daly (N. Y.) 214.

Where the action is for the homicide of an employé, if the evidence leaves the questions of negligence and contributory negligence in doubt, the case should be left to the jury, and it is error to grant a nonsuit. *Cook v. Western & A. R. Co.*, 69 Ga. 619.—DISTINGUISHED IN *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111. RECONCILED IN *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471. REVIEWED IN *Taylor v. Central R. & B. Co.*, 79 Ga. 330.

Evidence that deceased stepped off one track in order to avoid an incoming train, upon another on which a "dead" car was standing, which car was struck by a switching train and thrown forward so as to strike and kill him, is sufficient to sustain a verdict for plaintiff, and the court could not as a matter of law say deceased was guilty of contributory negligence. *Chicago & E. I. R. Co. v. Shannon*, 43 Ill. App. 540.

In an action under Mass. St. of 1887, ch. 270, for causing the death of a brakeman, who was a skilful man, and was apparently killed by reason of his head coming in contact with a bridge, no one having seen the accident, evidence that his duty required him to be on the rear car of a freight train, which on this occasion was a tall refrigerator car attached to the rear end of the caboosse, and to watch the rear end of the train, riding on the top of the car, with his face to the rear, although he knew there were low bridges under which the car must pass, warning of the approach to which was expected to be given by tell-tales, one of which, guarding the approach to the bridge in question, was out of order, will justify the inference that he was in the exercise of due care. *Maher v. Boston & A. R. Co.*, 158 Mass. 36, 32 N. E. Rep. 950.—APPLYING *Maguire v. Fitchburg R. Co.*, 146 Mass. 379. REVIEWING *Tyndale v. Old Colony R. Co.*, 156 Mass. 503.

In an action for killing a woman at a crossing, proof of her fear of the crossing; her habit of waiting for trains to pass before leaving home; the fact that she had a safe horse; that the train was a special one run near the time of a regular train; that

she had her watch with her; that she stopped at the foot of the rise; that the view was to some extent obstructed; that the warning signal was not given as required by statute; and the fact that she regarded the crossing as a place of danger, were facts from which it was competent for the jury to find that she was using ordinary care. *Evans v. Concord R. Corp.*, (N. H.) 21 Atl. Rep. 105.—QUOTING *Nutter v. Boston & M. R. Co.*, 60 N. H. 483.

(2) *Illustrations*.—A person was killed in the night-time by cars in motion. There was no eye-witness of the injury. The proof showed that about midnight the deceased left a store a few blocks distant from the place of the accident, and started on the sidewalk in the direction of his home, and was then duly sober, and that the place where he was killed was on his direct route home, and the accident must have happened very soon after he was last seen that night. *Held*, in an action to recover for his death, that the circumstances were such as might justify an inference whether or not the deceased used due care, and that direct proof on this point was not necessary. *Chicago & A. R. Co. v. Carey*, 115 Ill. 115, 3 N. E. Rep. 519.

A brakeman on a freight train was found dead on the track, having been thrown from the train apparently by the same separating and breaking in two. About a minute before that occurrence he was at his post attending to his duties, and there was evidence that he was experienced and a man of good habits. *Held*, that there was sufficient evidence of due care on his part to go to the jury. *Burns v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 409, 69 Iowa 450, 30 N. W. Rep. 25.—NOT FOLLOWING *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507; *Riley v. Connecticut River R. Co.*, 135 Mass. 292; *Cordell v. New York C. & H. R. Co.*, 75 N. Y. 330.—QUOTED IN *Bromley v. Birmingham Mineral R. Co.*, 95 Ala. 397.

In an action by the administrator of a person so injured by being so struck by a car while crossing the railroad that he died almost immediately, there was evidence that the railroad, running north and south, crossed a highway at grade near the railroad station; that a short distance north of the highway a side track branched off and crossed the highway a little easterly of the main track, and led into but not through the station; that the station was south of

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the highway; that the pathway used by persons going to the station from the highway on the east side crossed the side track obliquely, the distance to the platform being one hundred and fifty-seven feet; that at the point where the path left the highway one could see up the track to the north for about one hundred and fifty feet, and from the track itself for half a mile; that the person injured was going to the station to see his daughter off by a train which was then due; that the ground was frozen and slippery; that as he approached the railroad from the east, a freight train was coming from the north, which kept upon the main track, except a single car, which was switched upon the side track; that as he was crossing the side track by the usual path, he was struck by the detached car, which was moving rapidly, and without any signal or warning. *Held*, that on this evidence the jury would not be warranted in finding that the plaintiff's intestate was in the exercise of due care. (Gray, C.J., and Morton, J., dissenting.) *Hinckley v. Cape Cod R. Co.*, 120 *Mass.* 257.—DISTINGUISHING *Craig v. New York, N. H. & H. R. Co.*, 118 *Mass.* 431; *French v. Taunton Branch R. Co.*, 116 *Mass.* 537; *Williams v. Grealy*, 112 *Mass.* 79.—DISTINGUISHED IN *O'Connor v. Boston & L. R. Corp.*, 15 *Am. & Eng. R. Cas.* 362, 135 *Mass.* 352; *Maguire v. Fitchburg R. Co.*, 34 *Am. & Eng. R. Cas.* 9, 146 *Mass.* 379, 6 *N. Eng. Rep.* 33, 15 *N. E. Rep.* 904. QUOTED IN *Texas & N. O. R. Co. v. Crowder*, 63 *Tex.* 502.

It appeared that the deceased, an employé in an elevator, was injured while assisting in the unloading of two cars in the building, the brakes of which had been set, and the cars thus rendered stationary. The intestate was ordered by the foreman to stop work, and there was no evidence to show where he went or what he did thereupon. The railroad company negligently and without reasonable warning, while the cars were being unloaded, sent other cars into the building against the stationary cars with such violence as to force them a considerable distance from their position; and immediately after, the intestate was found dead, lying across a rail of the track. *Held*, that the case was not one in which it was necessary to show some positive act on the part of the intestate in order to prove that he was in the exercise of due care, and that the question whether he did exercise such care

should have been submitted to the jury on the facts. *Maguire v. Fitchburg R. Co.*, 34 *Am. & Eng. R. Cas.* 9, 146 *Mass.* 379, 6 *N. Eng. Rep.* 33, 15 *N. E. Rep.* 904.

Defendant company maintained its track on an embankment where a pool of water existed on one side. It neither forbade nor invited persons to pass over the embankment, but persons were in the habit of walking thereon, and a path was formed between the track and the water. A girl, eleven years old, was on her way to school, and was seen approaching the embankment playing with a rubber ball by tossing it in the air, and her body was afterwards found in the water. *Held*, that it could not be said as a matter of law that she was free from contributory negligence. *Hooper v. Johnston, G. & K. H. R. Co.*, 35 *N. Y. S. R.* 503, 13 *N. Y. Supp.* 151, 59 *Hun* 121; *affirmed in* 128 *N. Y.* 613, *mem.*, 38 *N. Y. S. R.* 1013.—APPLYING *Reynolds v. New York C. & H. R. R. Co.*, 58 *N. Y.* 248; *Wendell v. New York C. & H. R. R. Co.*, 91 *N. Y.* 420; *Bond v. Smith*, 113 *N. Y.* 385, 22 *N. Y. S. R.* 666.

Plaintiff's intestate was killed at a street crossing by a train that was behind time, and running twenty-five miles an hour, when the city ordinance restricted the speed to five miles. There was also evidence that the brakes were defective, and that no signals were given. It appeared that the intestate was driving at a slow trot, and looked both ways for trains before going on the track. *Held*, sufficient to sustain a verdict for plaintiff. *Towns v. Rome, W. & O. R. Co.*, 8 *N. Y. Supp.* 137, 28 *N. Y. S. R.* 124; *affirmed in* 124 *N. Y.* 642, *mem.*

Plaintiff's husband was killed at a city crossing after dark, where a view of the track was unobstructed, and the engine was carrying a headlight. Plaintiff testified that she was with her husband at the time, but only claimed that he looked both ways for trains because "it was perfectly natural for him to do so." *Held*, not sufficient to show due care on the part of the husband. *Scott v. Third Ave. R. Co.*, 41 *N. Y. S. R.* 152, 61 *Hun* 627, 16 *N. Y. Supp.* 350.—REVIEWING *Fenton v. Second Ave. R. Co.*, 126 *N. Y.* 625, 36 *N. Y. S. R.* 385; *Davenport v. Brooklyn City R. Co.*, 100 *N. Y.* 632.

The evidence showed that plaintiff's intestate was killed at a crossing where gates were maintained, in attempting to cross immediately after a train had passed, and

while the gates were still down, by being struck by a backing engine. It appeared that his view of the track was unobstructed for the last five or six feet before reaching it, and that the intestate looked each way just after the train had passed, but failed to see the engine. There was a double track at the place, but the evidence did not show on which track the accident occurred, nor in which way the engine was going. *Held*, not sufficient to show due care on the part of the intestate. *Donohue v. Lake Shore & M. S. R. Co.*, 47 N. Y. S. R. 161, 19 N. Y. Supp. 961.

Defendant company permitted water to run from a spout and freeze on a sidewalk; and plaintiff's intestate fell on the ice and was killed by a tanner's knife, which he carried, entering his side. His widow testified that she wrapped the knife, before her husband started, in a newspaper, and then wrapped his working clothes around it, in a bundle, and then put another garment around this and knotted it tight, and that he had been in the habit of carrying the knife thus for years without injury. *Held*, that it could not be said as a matter of law that the deceased was negligent in carrying the knife, and that the jury had a right to believe the evidence and find for the plaintiff. *McGoldrick v. New York C. & H. R. R. Co.*, 49 N. Y. S. R. 566, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 914.

270. Showing contributory negligence of deceased.—In an action for the death of plaintiff's intestate at a crossing with the highway, evidence that the deceased, in approaching the crossing, was told that the train was coming would not be sufficient to authorize the court in concluding that the deceased was guilty of negligence; it must also appear that the decedent heard and understood what was said to him. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. Cas. 89, 66 Mich. 150, 9 West. Rep. 903, 33 N. W. Rep. 161.

Where one walking on a public highway attempts to cross the tracks of a railroad in front of an approaching train and the flagman at the crossing takes hold of him, after warning him to stop, but he breaks away and jumps in front of the train and is killed, the question whether the accident was the result of the action of the flagman and whether the flagman's action was justified, under the circumstances, will not be

submitted to the jury. *Oberdorfer v. Philadelphia & R. R. Co.*, 149 Pa. St. 6, 27 Atl. Rep. 304.

A nonsuit is properly directed in a suit against a company for killing a person, where the evidence shows that a short time before the killing the deceased was walking on the track in the same direction that the train was going, and where there is no evidence to show that he was discovered in time to have averted the injury. *Texas & P. R. Co. v. Nicholson*, (Tex. Civ. App.) 23 S. W. Rep. 770.

In a suit by a widow against a railroad for the homicide of her husband, the evidence for the plaintiff was as follows: The deceased was employed by the defendant to work on a railroad; while so employed, one A., as "boss," directed him, together with other hands, to push certain cars loaded with iron, and directed them to stand on the side and shove them; the deceased voluntarily placed himself between two flat cars, and while they were being pushed and in motion, he fell; the car ran over his foot or leg, and from the injury so received he died. It did not appear when the deceased placed himself between the cars that the "boss" knew he had done so, or what relation this "boss" sustained to the deceased and his associates. *Held*, that the evidence failed to make out any case against the railroad, and a nonsuit was properly awarded. *Stanley v. Richmond & D. Ext. R. Co.*, 72 Ga. 202.

In an action for causing the death of a brakeman, which was alleged to have been caused by a defective coupling and drawhead, another brakeman testified that immediately before the accident, and while standing about twenty feet away, the coupling was apparently in good condition; but another witness, a yardman, testified that he noticed a defect therein at a distance of four or five feet away. *Held*, that a nonsuit was properly refused, and the question of contributory negligence was properly left to the jury. *Wells v. Denver & R. G. W. R. Co.*, 7 Utah 482, 27 Pac. Rep. 688.

2. On the Question of Damages.

271. In general.—The measure of damages for wrongfully causing the death of an adult male is the probable future accumulations that he would have made; and in estimating such, it is proper to consider

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Where the personal representative sues for the wrongful death of an infant, evidence of the general nature of the employment of the child's father is admissible as tending to show the probable pursuits of the child. *Walters v. Chicago, R. I. & P. R. Co.*, 41 *Iowa* 71.

Where it appeared that the decedent had sustained a serious injury some years before, which the evidence tended to show would have a permanent effect upon him, it was not prejudicial error to permit his brother to testify, in effect, that such injury had no effect at all upon decedent's health, after it had healed, so far as he knew; especially where the witness had before testified, in substance, to the same thing, without objection. *Van Gent v. Chicago, M. & St. P. R. Co.*, 80 *Iowa* 526, 45 *N. W. Rep.* 913.

Testimony showing the pecuniary circumstances of the parents of a child is admissible in an action to recover for its death. *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 261, 10 *West. Rep.* 184, 33 *N. W. Rep.* 306.

While in a suit by the mother, a widow with no children, for causing the death of her son, his physical sufferings preceding the death can form no basis for damages; yet where the testimony showed that the body of deceased had been mangled and that he died a few hours after the injury, it is no ground for reversal that a witness, over objection, was allowed to testify that the deceased "moaned until he died." *Texas & P. R. Co. v. Lester*, 75 *Tex.* 56, 12 *S. W. Rep.* 955.

In an action for the negligent killing of a passenger, prosecuted by deceased's personal representative for the benefit of his widow and next of kin, evidence as to the funeral expenses of the deceased is improper and misleading. *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 *Ark.* 287, 21 *S. W. Rep.* 587.

Where the action is for negligently causing death, and there is nothing showing that any damages were asked or given for suffering borne by the deceased, evidence by the widow as to finding pieces of flesh after the accident, is not ground for reversal, but it will be considered admissible merely as a circumstance attendant upon

the injury. *Cook v. Clay St. Hill R. Co.*, 60 *Cal.* 604, 6 *Am. & Eng. R. Cas.* 175.

The fact that the widow who sues for the killing of her husband, worked in the field for a livelihood after his death, is immaterial and irrelevant to the issue on trial, and should not therefore go to the jury as evidence. *Central R. Co. v. Moore*, 61 *Ga.* 151.

Under the Illinois statute the measure of damages to the next of kin is the just compensation for the loss of the support which the deceased might have provided had he lived; and it is error to admit evidence as to the annual cost of supporting the family that the deceased leaves. *Ohio & M. R. Co. v. Simms*, 43 *Ill. App.* 260.

Evidence as to the state of health of the mother of a minor killed on a railroad is not admissible in a suit by her to recover damages. *Benton v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 496, 8 *N. W. Rep.* 330.—REVIEWING *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 88.

Where the action is for causing the death of a child it is error to admit evidence as to the grief of the father; but where the verdict is fixed only at two thousand dollars, and it is not claimed that this amount is excessive, the action will not be reversed for the admission of such evidence, as it appears that the jury was not influenced thereby. *Hyde v. Union Pac. R. Co.*, 7 *Utah* 356, 26 *Pac. Rep.* 979.

Evidence was admitted to prove that the deceased did not have expensive or extravagant habits, that he got less benefit from his wages than his wife derived from them, that her clothes and medical expenses cost more than his, that she was sick very often, etc. *Held*, that while the evidence was immaterial it did not prejudice the company. *Savannah, F. & W. R. Co. v. Flannagan*, 39 *Am. & Eng. R. Cas.* 661, 82 *Ga.* 579, 9 *S. E. Rep.* 471.—DISTINGUISHING *Central R. Co. v. Rouse*, 77 *Ga.* 393.

272. Proof of existence of family relation.—In a statutory action against the employer by the personal representative of a deceased employé it is not error to exclude proof of the fact that the deceased left a wife and minor child dependent on him, unless followed by an offer to prove his expenditures on their account. *Bromley v. Birmingham Mineral R. Co.*, 95 *Ala.* 397, 11 *So. Rep.* 341.

The deceased had made an arrangement

to become a substitute for a drafted man, and had declared his intention of giving his bounty money to his parents. He was on his way to consummate the arrangement when he was killed on a railroad train. *Held*, that these facts were proper evidence on the question of the continuance of the family relation. *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.—FOLLOWED IN *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168.

273. Must show pecuniary loss to beneficiaries.—In an action against a railway company (under Mansf. Ark. Dig. §§ 5223, 5226) to recover the damages resulting to a father from the killing of his son, who was of age but unmarried, substantial damages can be recovered only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of his son—the reasonable character of such expectation to appear from the facts in proof. In the absence of such proof only nominal damages can be recovered. *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. Rep. 694.

In an action under New York Act of 1847, ch. 450, as amended in 1849, ch. 256, for wrongfully causing the death of a child, the absence of proof of special pecuniary damage to the next of kin is not ground for ordering a nonsuit or directing a verdict for plaintiff for merely nominal damages. *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317, 2 Am. Ry. Rep. 409.—FOLLOWING *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.—FOLLOWED IN *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Cornwall v. Mills*, 12 J. & S. (N. Y.) 45. QUOTED IN *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491; *Hooghkirk v. Delaware & H. Canal Co.*, 63 How. Pr. (N. Y.) 328; *Nashville & C. R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12. REVIEWED IN *Gorham v. New York C. & H. R. Co.*, 23 Hun (N. Y.) 449; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.—*Gorham v. New York C. & H. R. Co.*, 23 Hun 449.—REVIEWING *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317.

The facts that the children of one killed by negligence are of full age and not living with their parent and are supporting them-

selves do not alone show that they have sustained no pecuniary damage from the parent's death. *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523.—APPROVED IN *Kelly v. Twenty-third St. R. Co.*, 14 Daly (N. Y.) 418, 14 N. Y. S. R. 699. QUOTED IN *Lustig v. New York, L. E. & W. R. Co.*, 48 N. Y. S. R. 916.

Where a father sues under Lord Campbell's Act for the death of his son, the defendant is entitled to judgment where there is no evidence to enable the jury to say that it was reasonably probable that pecuniary benefit would have resulted to the father from the continuance of his son's life. *Bourke v. Cork & M. R. Co.*, 4 Ir. L. R. 682.

Proof of the death and relationship of the plaintiff to the deceased does not give a right to nominal damages; the plaintiff must show actual pecuniary injury. *Duckworth v. Johnson*, 4 H. & N. 653, 5 Jur. N. S. 630, 29 L. J. Ex. 25.

274. Competency of proof of pecuniary loss.—It was not error to permit the plaintiff to prove that the deceased had been in the habit of turning his wages over to his wife, and permitting the same to be expended for the support of his family. This evidence was competent to show the loss sustained by his family because of his death. *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. Rep. 564.—FOLLOWING *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.

In an action by the administrator of a son killed, there being some evidence, although of an uncertain character, showing a beneficial interest of the father in his son's life, this question was properly for the determination of the jury. *Davis v. Columbia & G. R. Co.*, 28 Am. & Eng. R. Cas. 440, 21 So. Car. 93.

Evidence is admissible to show the condition and circumstances of the family of the deceased, his business qualifications, the condition of his health, the amount he was realizing annually from his employments, the value of his services to his family, and the damage suffered by them in the loss of his care, nurture, and instruction. *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351.

Upon the question of damages for the negligent killing of a child, evidence that the parents are poor, in bad health, and obliged to work for a living, is admissible;

and in such a case the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond the child's minority. *Johnson v. Chicago & N. W. R. Co.*, 25 *Am. & Eng. R. Cas.* 338, 64 *Wis.* 425, 25 *N. W. Rep.* 223.

Evidence that some of the younger children of plaintiff's intestate were in poor health is competent as tending to show that her death was a pecuniary loss to them especially. So, also, evidence tending to show that the children had no means of support of their own is admissible. *McKeigue v. Janesville*, 68 *Wis.* 50, 31 *N. W. Rep.* 298.

In an action under 9 & 10 Vict. c. 93, for the benefit of the father of the deceased, evidence was given that the father, who was fifty-nine years of age, was nearly blind and injured in his leg and hands, and was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since. *Held*, that there was evidence for the jury of pecuniary injury to the father from the son's death. *Hetherington v. North Eastern R. Co.*, 6 *Am. & Eng. R. Cas.* 490, *L. R.* 9 Q. B. D. 160.

275. Proof of dependence upon deceased for support.—Under *Mansf. Ark. Dig.* § 5226, giving a right of action for wrongfully causing death, for the benefit of the next of kin, where the mother sues as administratrix for the death of her son, evidence that she was dependent upon him for support is admissible. *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 *Am. & Eng. R. Cas.* 459, 48 *Ark.* 333, 3 *S. W. Rep.* 50.

Evidence of the father's physical disability to labor is admissible in behalf of the mother, as tending to show her partial dependence on the minor son whose homicide is complained of. *Augusta R. Co. v. Glover*, (Ga.) 58 *Am. & Eng. R. Cas.* 269, 18 *S. E. Rep.* 406.

In an action by an administrator against a railroad corporation to recover damages for negligently and wrongfully causing the death of the intestate, evidence that the deceased in his lifetime supported the plaintiff (his widow) and her children, is not only admissible, but highly proper, if not indispensably necessary. *Chicago &*

A. R. Co. v. May, 15 *Am. & Eng. R. Cas.* 320, 108 *Ill.* 288.—QUOTED IN *Pennsylvania Co. v. Keane*, 143 *Ill.* 172.

It is not competent for the plaintiff to show what the pecuniary circumstances of the widow, family, or next of kin are or have been since the death of the intestate, but it is competent to show that the wife, children, or next of kin were dependent upon him for support before and at the time of his death. *Pennsylvania Co. v. Keane*, 143 *Ill.* 172, 32 *N. E. Rep.* 260.—QUOTING *Illinois C. R. Co. v. Baches*, 55 *Ill.* 379; *Chicago & A. R. Co. v. May*, 108 *Ill.* 288. REVIEWING *Chicago & N. W. R. Co. v. Moranda*, 93 *Ill.* 302; *Chicago, B. & Q. R. Co. v. Johnson*, 103 *Ill.* 512.—*Chicago & N. W. R. Co. v. Howard*, 6 *Ill. App.* 569. *Chicago, R. I. & P. R. Co. v. Henry*, 7 *Ill. App.* 322.

In an action by an administrator for causing the death of his intestate, a brakeman, it is not necessary to prove the amount that the intestate had been contributing to the support of the next of kin, in order to recover substantial damages, where there is evidence that he actually did contribute to such support, and that the next of kin was in need of financial aid. *Ohio & M. R. Co. v. Wangelin*, 43 *Ill. App.* 324.—QUOTING *Chicago & A. R. Co. v. Shannon*, 43 *Ill.* 346.

Except so far as regulated by the statute which declares that the pecuniary compensation for loss of life to the next of kin must be "fair and just," the amount of such damages must be left largely to the discretion of the jury in each case. *Ohio & M. R. Co. v. Wangelin*, 43 *Ill. App.* 324.—QUOTING *Chicago v. Keefe*, 114 *Ill.* 230.

Evidence was properly admitted to show plaintiff's health, prospects, and pecuniary condition, and her need and prospects of receiving assistance from deceased, her dependence upon him, his ability to contribute, and his willingness to do so. *Missouri Pac. R. Co. v. Perego*, 36 *Kan.* 424, 14 *Pac. Rep.* 7.

Where the action is for causing the death of a child, and, under the statute, the damages go to the surviving parents, evidence of their health and means of support, and any other facts tending to show that they will need the services of the deceased, or that they will suffer pecuniary loss from his death, is proper. *Ewen v. Chicago & N. W. R. Co.*, 38 *Wis.* 613.

In an action by a mother, as administrator, to recover for the wrongful death of her son, a brakeman, the evidence showed that he was her only child, and at the time of his death was twenty-one years old, in perfect health, and earning seventy-five dollars a month; that out of this he gave his mother thirty dollars a month, and prior to his railroad engagement, when his wages were about sixty dollars per month, he gave her twenty-five dollars. *Held*, sufficient to show pecuniary damage to the plaintiff. *Southern Pac. Co. v. Lafferty*, 57 *Fed. Rep.* 536.

The plaintiff, as administrator, sued the defendants, under the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), to recover damages for the death of his son, who had been killed by their negligence. At the trial the plaintiff gave evidence to the effect that he was nearly blind, and was injured in his leg and hands, and that the deceased was always very kind to him, and used to contribute to his support five or six years ago when he required it. *Held*, upon the above facts, that there was some evidence for the jury of a reasonable expectation of benefit from the continuance of the son's life, entitling the plaintiff to sue under 9 & 10 Vict. c. 93. *Hetherington v. North Eastern R. Co.*, 51 *L. J. Q. B. D.* 495, 4 *Ry. & C. T. Cas.* xv.

276. Showing the habits and character of deceased.—In an action for damages resulting from the death of a parent and husband, evidence as to the business, education, and habits of sobriety and economy of the deceased is admissible. *Taylor v. Western Pac. R. Co.*, 45 *Cal.* 323.

It is competent to prove the age, strength, health, skill, industry, habits, and character of the deceased, with a view to arrive at his pecuniary worth to his family. *Kesler v. Smith*, 66 *N. Car.* 154.—REVIEWED IN *Kansas Pac. R. Co. v. Lundin*, 3 *Colo.* 94.—*Chicago & G. W. R. Co. v. Travis*, 44 *Ill. App.* 466.—REVIEWING *Illinois C. R. Co. v. Weldon*, 52 *Ill.* 290; *Illinois C. R. Co. v. Baches*, 55 *Ill.* 379.—*Van Gent v. Chicago, M. & St. P. R. Co.*, 80 *Iowa* 526, 45 *N. W. Rep.* 913.—FOLLOWING *Simonson v. Chicago, R. I. & P. R. Co.*, 49 *Iowa* 92; *Donaldson v. Mississippi & M. R. Co.*, 18 *Iowa* 290.

In estimating the loss to the next of kin of a railroad employé, his income may be considered, deducting therefrom his personal expenses; but the amount to be deducted is not simply the cost of his food

and clothing. The personal habits of the deceased, his station in life, his means, and his manner of living may be proven, and considered by the jury. *Killian v. Augusta & K. R. Co.*, 79 *Ga.* 234, 4 *S. E. Rep.* 165.

277. Proof of deceased's reputation, kindly disposition, etc.—Under *Cal. Code Civ. Pro.* § 377, providing that such damages may be given for wrongfully causing death "as under all the circumstances of the case may be just," where the action is for causing the death of a married man, evidence is admissible to show that it was his custom to be at home after business hours; that his domestic relations were happy, and that he was kind and attentive to an invalid wife, and that he was a kind father. *Cook v. Clay St. Hill R. Co.*, 6 *Am. & Eng. R. Cas.* 175, 60 *Cal.* 604.—FOLLOWING *Beeson v. Green Mountain Gold Min. Co.*, 57 *Cal.* 20.—DISTINGUISHED IN *Munro v. Pacific Coast D. & R. Co.*, 84 *Cal.* 515, 24 *Pac. Rep.* 303; *Morgan v. Southern Pac. Co.*, 95 *Cal.* 510; *Webb v. Denver & R. G. W. R. Co.*, 7 *Utah* 17.

In an action against a railway company for the pecuniary damages caused to plaintiff by the negligent killing of her husband, a witness of plaintiff was properly allowed to state that the husband was kind and affectionate to his family, and was an indulgent father and husband. *Missouri Pac. R. Co. v. Bond*, 2 *Tex. Civ. App.* 104, 20 *S. W. Rep.* 930.

In an action for causing the death of a brakeman evidence as to his being a good railroad man is not admissible on the question of contributory negligence; but it is admissible on the question of damages. *Wells v. Denver & R. G. W. R. Co.*, 7 *Utah* 482, 27 *Pac. Rep.* 688.

278. Proof of deceased's capacity for business, making money, etc.—The evidence showing that the deceased had been a farmer since arriving at years of maturity, and had never followed any other vocation, it was proper to prove his mental and physical capacity in order to show his ability to earn money as a farmer; but it was not admissible for witnesses to give their opinions as to the value of his services in occupations in which he had never engaged. *Atlanta & W. P. R. Co. v. Newton*, 85 *Ga.* 517, 11 *S. E. Rep.* 776.—QUOTING *Mansfield C. & C. Co. v. McEnery*, 36 *Am. Rep.* 664.

It is incompetent to prove, as bearing on

the measure of damages, the value of the crops produced by deceased, as a farmer, for one or more years prior to his death. *Louisville & N. R. Co. v. Howard*, 90 *Tenn.* 144, 19 *S. W. Rep.* 116.

Evidence that the deceased person had engaged at different times in various pursuits, and of what he made or was capable of making in each of these, is relevant, although at the time of his death he had ceased for a number of years to act in one of them, his capacity to pursue it not being impaired. What he had earned in it would not serve as a direct basis for estimating the value of the life, but might be looked to by the jury in estimating his capacity to command continuous, profitable employment should he cease to pursue the business vocation in which he was engaged when he was killed. Evidence that at that time he held the offices of postmaster and tax-collector, and of the amount of his income from the same, would also be relevant to show pecuniary loss for the unexpired term of office, but not to furnish a basis of direct compensation for any longer period. *Christian v. Columbus & R. R. Co.*, 90 *Ga.* 124, 15 *S. E. Rep.* 701.

The damages that are recoverable for the death of a railroad employé are limited to the present worth of his life to his estate, in determining which evidence of the age of the deceased, his probable duration of life, habits of industry and sobriety, his health, means, business, earnings, skill in business, whether married or single, and his ability to labor, may all be considered. *Wheeler v. Chicago, M. & St. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 693, 85 *Iowa* 167, 52 *N. W. Rep.* 119.

In an action under Minn. Gen. St. 1878, ch. 77, § 2, evidence of the amount of property deceased had acquired, his habits of industry, his ability to make money, and his success in business, is proper as a basis for the damages. *Shaber v. St. Paul, M. & M. R. Co.*, 2 *Am. & Eng. R. Cas.* 185, 28 *Minn.* 103, 9 *N. W. Rep.* 575.

In an action to recover for wrongful death of a passenger, a wife, it is competent for the plaintiff to prove the occupation and employment of the deceased to show her general capacity to earn money, and her relation to her family. *Tilley v. Hudson River R. Co.*, 24 *N. Y.* 471, 23 *How. Pr.* 363.

In an action by a father as administrator of his wife, alleged to have been killed by the defendant's negligence, evidence in re-

lation to the capacity of the mother to transact business and make money, is proper, as aiding the jury in arriving at a correct result in regard to the pecuniary benefit which the mother was to her children, and her capacity to bestow such training and education as would be pecuniarily serviceable to the children in after life. *Tilley v. Hudson River R. Co.*, 29 *N. Y.* 252.

In an action under Bat. N. Car. Rev. ch. 45, § 121, for damages resulting from death caused by negligence, the rule is that the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased is the guide to the jury in estimating the amount of damages; and to this end evidence of the age, habits, industry, means, and business of the deceased is indispensable. *Burton v. Wilmington & W. R. Co.*, 82 *N. Car.* 504.

In an action by the widow of an engineer for the death of her husband it is competent to show that he was temperate and regular in his habits, as bearing on his capacity for labor as well as skill in his art, business, or profession, in order to show what he was capable of earning. *East Tenn., V. & G. R. Co. v. Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea (Tenn.)* 46.

In an action for causing the death of a railroad employé it is not competent to show, for the purposes of affecting the damages, that the deceased was in the line of promotion, and would have received greater wages if he had lived and the promotion had come. *Brown v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 652, 21 *N. W. Rep.* 193.—FOLLOWED IN *Chase v. Burlington, C. R. & N. R. Co.*, 38 *Am. & Eng. R. Cas.* 148, 76 *Iowa* 675, 39 *N. W. Rep.* 196.

279. Showing the ages and number of deceased's children.*—A widow, suing for the death of her husband, an employé, may testify as to the number of her infant children that the husband had been supporting, and the burden of which support was cast on her by his death. *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 *Mo.* 673, 13 *S. W. Rep.* 714.—APPLIED IN *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 *Mo.* 205.—*Breckenfelder v. Lake Shore & M. S. R. Co.*, 79 *Mich.* 560, 44 *N. W. Rep.* 957. *Louisville, C. & L. R. Co. v. Mahony*, 7 *Bush (Ky.)* 235.—REVIEWED IN *Louisville*

* Evidence as to age and number of children and their treatment by deceased, see 54 *Am. & Eng. R. Cas.* 99, *abstr.*

& N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. Rep. 706.—*Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 11 S. W. Rep. 310.—APPLIED IN *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205. DISTINGUISHED IN *Hawes v. Kansas City Stock Yards Co.*, 103 Mo. 60. FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25. OVERRULED IN *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.—*Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87, 21 S. W. Rep. 1110. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503.—APPLYING *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 673; *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74.—*Chilton v. Union Pac. R. Co.*, 8 Utah 47, 29 Pac. Rep. 963. *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. (Va.) 602. *Atchison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25.—FOLLOWING *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 84, 11 S. W. Rep. 310.

It seems that where the jury is properly instructed as to the allowance of damages it is not error to fully advise the jury by evidence of the exact situation of the deceased, his occupation, earnings, age, health, habits, family, and estate. *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280.—FOLLOWED IN *Van Gent v. Chicago, M. & St. P. R. Co.*, 80 Iowa 526.

Evidence of the number of children left by the deceased is inadmissible, as irrelevant and calculated to mislead the jury. *Kesler v. Smith*, 66 N. Car. 154. *Beems v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. Cas. 222, 10 Am. & Eng. R. Cas. 658, 58 Iowa 150, 12 N. W. Rep. 222.—REVIEWING *Simonsen v. Chicago, R. I. & P. R. Co.*, 49 Iowa 87.

280. Showing value of deceased's services.—In an action by an administrator under Neb. Comp. St. ch. 21, to recover for the death of his intestate, it is proper to prove the value of the services of the deceased, which the next of kin of the deceased could reasonably expect, but for the injury, would have been rendered in their behalf, the natural expectancy of life of the deceased just previous to receiving the injury which resulted in her death having been duly shown. *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. Rep. 913.

In an action by an administrator for the death of a minor 15 years old, a witness

cannot be allowed to testify as to what the services of deceased would have been worth when he reached the age of 21, if he had lived. *Nave v. Alabama G. S. R. Co.*, 54 Am. & Eng. R. Cas. 151, 96 Ala. 264, 11 So. Rep. 391.

Where the damages are claimed for the death of a child too young to be capable of earning anything, or rendering services of any value, the value of its probable future services to the parent, during its minority, is a matter of conjecture, and may be determined by the jury without the testimony of witnesses. *Little Rock & Ft. S. R. Co. v. Barker*, 19 Am. & Eng. R. Cas. 195, 39 Ark. 491.

In an action by a father to recover for the death of his minor female child, it is proper to refuse to instruct the jury that, in estimating the damages, they may consider the chances of her marriage before she is 21, where there is no evidence before the jury by which they could arrive at any conclusion on the subject. *Seaman v. Farmers' L. & T. Co.*, 15 Wis. 578.

281. Proof of value of wife's services.—Where the action is for causing the death of a wife, the surviving husband should not be allowed to testify as to the value of her services to himself and family per year. He should testify as to the facts relating to her services, and as to how much they are worth is a conclusion to be deduced therefrom by the jury. *Chicago & E. I. R. Co. v. Roberts*, 35 Ill. App. 137.

It is not necessary that he show that he suffered pecuniary loss. In the absence of proof to the contrary, the jury might infer that she was an industrious and useful wife. *Delaware, L. & W. R. Co. v. Jones*, 128 Pa. St. 308, 18 Atl. Rep. 330.

In an action by a husband for the negligent killing of his wife, evidence is admissible that after his marriage there was a marked change for the better in his habits and pecuniary condition, as affecting the quantum of damages. *Simmons v. McConnell*, 86 Va. 494, 10 S. E. Rep. 838.

282. Showing income or pecuniary condition of deceased.—As relevant to the question of the amount of damages the plaintiff is entitled to recover for the personal injuries which caused his intestate's death, he may prove the intestate's habits of industry and sobriety, his state of health, and his net income. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. Rep. 577.

Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. Rep. 579.

In an action under the Iowa statute for causing the death of plaintiff's intestate, the measure of damages is the sum necessary to compensate the estate for the loss it has suffered by reason of the death of the intestate; and in arriving at such sum, any evidence that tends to show what his probable future accumulations would have been, is proper. *Kelley v. Central R. Co.*, 5 McCrary (U. S.) 653.

It is proper for the purpose of showing the reasonable expectation of pecuniary benefit to the mother of the deceased, to admit evidence of his pecuniary circumstances and ability to make money, habits of industry, her dependence upon him, and his assistance and promises of support, and other circumstances of like character. *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. Rep. 575.

Evidence tending to show what property the deceased had 20 years before, what occupation he had followed, and what he was worth at the time of his death, is admissible for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of his life. *Phelps v. Winona & St. P. R. Co.*, 32 Am. & Eng. R. Cas. 56, 37 Minn. 485, 35 N. W. Rep. 273, 5 Am. St. Rep. 867.

In a suit for damages by the wife and mother for the wrongful killing of the deceased, evidence showing the ability of the deceased, had he lived, to render pecuniary aid to his wife and mother, is proper. *Dallas & W. R. Co. v. Spicker*, 21 Am. & Eng. R. Cas. 160, 61 Tex. 427, 48 Am. Rep. 297.

It is competent to prove the monthly wages of the deceased, as well as his probable chances of promotion at the time of his death, in a suit by the widow and children for damages for negligently causing his death. *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. Rep. 104.

In an action for damages by the widow and children of a man killed by a railway collision, it is competent to prove how much cotton and corn the deceased could raise in a year, and how much he could earn. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.

Testimony that the deceased lived many years ago in a state of squalor and wretchedness was incompetent. *Waller v. Chicago, D. & M. R. Co.*, 39 Iowa 33, 9 Am. Ry. Rep. 78, 20 Am. Ry. Rep. 319.

Evidence of the pecuniary means of the husband at the time of his death is inadmissible in a suit to recover damages for the loss sustained by such death, alleged to have been caused by the negligence of the defendant. *Hunn v. Michigan C. R. Co.*, 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502.—QUOTING *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 214.

Whether in an action for the negligent killing of plaintiff's intestate, it is reversible error for the trial judge to permit plaintiff to show that her intestate left no property, see *Koosorowska v. Glasser*, 8 N. Y. Supp. 197.

283. Showing expectancy of life, generally.—The method of estimating the pecuniary damages, in actions for causing death, depends to a great extent upon the sound judgment of the jurors as to what is just, reasonable, and proper under all the circumstances, taking into consideration the age of the deceased, his condition, health, employment, and reasonable expectation of life. *Southern Pac. R. Co. v. Laferty*, 57 Fed. Rep. 536.

In an action for the wrongful death of a young man, nineteen years and ten months old, it is error to permit the plaintiff to show the expectancy of life of deceased at the assumed age of twenty-one years. *Wheelan v. Chicago, M. & St. P. R. Co.*, 49 Am. & Eng. R. Cas. 693, 85 Iowa 167, 52 N. W. Rep. 119.

In determining the life expectancy of an employé, who is killed during his minority, the evidence should be based upon his age at the time of his death, and not at the time when he would reach his majority. *Wheelan v. Chicago, M. & St. P. R. Co.*, 49 Am. & Eng. R. Cas. 693, 85 Iowa 167, 52 N. W. Rep. 119.

On the question of damages, plaintiff might ask a witness "from his knowledge of decedent's age, habits, health, and physical condition, how long he would have been useful to his family." *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.

284. Life, or mortality tables.*—For the purpose of showing the probable duration of the life of the deceased refer-

* Life tables admissible in evidence, see note, 19 AM. & ENG. R. CAS. 176.

ence may be had to the Carlisle or other approved life tables. *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1. See also *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 162. *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.—APPROVING *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 104. REVIEWING *Maccon & W. R. Co. v. Johnson*, 38 Ga. 409; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Taylor v. Western Pac. R. Co.*, 45 Cal. 332; *Kesler v. Smith*, 66 N. Car. 154; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 247; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 339.—*Louisville C. & L. R. Co. v. Mahony*, 7 Bush (Ky.) 235.—FOLLOWING *O'Donnell v. O'Donnell*, 3 Bush 216.—*San Antonio & A. P. R. Co. v. Bennett*, 76 Tex. 151, 13 S. W. Rep. 319. *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. Rep. 298.

And the Encyclopedia Britannica, being a familiar work of science of unquestioned authority, may be introduced to show such tables. *Worden v. Humeston & S. R. Co.*, 76 Iowa 310, 41 N. W. Rep. 26.

The computation, however, should be made from the date of decedent's death, if an infant, and not from the age of 21, although recovery dates from that time. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

The deceased having been shown to have been a healthy, strong man, and his age, occupation, and earning power having been made to appear, it was competent to show the expectation of life of such a man according to the Carlisle tables of mortality. *Steinbrunner v. Pittsburgh & W. R. Co.*, 146 Pa. St. 504, 23 Atl. Rep. 239.—FOLLOWED IN *McCue v. Knoxville*, 146 Pa. St. 580.

Being based upon general population, and not upon selected or insurable lives, the Carlisle tables are admissible in such a case, as some evidence competent to be considered by the jury in determining what was the actual expectation of life of the deceased. *Steinbrunner v. Pittsburgh & W. R. Co.*, 146 Pa. St. 504, 23 Atl. Rep. 239.—DISTINGUISHING *Shippen's Appeal*, 80 Pa. St. 391.

The value of such tables, however, when applied to a particular case, will depend very much upon other matters, such as state of health, habits of life, social condition, etc.; and the attention of juries should be called pointedly to these qualifying circumstances. *Steinbrunner v. Pittsburgh & W. R. Co.*, 146 Pa. St. 504, 23 Atl. Rep. 239.

If the action is for personal injuries not resulting in death, the Carlisle tables are immaterial and should not be introduced in evidence. *Nelson v. Chicago, R. I. & P. R. Co.*, 38 Iowa 564.—DISAPPROVED IN *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18. OVERRULED IN *Chase v. Burlington, C. R. & N. R. Co.*, 38 Am. & Eng. R. Cas. 148, 76 Iowa 675, 39 N. W. Rep. 196.

It is not error in the judge on the trial of an action by a widow against a railroad company for the homicide of her husband, who was an engineer on its train, to permit the "Northampton Tables of Mortality" to be put in evidence before the jury. *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410, 7 Am. Ry. Rep. 143. *Sauter v. New York C. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *affirming* 6 Hun 446.

Whether, in an action for fatal negligence, a computation of the probabilities of life, based upon Haswell's tables, is admissible for the purpose of fixing damages, *quære*. *Klanowski v. Grand Trunk R. Co.*, 21 Am. & Eng. R. Cas. 648, 57 Mich. 525, 24 N. W. Rep. 801.

In an action for the death of a brakeman on a railroad, standard life tables are admissible to show the probable duration of the life of a person of decedent's age, and thus aid in estimating the damages, and this notwithstanding the hazardous nature of the employment of deceased. *Coates v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 265, 62 Iowa 486, 17 N. W. Rep. 760.

In using life tables as a basis for calculation of the value of the life of the deceased, the gross value when ascertained must be reduced to its present value to find the sum to be paid to the plaintiff, his widow. If the expectancy of her husband's life be twelve years, the verdict should be for a sum not larger than would be exhausted at the end of that time by expending each year a sum equal to his net earnings, the homicide having occurred before the passage of the statute forbidding any deduction for his expenses. *Atlanta & W. P. R. Co. v. Newton*, 45 Am. & Eng. R. Cas. 211, 85 Ga. 517, 11 S. E. Rep. 776.

Where the evidence showed that the deceased was twenty-five years of age, and that he was an active, industrious man, in good health, had a common education, and at the time of his death he was earning

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from \$40 to \$45 per month, these facts were sufficient to authorize an award of substantial damages, without the introduction of life tables to show the probable duration of decedent's life, had he not been killed; and, in the absence of a claim that the amount awarded was excessive, the verdict should not be disturbed. *Beems v. Chicago, R. I. & P. R. Co.*, 67 *Iowa* 435, 25 *N. W. Rep.* 693.

Where a father sues for killing his son it is error to admit in evidence mortuary tables showing the expectation of life of the deceased (when living), as it is the expectation of life of him who would soonest die, in the ordinary course of nature, which should be made the basis of the award of damages. The expectation of the father's life being presumably shorter than the son's, the expectancy of the plaintiff should have been shown instead of that of the deceased. *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291.

285. What may be shown in mitigation of damages, generally. — The fact that the deceased at the time he was killed was suffering from a pulmonary disease which affected the probable continuance of his life, is admissible in evidence for the defendant. *Columbus & W. R. Co. v. Bridges*, 38 *Am. & Eng. R. Cas.* 136, 86 *Ala.* 448, 5 *So. Rep.* 864.

The character of the deceased as a drunken, worthless man, making no provision for his family, but being a burden to them for his support, is proper matter to be proved in mitigation of damages. *Nashville & C. R. Co. v. Prince*, 2 *Heisk. (Tenn.)* 580. — **OVERRULING** *Louisville & N. R. Co. v. Burke*, 6 *Coldw. (Tenn.)* 45. — **EXPLAINED** IN *Louisville & N. R. Co. v. Conner*, 2 *Baxt. (Tenn.)* 382. **FOLLOWED** IN *Nashville & C. R. Co. v. Stevens*, 9 *Heisk.* 12; *East Tenn., V. & G. R. Co. v. Mitchell*, 11 *Heisk.* 400. **QUOTED** IN *Nashville & C. R. Co. v. Smith*, 6 *Heisk.* 174. **REVIEWED** IN *Louisville & N. R. Co. v. Gower*, 31 *Am. & Eng. R. Cas.* 168, 85 *Tenn.* 465.

The condition and conduct, the carelessness, recklessness, and the imprudence of the deceased may be considered by the jury in assessing direct pecuniary damages resulting to the party from the injury. *Louisville & N. R. Co. v. Conner*, 2 *Baxt. (Tenn.)* 382, 21 *Am. Ry. Rep.* 194. — **DISAPPROVING** *Smith v. Nashville & C. R. Co.*, 6 *Coldw. (Tenn.)* 592. **EXPLAINING** *Nashville & C. R. Co. v. Prince*, 2 *Heisk. (Tenn.)* 587. **FOL-**

LOWING *Louisville & N. R. Co. v. Burke*, 6 *Coldw.* 51. — **QUOTED** IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 *Lea (Tenn.)* 128.

In an action for damages by a widow for the negligent killing of her husband, the defendant may obtain answers to interrogatories asking for a copy of testator's will; inquiring what amount of assets plaintiffs had realized over and above all debts and liabilities due by testator; inquiring whether any of the legatees or devisees had any further expectations, reversions, or interest not included in the preceding interrogatories and which might be derivable from any other real or personal estate in which testator had an interest, and to set them forth fully and their value, as bearing on the measure of damages. *Ferrie v. Great Western R. Co.*, 15 *U. C. Q. B.* 513.

286. Showing plaintiff's pecuniary condition. — In an action by an administratrix it is proper to show the amount of earnings of the deceased, and that plaintiff was his wife, and that they had minor children. But it is wholly immaterial whether such next of kin has or has not other pecuniary resources after his death. It is error to admit proof that plaintiff and her children had no other means of support save his daily earnings. *Chicago & N. W. R. Co. v. Moranda*, 93 *Ill.* 302. — **REVIEWED** IN *Pennsylvania Co. v. Keane*, 143 *Ill.* 172.

It is technically erroneous to admit evidence that the family of the deceased were entirely dependent on his labor for support, though in the particular case the admission of such evidence was not considered as doing any harm. *Chicago, B. & Q. R. Co. v. Johnson*, 8 *Am. & Eng. R. Cas.* 225, 103 *Ill.* 512. — **REVIEWED** IN *Pennsylvania Co. v. Keane*, 143 *Ill.* 172.

In a suit for compensation by the wife against a railroad company for the loss of her husband, her statements as to her pecuniary condition are inadmissible. *Texas & P. R. Co. v. Harrington*, 21 *Am. & Eng. R. Cas.* 571, 62 *Tex.* 597.

Where the action is for the death of a boy eight years old, it is competent to show that the mother, to whom the damages will go under the statute, is a widow in poor health with little means, supported largely by her friends; and that by reason of the death of the child she will lose the benefit of a pension that she had been drawing, of two dollars per month, though there is no allegation in the complaint that she would

lose such pension. *Ewen v. Chicago & N. W. R. Co.*, 38 *Wis.* 613.—REVIEWING *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 *N. Y.* 317.

In an action for the death of her husband a widow may show that she had no means of support except what her husband furnished her. *Annas v. Milwaukee & N. R. Co.*, 27 *Am. & Eng. R. Cas.* 102, 67 *Wis.* 46, 30 *N. W. Rep.* 282, 57 *Am. Rep.* 388, *n.*

In an action by the father, as administrator, for the death of his son, where there is no pretense that such son, on account of tender years or want of mental capacity, was incapable of taking care of himself, the defendant will not have the right to prove that the plaintiff was a man of wealth at and before the time of the accident. *Illinois C. R. Co. v. Slater*, 129 *Ill.* 91, 21 *N. E. Rep.* 575; *affirming* 28 *Ill. App.* 73.—DISTINGUISHING *Chicago & A. R. Co. v. Gregory*, 58 *Ill.* 226.

In such case the court properly refused to instruct the jury that the father was entitled to the earnings and services of his minor son until the latter was twenty-one years of age, and the jury had no right to allow to the estate for any loss of services or earnings of the son during the period of his minority. *Illinois C. R. Co. v. Slater*, 129 *Ill.* 91, 21 *N. E. Rep.* 575; *affirming* 28 *Ill. App.* 73.

In an action under the Illinois statute for wrongfully causing the death of a husband, for the benefit of the widow and next of kin, evidence that the husband was the sole support of his wife at the time of his death is inadmissible. She is entitled to recover the same compensation whether she be rich or poor. *Pennsylvania Co. v. Keane*, 41 *Ill. App.* 317.

C., who was twenty-four years old, was killed by a railroad company. The father of C., as the next of kin, brought an action against the company for damages under a statute which gave the right to the next of kin to sue for such injury. *Held*, that evidence of the pecuniary condition of the father was competent as affording some aid in fixing the amount of damages suffered by him. *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291.

287. Proof of widow's right to a pension.—In a suit by the administratrix for the benefit of the widow and children of a passenger who was killed by the negligent act of a railroad company it was

proved that the intestate was receiving a monthly pension from the government. *Held*, that the court properly refused to admit evidence that the widow and minor children were upon certain conditions entitled in their own right to receive pensions upon intestate's death. *St. Louis, I. M. & S. R. Co. v. Maddy*, 58 *Am. & Eng. R. Cas.* 327, 57 *Ark.* 306, 21 *S. W. Rep.* 472.

288. Insurance on deceased's life.*

—In an action for the killing of the plaintiff's testator, evidence that his life was insured is not admissible on the question of damages. *Kellogg v. New York C. & H. R. R. Co.*, 79 *N. Y.* 72.—FOLLOWING *Terry v. Jewett*, 78 *N. Y.* 338.

The receipt of money by those for whose benefit the action is brought, on a policy of insurance on the life of the deceased, cannot be shown to reduce the amount of recovery. *Sherlock v. Alling*, 44 *Ind.* 184.—QUOTED IN *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 *Ind.* 43. REVIEWED IN *Cunningham v. Evansville & T. H. R. Co.*, 23 *Am. & Eng. R. Cas.* 347, 102 *Ind.* 478, 52 *Am. Rep.* 683.—*North Pennsylvania R. Co. v. Kirk*, 1 *Am. & Eng. R. Cas.* 45, 90 *Pa. St.* 15. *Baltimore & O. R. Co. v. Wightman*, 29 *Gratt. (Va.)* 431, 17 *Am. Ry. Rep.* 351.

XI. INSTRUCTIONS.

I. What Questions should be Submitted to the Jury.

289. Questions of law for the court.

—Where the whole testimony in a case and all legitimate inferences that can be drawn therefrom show that the plaintiff's intestate was injured by reason of his own want of ordinary care, the question whether there was or was not negligence on the part of the injured party is a question of law to be decided by the court. *Mynning v. Detroit, L. & N. R. Co.*, 67 *Mich.* 677, 12 *West. Rep.* 427, 35 *N. W. Rep.* 811.

Plaintiff's intestate attempted to cross the track when a train was rapidly approaching in full view, and when it was less than four telegraph poles, or about 300 feet, from him, and caught his feet when on the track and before he could extricate himself was struck by the train and killed. The court was requested to charge that he was

* Insurance on deceased's life as affecting amount of damages in actions for causing death, see note, 18 *AM. ST. REP.* 380.

guilty of contributory negligence if he attempted to cross when the train was that distance away, but the court declined and said that he would leave the question to the jury. *Held*, error, as upon a conceded or supposed state of facts contributory negligence is one of law for the court, and it is error to leave it to the jury. *McPhillips v. New York, N. H. & H. R. Co.*, 37 N. Y. S. R. 263, 13 N. Y. Supp. 917.

290. Questions of fact for the jury, generally.—Whether a person's capacity to earn money and to labor successfully would be diminished from old age, and if so, how much, depends largely upon the character of the labor and the expectation of life of the person; and it is proper to submit such question to the jury. *Georgia R. Co. v. Pittman*, 73 Ga. 325.

If the evidence is conflicting on the question whether the intestate survived his injuries, it should be submitted to the jury. *Tully v. Fitchburg R. Co.*, 14 Am. & Eng. R. Cas. 682, 134 Mass. 499.

Whether a given state of facts constitutes negligence, is generally a question of law; but whether a particular negligence contributed to the catastrophe, is a question of fact. *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282.

Where a witness, standing upon the side of a track, three fourths of a mile from the plaintiff's intestate, testified that he saw him lying, apparently helpless, as he thought, along the ends of the cross-ties beyond the rails, when the engine that ran over and killed him passed the witness, running at twenty miles an hour—*held*, that the judge should have allowed the jury to determine whether the engineer could, by ordinary care, have discovered, from his elevated position on the engine, that intestate was lying helpless on the track in time, by prompt and strenuous effort, to have saved the life of the latter without putting his passengers in jeopardy. *Deans v. Wilmington & W. R. Co.*, 45 Am. & Eng. R. Cas. 45, 107 N. Car. 686, 12 S. E. Rep. 77.—DISTINGUISHED IN *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589; *High v. Carolina C. R. Co.*, 112 N. Car. 385.

291. Cause of death.—The cause of death is a fact to be found by the jury; not a presumption of law to be declared by the court. *East St. Louis Connecting R. Co. v. Dwyer*, 41 Ill. App. 522.

Plaintiff's intestate, a brakeman on a

freight train which had separated into two parts, and whose duty it was at once to apply the brakes, was last seen alive while standing near the brake on top of a rear car, and a few moments afterwards, the car having run over him, his body was found lying between the rails. No one saw him fall, and there was no evidence as to the circumstances immediately attending his death; but it was shown that there was a footboard across the top of the car for him to walk on, and a hole three or four feet wide in the car which extended over or under the footboard, and the existence of which was known to the conductor. *Held*, that the question should have been submitted to the jury whether the hole in the roof caused the injury. *Bromley v. Birmingham Mineral R. Co.*, 95 Ala. 397, 11 So. Rep. 341.—QUOTING *Burns v. Chicago, M. & St. P. R. Co.*, 69 Iowa 450; *Allen v. Willard*, 57 Pa. St. 374; *Gay v. Winter*, 34 Cal. 164; *Cordell v. New York C. & H. R. Co.*, 75 N. Y. 332. REVIEWING *Strong v. Stevens Point*, 62 Wis. 255; *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507.

292. Questions of defendant's negligence and deceased's contributory negligence.—What constitutes negligence, or ordinary care, or the want of it, in the deceased, contributing to his death; and the reasonable skill, care, and diligence exercised on the part of the railroad company to relieve it from responsibility for the fatal occurrence, are questions, according to the nature of the evidence, to be determined by the jury from all the facts and circumstances. *Cumberland & P. R. Co. v. State*, 37 Md. 156. *Baltimore & O. R. Co. v. State*, 29 Md. 252. *Kennayde v. Pacific R. Co.*, 45 Mo. 255.

A nonsuit should only be allowed where there is not sufficient evidence to show negligence on the part of the defendant, or the evidence of contributory negligence is so clear as to justify the court in declaring it such as a matter of law; but if there are facts and circumstances appearing in the evidence which fairly tend to show negligence and to rebut any inference of contributory negligence on the part of the deceased, then both questions should be left to the jury. *Leavitt v. Chicago & N. W. R. Co.*, 64 Wis. 228, 25 N. W. Rep. 4. *Deisen v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 454, 45 N. W. Rep. 864. *Johnson v. Chicago & N. W. R. Co.*, 1 Am. & Eng.

R. Cas. 155, 49 *Wis.* 529, 5 *N. W. Rep.* 886. *Lavier v. Central R. Co.*, 71 *Ga.* 222.—FOLLOWING *Georgia R. & B. Co. v. Neely*, 56 *Ga.* 540.—APPROVED IN *Western & A. R. Co. v. Bloomingdale*, 74 *Ga.* 604.

It is a question for the jury, in an action for the death of a passenger caused by a switch on a connecting line being turned the wrong way, whether the company which sold the passenger his ticket and which ran its train over such connecting line, was guilty of negligence. *Birkett v. Whitehaven Junction R. Co.*, 4 *H. & N.* 730, 28 *L. J. Ex.* 348.

In an action for the death of a child who was run over by a street-car drawn by two mules, the evidence tended to show that the deceased with a companion was driving a cow from a westerly direction across the street, and in crossing he was tripped by the east mule and thrown on the track, and the front wheel of the car passed over his leg. The driver testified that he saw neither of the boys until after the accident, and there was also evidence which tended to show that the attention of the driver was at the time directed to some person standing on the west side of the street. *Held*, that the question of defendant's negligence was for the jury. *Senn v. Southern R. Co.*, 108 *Mo.* 142, 18 *S. W. Rep.* 1007.

In an action for causing the death of plaintiff's testator, plaintiff's evidence tended to show that the testator crossed the railroad tracks in front of an approaching train, to a platform constructed for the accommodation of passengers taking local trains, and after reaching and while standing upon the platform was struck by a car of the train and killed. The train was an express which did not stop at the platform. The car projected from three to five inches over the platform. *Held*, that the questions as to negligence and contributory negligence were properly submitted to the jury. *Dobiecki v. Sharp*, 8 *Am. & Eng. R. Cas.* 485, 88 *N. Y.* 203.—FOLLOWING *Brassell v. New York C. & H. R. R. Co.*, 84 *N. Y.* 241; *Weston v. New York El. R. Co.*, 73 *N. Y.* 595.—REVIEWED IN *Craig v. Manhattan R. Co.*, 13 *Daly (N. Y.)* 214.

The fact that the platform was not connected with a depot, but was simply for the accommodation of a certain class of passengers, did not exonerate defendant from liability; it was not to be assumed without proof, that the testator must have known that

the platform was for a train which he did not intend to take, or that he was negligent in being there; and he had a right to assume that he could stand upon the platform without being exposed to unnecessary hazard or danger. *Dobiecki v. Sharp*, 8 *Am. & Eng. R. Cas.* 485, 88 *N. Y.* 203.

Plaintiff's intestate, a son of 17, was killed after being employed as a brakeman for two weeks. It appeared that he was attempting to make a coupling and was crushed between the cars by one bumper being lower than the other and passing under it, and thus allowing the cars to come very near together. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury. *Donohue v. Brooklyn City R. Co.*, 38 *N. Y. S. R.* 485, 14 *N. Y. Supp.* 639.—REVIEWING AND QUOTING *Ellis v. New York, L. E. & W. R. Co.*, 95 *N. Y.* 546.

Plaintiff's intestate was killed at a crossing where standing cars obstructed the view and where gates were maintained. He waited until a train had passed, and when the gates were raised started across, but immediately upon passing the standing cars he was struck by a rapidly backing engine. It appeared that the gate on the opposite side lifted to allow a woman, who was driving, to pass, and at once began to lower, and the gateman claimed he then called to the intestate. *Held*, that the questions of both negligence and contributory negligence were for the jury. *Oldenburg v. New York C. & H. R. R. Co.*, 124 *N. Y.* 414, 29 *N. Y. S. R.* 836, 9 *N. Y. Supp.* 419.

Plaintiff owned a coal and lumber yard, in which his son was employed, and through which a siding ran to plaintiff's warehouse. A lumber car had been left standing on the siding longer than the rules of the company allowed. It was not sufficiently blocked, and had a defective brake. A train was moved on to the siding, starting the lumber car, which ran into the warehouse, killing plaintiff's son, who, attracted by the noise of the moving car, hurried into the warehouse to see the cause. *Held*, that it was properly left to the jury to pass upon the negligence of the railroad and the contributory negligence of the deceased. *North Pa. R. Co. v. Kirk*, 1 *Am. & Eng. R. Cas.* 45, 90 *Pa. St.* 15.

293. — where there is a conflict of evidence.—In an action to recover damages from a railroad company for caus-

which he did as negligent not to assume the platform unnecessary v. *Sharp*, 8 Y. 203.

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ing the death of a brakeman it appeared that the cause of the accident was a flaw or crack in the brake. The evidence was conflicting as to whether this flaw or crack could have been discovered by the exercise of reasonable care on the part of the company. *Held*, that this question was properly left to the jury. *Leahy v. Southern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 230, 65 Cal. 150, 3 Pac. Rep. 622.

Deceased was killed while driving over a public crossing by collision with an engine and tender which were running backwards. One of the plaintiff's witnesses testified that he was present at the time of the accident; that no whistle was blown and no bell rung, and that there was no light on the back of the tender. His testimony was distinctly contradicted by five of defendant's witnesses. *Held*, that the question whether the defendant was guilty of negligence was for the jury, there being an irreconcilable conflict in the evidence. *State v. Union R. Co.*, 42 Am. & Eng. R. Cas. 167, 70 Md. 69, 18 Atl. Rep. 1032.—DISTINGUISHING *State v. Baltimore & P. R. Co.*, 58 Md. 485; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 618. QUOTING *Pleasants v. Fant*, 22 Wall. (U. S.) 122.

Plaintiff's intestate was killed at a city crossing while driving at a slow trot. There was evidence that he looked both ways for trains, but his view was somewhat obstructed; that the train approached the crossing at the rate of 25 miles an hour, while the city ordinance prohibited a rate of more than five miles an hour. There was evidence tending to show that there was a defective brake, and that the whistle was blown when the train was more than a block away, but there was a conflict of evidence whether any other signals were given between that point and the crossing. *Held*, that the questions of negligence and contributory negligence were properly left to the jury. *Towns v. Rome, W. & O. R. Co.*, 28 N. Y. S. R 124, 54 Hun 638, 4 Sile. Sup. Ct. 332, 8 N. Y. Supp. 137; affirmed in 124 N. Y. 642, mem., 36 N. Y. S. R. 1015.

A fireman was killed by the collapsing of the crown sheet of the boiler of his engine while taking in water. The company was charged with negligence in failing to properly inspect the engine before it was sent out, and it was charged that the crown sheet had been burned before the fireman took charge of it for the trip; but upon both

of these questions the evidence was conflicting. *Held*, that the question of the company's negligence was properly submitted to the jury. *Hudson v. Rome, W. & O. R. Co.*, 73 Hun (N. Y.) 467, 26 N. Y. Supp. 386, 56 N. Y. S. R. 39.

In an action against a railroad company to recover damages for the death of a minor, caused by a collision between a locomotive owned by defendant and a wagon in which the minor was seated with an elder brother, there was evidence that before driving on the track they stopped to look and listen. *Held*: (1) the witnesses appearing to differ as to the proper place, that whether they stopped at a favorable and suitable place to see and hear an approaching train could not be ruled as a matter of law; (2) that the distance from the track, and the intervening objects either wholly or partially obstructing the view, were questions to be considered by the jury. *Philadelphia & R. R. Co. v. Noar*, 3 Pennyp. (Pa.) 443.

204. Contributory negligence or due care of deceased.—(1) *General rules.*—Whether plaintiff's intestate was guilty of contributory negligence was a question for the jury. *Hendrickson v. Great Northern R. Co.*, 52 Minn. 340, 54 N. W. Rep. 189. *Keim v. Union R. & T. Co.*, 90 Mo. 314, 2 S. W. Rep. 427.

Whether the deceased, who crossed a track at a crossing near the limits of a large city, where the approaching train could not be easily seen by him, and where no signal was given, except the blowing of a whistle about 400 yards from the crossing, was guilty of contributory negligence is a question for the jury. *Richmond & D. R. Co. v. Johnston*, 89 Ga. 560, 15 S. E. Rep. 908.—QUOTING *Richmond & D. R. Co. v. Howard*, 79 Ga. 51.

Whether the deceased should have waited for the approaching train to pass before attempting to cross the track is a question of fact to be determined in view of all the attendant circumstances. *Chicago & A. R. Co. v. Adler*, 39 Am. & Eng. R. Cas. 666, 129 Ill. 335, 21 N. E. Rep. 846; affirming 28 Ill. App. 102.

In considering the question of ordinary care and prudence on the part of a person killed by being run over on a railroad track the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of

men to guard themselves against danger. *Baltimore & O. R. Co. v. State*, 36 Md. 366. —REVIEWING *Northern C. R. Co. v. State*, 29 Md. 420.

Where an employé is killed by falling rock in a quarry, the question whether he knew all about the facts and voluntarily assumed the risks, and thus by his contributory negligence precluded a recovery, is for the jury. *Cullen v. Norton*, 52 Hun (N. Y.) 9, 22 N. Y. S. R. 221, 4 N. Y. Supp. 774; *reargument* in 24 N. Y. S. R. 103, 5 N. Y. Supp. 23.

If the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without the negligence of the deceased, that inference becomes possible so as to raise a question of fact for the jury, although there were no eye-witnesses of the accident. *Wall v. Delaware, L. & W. R. Co.*, 54 Hun (N. Y.) 454, 28 N. Y. S. R. 132, 7 N. Y. Supp. 709; *affirmed in* 125 N. Y. 727, *mem.*, 35 N. Y. S. R. 995. —FOLLOWING *Coppins v. New York C. & H. R. R. Co.*, 48 Hun 292; *Palmer v. New York C. & H. R. R. Co.*, 112 N. Y. 234. QUOTING *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 203; *Greany v. Long Island R. Co.*, 101 N. Y. 419; *Parsons v. New York C. & H. R. Co.*, 113 N. Y. 364.

If the undoubted evidence clearly shows any fact which proves that deceased was guilty of concurring negligence, the court should say there can be no recovery; but if the fact relied on to establish negligence is doubtful, the case should be submitted to the jury. *Pennsylvania R. Co. v. Fortney*, 1 Am. & Eng. R. Cas. 128, 90 Pa. St. 323.

(2) *Illustrations.* — Defendant company maintained a building and platform adapted for the use of passengers at a point 500 feet from where its track crossed another railroad, where, by law, its trains were required to stop; but no tickets were sold nor trains advertised to stop at the place. Plaintiff's intestate, who was a passenger, left the train at this point, but on the opposite side of the platform, and was killed by a passing train on a parallel track. *Held*, that the question of the company's liability was properly left to the jury. *McKimble v. Boston & M. R. Co.*, 24 Am. & Eng. R. Cas. 463, 141 Mass. 463, 5 N. E. Rep. 804. —FOLLOWING *McKimble v. Boston & M. R. Co.*, 139 Mass. 542.

Plaintiff's intestate was killed at night while on a crossing near a station, by an

engine which was moving about 6 miles an hour, without signals, and pushing a coal car in front of it, on which there was no light nor watchman. The evidence tended to show that the engine could have been stopped within from 20 to 35 feet, and that an engineer, with a good headlight, could see from 150 to 200 feet ahead of him, while the noise from the movement of the engine and car could have been heard 100 feet. There was also evidence that a headlight on the engine would tend to dazzle the sight and prevent one from seeing the car it was pushing, and that a person at night could not tell from the headlight alone whether the car was moving toward him or not. *Held*, that the question of the contributory negligence of the deceased was for the jury. *Scoville v. Hannibal & St. J. R. Co.*, 22 Am. & Eng. R. Cas. 534, 81 Mo. 434.

Plaintiff's intestate approached a crossing where there were four tracks, and stopped on the first one, which was used for the storage of cars, and not for passing trains, when a backing train on another track struck a cart and propelled it against him with such force as to produce death. *Held*, that whether he used proper care in stopping where he did was a question for the jury, and it could not be declared contributory negligence as a matter of law. *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313, 32 N. Y. S. R. 612, 11 N. Y. Supp. 80; *affirmed in* 126 N. Y. 629, *mem.*, 36 N. Y. S. R. 1012.

Plaintiff's intestate at first rejected the advice of his physician, and refused to have his injured leg amputated; he died about ten days after the accident. The physician swore that amputation would have improved his chances, but also said that, within his own experience, there had been cases where, under advice and in the face of such objection, amputation had been omitted and the limb saved. *Held*, that the refusal of the intestate could not be said to be, as a matter of law, negligence. *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 20 N. E. Rep. 569, 21 N. Y. S. R. 827, 8 Am. St. Rep. 793; *affirming* 44 Hun 304, 7 N. Y. S. R. 627, 12 Civ. Pro. 301.

Plaintiff's intestate stopped at a crossing until a train passed, and then, in attempting to cross, was struck by an engine which followed the train about 50 feet behind. He was a deaf mute, and the accident occurred

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at a street crossing about midnight when it was very dark, and the engine was backing at the rate of 20 miles an hour, with no headlight on its tender, while a city ordinance prohibited a rate of more than eight miles an hour. There was also evidence that a flagman was stationed at the crossing, but was not there at the time of the accident. *Held*, that the questions of negligence and contributory negligence should have been left to the jury. *Waliele v. New York C. & H. R. R. Co.*, 19 *Hun* (N. Y.) 69.

Plaintiff's intestate was killed while driving a loaded wagon across defendant's tracks at a city crossing and while walking at the side of his wagon, which obstructed his view of an approaching train to the east. When he was near the crossing the gates were up, but as he approached it, the first gate was up, and the one on the opposite side had been lowered. He was struck by a train running rapidly, without giving the statutory signals. *Held*, that the question of his contributory negligence was properly submitted to the jury. *Startz v. Pennsylvania & N. Y. C. & H. R. Co.*, 42 N. Y. S. R. 457, 16 N. Y. Supp. 810; *affirmed* in 136 N. Y. 639, *mem.*, 32 N. E. Rep. 1014, 49 N. Y. S. R. 914.—QUOTING *Palmer v. New York C. & H. R. R. Co.*, 112 N. Y. 234, 20 N. Y. S. R. 904; *Fitzgerald v. Long Island R. Co.*, 10 N. Y. S. R. 433; *Phillips v. New York C. & H. R. R. Co.*, 25 N. Y. S. R. 91.

Plaintiff's intestate was killed at a street crossing 173 feet wide, where two gates were maintained and operated by the same man, but by different cranks. It appeared that as he approached, the first gate was open, but the other was closed. *Held*, that inasmuch as an open gate is ordinarily an assurance of safety, it was for the jury to determine whether he had a right to assume that no train would pass, and whether he was justified in supposing that the other gate would be lifted as he approached it. *Haywood v. New York C. & H. R. R. Co.*, 35 N. Y. S. R. 748, 59 *Hun* 617, 13 N. Y. Supp. 177; *affirmed* in 128 N. Y. 596, *mem.*, 38 N. Y. S. R. 1011.—QUOTING *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 202; *Palmer v. New York C. & H. R. R. Co.*, 112 N. Y. 234, 20 N. Y. S. R. 904.

Plaintiff's intestate, a boy between 8 and 9 years old, was killed at a place where he was familiar with the defendant's tracks. An advertising car lay on a branch track between two other tracks, and the boy was

doing some errands for the parties occupying the car, and started across the track when an approaching train was in full view, running at a speed of 35 miles or more an hour; but he was struck and killed. *Held*, that the question of his contributory negligence was properly left to the jury. *Collis v. New York C. & H. R. R. Co.*, 71 *Hun* (N. Y.) 504, 24 N. Y. Supp. 1090, 55 N. Y. S. R. 82.—FOLLOWING *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 422; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 294; *Byrne v. New York C. & H. R. R. Co.*, 83 N. Y. 620; *Swift v. Staten Island R. T. R. Co.*, 123 N. Y. 645. QUOTING *Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 316; *Wendell v. New York C. & H. R. R. Co.*, 91 N. Y. 428.

The evidence showed that the deceased was shoveling snow from defendant's track on a stormy morning, and was struck by a backing engine. Several witnesses testified that they did not hear any whistle, and one testified that he was listening, but did not hear it. *Held*, that the question of contributory negligence was for the jury. *Wall v. Delaware, L. & W. R. Co.*, 7 N. Y. Supp. 709, 28 N. Y. S. R. 132, 54 *Hun* 454.—QUOTING *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 203.

Plaintiff's intestate was charged with contributory negligence in being intoxicated, but plaintiff introduced evidence showing how the accident occurred, which tended to show an absence of contributory negligence, and that the intoxication did not contribute to the accident. *Held*, that the mere fact of intoxication would not constitute contributory negligence in itself, and it was proper to instruct the jury that it was for them to decide whether the intoxication contributed to the injury; and the jury finding that it did not, a verdict for plaintiff should be upheld. *Tompkins v. Osuego*, 15 N. Y. Supp. 371, 40 N. Y. S. R. 4, 61 *Hun* 619, *mem.*

A passenger on a railway train, after alighting from the car which conveyed him to his point of destination, went forward to the baggage car after he had reached the platform, and, while engaged in assisting the employes of the road in getting out his baggage, was fatally injured by the moving of the train. In a suit for damages brought by the widow, for herself and her infant son—*held*: (1) Whether the deceased had a receipt, bill of lading, or check for his

goods, which rendered it unnecessary for him to go to the baggage car after he had been safely delivered at his destination, and whether it was proper, under all the circumstances of the case, for him to enter the car containing his effects, and see in person to their being unloaded, it was the province of the jury to determine. (2) What he should have done was what a prudent man would have done in the same situation; and what was done, and what should have been done, were both questions for the jury. *International & G. N. R. Co. v. Ormond*, 27 *Am. & Eng. R. Cas.* 139, 64 *Tex.* 485.—FOLLOWED IN *Campbell v. McCoy*, 3 *Tex. Civ. App.* 298.

205. Duty of deceased to stop, look, and listen.—The question whether the deceased ought to have stopped before attempting the crossing is one of fact for the jury. *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 *Am. & Eng. R. Cas.* 89, 66 *Mich.* 150, 9 *West. Rep.* 903, 33 *N. W. Rep.* 161.

Whether deceased looked and listened, or whether, if he exercised due care in the circumstances, he ought to have seen the approaching engine, was properly submitted to the jury. *Zoliewski v. New York C. & H. R. R. Co.*, 1 *Misc. (N. Y.)* 438, 51 *N. Y. S. R.* 54, 21 *N. Y. Supp.* 916. *Massoth v. Delaware & H. Canal Co.*, 64 *N. Y.* 524; *affirming* 6 *Hun* 314.—APPLIED IN *O'Mara v. Delaware & H. Canal Co.*, 18 *Hun (N. Y.)* 192; *Canfield v. New York C. & H. R. R. Co.*, 46 *N. Y. S. R.* 911. QUOTED IN *Puff v. Lehigh Valley R. Co.*, 71 *Hun (N. Y.)* 577; *Towns v. Rome, W. & O. R. Co.*, 28 *N. Y. S. R.* 124; *Griffith v. Utica & M. R. Co.*, 43 *N. Y. S. R.* 835. REVIEWED IN *Conklin v. New York C. & H. R. R. Co.*, 43 *N. Y. S. R.* 414.

Whether or not the deceased, by stopping and listening, could have heard the train, was, under the circumstances of this case, a question for the jury. *Petty v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 618, 88 *Mo.* 306.—QUOTING AND DISTINGUISHING *Fletcher v. Atlantic & P. R. Co.*, 64 *Mo.* 484. QUOTING *Buesching v. St. Louis Gaslight Co.*, 73 *Mo.* 219. REVIEWING *Schum v. Pennsylvania R. Co.*, 107 *Pa. St.* 8.—*Collins v. New York, N. H. & H. R. Co.*, 4 *N. Y. S. R.* 874, 42 *Hun* 657, *mem.*; *affirmed* in 112 *N. Y.* 659, *mem.*, 20 *N. E. Rep.* 412, *mem.*, 20 *N. Y. S. R.* 977.

Plaintiff's intestate was killed while driv-

ing over a crossing where the view was somewhat obstructed by a box car which lay partly on the crossing, and by other objects. The evidence tended to show that as he was passing the car he stood up and looked as best he could for trains; that his ears were covered, but not so as to prevent his hearing ordinary conversation. *Held*, that the question of his contributory negligence was properly left to the jury. *Perkins v. Buffalo, R. & P. R. Co.*, 10 *N. Y. Supp.* 356.

Deceased was walking slowly, picking her way along over a very rough course, and there was the noise of a gravel train to attract her attention, and in the direction from which the train that struck her was approaching there were various obstructions to her view, and no signals were given of the approach of the train. *Held*, that the question of her negligence was for the jury, although there was no direct evidence that she looked both ways before attempting to cross. *Rodrian v. New York, N. H. & H. R. Co.*, 28 *N. Y. S. R.* 625, 7 *N. Y. Supp.* 811.—DISTINGUISHING *Smedis v. Brooklyn & R. B. R. Co.*, 88 *N. Y.* 13.

206. Contributory negligence of driver of vehicle.—Deceased was driving a cart on the track of a street railway. The horse, being breathed, stopped, and he got out and stood by his head. Seeing a steam dummy approaching, he leaped upon the cart and endeavored to whip up his horse. The dummy then struck the cart, killing him. *Held*, that the questions of negligence and of contributory negligence were both for the jury. *McKeever v. Market St. R. Co.*, 19 *Am. & Eng. R. Cas.* 123, 59 *Cal.* 294.

A hose-carriage, in response to a fire alarm, was being driven rapidly along a street, in the night-time, and in attempting to cross obliquely the rails of a street-car track, which protruded three or four inches above the adjoining street, the driver was thrown out and killed. There was evidence tending to show that he was familiar with the street, and the condition of the track. *Held*, that as the proof did not present a clear case, so as to amount to negligence in law, the question of negligence should have been submitted to the jury under appropriate instructions. *Smith v. Union R. Co.*, 61 *Mo.* 588.

The driver of a cart was killed by moving cars while weighing coal on scales very

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near the track. The cars hit the cart and knocked it against deceased, killing him. There was evidence that the cart projected a few inches over the line of the scales, and that it had been left some ten minutes longer than was necessary. *Held*, that the deceased's contributory negligence was for the jury. *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311.—QUOTED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

297. Contributory negligence of employee.—Where the evidence tended to show that a brakeman who, in looking from a car window, received an injury from a water-tank left recently, by widening of the track, at an unsafe distance from the side of the car, was in performance of a duty arising out of the particular circumstances of his situation and connected with his employment, the question whether he exercised due care and caution, and conducted himself in the usual way similar acts are done by persons in like employment, and other considerations of like character, do not fall within the range of ordinary observation and experience, and should be submitted to the judgment and experience of the jury, under proper instructions from the court. *Walsh v. Oregon R. & N. Co.*, 10 Oreg. 250.—QUOTING *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 448.

The evidence was conflicting as to whether deceased had or had not, contrary to rules, used a club or lever to set up the brake, this being the cause of the occurrence of the accident. *Held*, that this question was properly left to the jury. *Leahy v. Southern Pac. R. Co.*, 15 Am. & Eng. R. Cas. 230, 65 Cal. 150, 3 Pac. Rep. 622.

In an action for the death of an engineer, claimed to have been caused by the negligence of certain employes in leaving a switch open, on the question of the want of due care on his part in approaching the switch—*held*, that where the target, showing whether the switch was open or closed, was some distance off, and so obscured by smoke and steam that an engineer approaching with his train could not see it, a failure to stop his train or check its speed on the mere suspicion or supposition that the switch might be left open, is not conclusive of a want of due care. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; affirming 33 Ill. App. 405.

Under such circumstances the engineer

might well suppose that others had done their duty by closing the switch, making it safe for him to proceed, and this omission of greater care on his part should not be held such negligence as to defeat a recovery. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; affirming 33 Ill. App. 405.

In such case it appeared that the engineer had his engine under proper control, and was running at a speed of from fourteen to eighteen miles an hour, and that he was at his proper place on the engine. *Held*, that the question of whether he used due care in approaching the switch, and in failing to observe the target, was one for the jury, to be determined by reference to his other duties and responsibilities, and from all the facts of the case. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; affirming 33 Ill. App. 405.

In an action for an injury resulting in death to a brakeman, received while attempting to uncouple a locomotive under the conductor's orders, another brakeman was asked: "Do you know from your experience on this road and other roads, what the general custom is as to the duties of the brakeman in obeying the orders of the conductor?" *Held*, properly admitted against defendant's objection that the rules defining the duties of a brakeman were in print, since it did not appear that the printed rules furnished the brakeman covered the point in question. *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 303.

In such case the rear brakeman on the train was properly permitted to testify that the conductor, in the absence of the deceased, told witness to tell deceased to cut off the engine, and that he (witness) told deceased to do so, without telling him that the conductor had so ordered. It was for the jury to say whether, under all the circumstances, the deceased might reasonably have understood it to be an order from the conductor. *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. Rep. 303.

Plaintiff's intestate was employed in tightening the plates used where rails joined, known as fish-plates, on a yard track. It appeared that he stood on the track, but in order to do his work it was not necessary to do so. A backing train struck another car standing on the track and pushed it

against him, causing death. There was no brakeman nor lookout on the car farthest from the engine, as required by a rule of the company. *Held*, that the question of contributory negligence was properly left to the jury. *Noonan v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 41, 62 Hun 618, 16 N. Y. Supp. 678; affirmed in 131 N. Y. 594, *mem.*, 42 N. Y. S. R. 949.

In an action to recover for the death of a brakeman, it was charged that the company was negligent in having a frog unblocked, in which the brakeman's foot caught while he was uncoupling cars; but it was claimed that he tried to uncouple the cars while they were in motion, but on this point there was no positive evidence either way. *Held*, that the question of his contributory negligence was for the jury. *Meek v. New York C. & H. R. R. Co.*, 69 Hun (N. Y.) 488, 52 N. Y. S. R. 932.

Where the evidence showed that a conductor and brakeman together loaded a car with timber and then started out with the car, and that from the negligent loading of the timber, it fell from the car and killed the brakeman—*held*, that the question of negligence of the conductor, and hence of the company, and contributory negligence of the brakeman, was properly left to the jury. *Openshaw v. Utah & N. R. Co.*, 6 Utah 132.

298. Safety of appliances used.—In an action for causing the death of K., plaintiff's intestate, it appeared that the death was caused by the explosion of the boiler of a locomotive upon which K. was employed as a fireman. Plaintiff's evidence tended to show that the engine was infirm and weak, was frequently and from necessity taken to the repair shops for repairs; that it was unable to hold water, or sustain a full head of steam. *Held*, that the question of defendant's negligence was one of fact for the jury. *Kirkpatrick v. New York C. & H. R. R. Co.*, 79 N. Y. 240.—**DISTINGUISHED** in *Coppins v. New York C. & H. R. R. Co.*, 43 Hun 26, 6 N. Y. S. R. 572.

299. Safety of truck.—Whether there was a substantial defect in the track caused by a defective rail and whether the deceased was familiar with the track in question were questions for the jury, where different conclusions might be drawn from the evidence thereon. *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 Mo. 673, 13 S. W. Rep. 714.

Owing to a block in the space between the main and the guard-rail on the track of defendant's road being worn, and a portion split off, caused by the operation of the road, plaintiff's intestate, a brakeman, caught his foot in said space and was run over and killed. The court submitted to the jury the question whether or not the block was so placed as to be dangerous to brakemen coupling or uncoupling cars in the exercise of ordinary care. *Held*, that as there was no evidence tending to show that the block in such space was improperly placed, or so placed as to be dangerous to employes, the submission was erroneous. *Griffith v. Burlington, C. R. & N. R. Co.*, 31 Am. & Eng. R. Cas. 227, 72 Iowa 645, 34 N. W. Rep. 609.

An employé, while engaged during the daytime in the course of his employment in assisting to pull a loaded car along a railroad track on the employer's premises, with his back to the car and fronting in the direction of a ditch across the track, fell into the ditch and was struck by the car and killed. The ditch was open and visible, but unguarded, and the employer had caused it to be dug, without giving warning thereof to his employes, in such a way as to render the track dangerous if used by them as they had been wont to use it, not knowing of the ditch. *Held*, in an action under Mass. St. of 1887, ch. 270, §§ 1 and 2, that it was a question for the jury, in the absence of direct evidence that the deceased knew of the ditch, as to whether there was a defect in the condition of the ways used in the employer's business which arose from his negligence, and whether the deceased was in the exercise of due care. *Gustafsen v. Washburn & M. Mfg. Co.*, 153 Mass. 468, 27 N. E. Rep. 179.

Defendant's road was constructed over a marshy place on an embankment and trestle-work, which settled in time, and the company from time to time deposited there a great quantity of old ties and other combustible materials. At a very dry time the marsh grass and the old ties and other material took fire, but it did not appear whether the fire originated in the grass or by coals dropping from passing engines. The track over the burning materials gave way under a train and a brakeman was killed. *Held*, that the question of the company's negligence was properly left to the jury, and a verdict in favor of plaintiff

should not be disturbed. *Near v. Delaware & H. Canal Co.*, 32 Hun (N. Y.) 557; *affirmed* (P) 98 N. Y. 663, *mem.*—*REVIEWING Davis v. Central Vt. R. Co.*, 55 Vt. 84.

In an action for the death of a brakeman, charged to have been due to the negligence of the company in having a frog unblocked, in which the brakeman's foot caught while he was uncoupling cars, there was evidence that there was a block in the frog before the accident, and that it had been removed apparently the day of the accident. *Held*, that the questions whether the brakeman's foot caught in the frog when the block had been taken out, and whether it was negligence not to have it blocked, were for the jury. *Meek v. New York C. & H. R. R. Co.*, 69 Hun (N. Y.) 488, 52 N. Y. S. R. 932.

300. Safe or unsafe rate of speed.

—Where the evidence is conflicting, the question whether the killing of plaintiff's intestate was due to negligence of the defendant in running its train at an unlawful rate of speed within the limits of a city is properly submitted to the jury. *Hoppe v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 74, 61 Wis. 357, 21 N. W. Rep. 227.

Where a boy, going on an errand, was killed in crossing a railroad by a train running at a high rate of speed, in the outskirts of a city, but where people frequently had to cross—*held*, in the absence of any ordinance regulating the speed, that it was for the jury to decide whether the train was running at a speed that was safe and prudent. *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33. —*DISTINGUISHING Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375.—*FOLLOWED IN Philadelphia & R. R. Co. v. Troutman*, (Pa.) 6 Am. & Eng. R. Cas. 117.

301. Neglect to flag train.—In an action for killing plaintiff's intestate, an engineer, it appeared that his train was behind time and a dispatcher directed the operator at a certain junction to flag and hold the train for orders. The operator held it until one train passed, and supposing that was all that the dispatch referred to, allowed it to move on, and it soon collided with another train, and the intestate was killed. *Held*, that the question as to whether the train dispatcher should have taken the additional precaution of sending an order to those in charge of intestate's train, as well as to the operator, was for the determination of the jury. *Sutherland v.*

Troy & B. R. Co., 46 Hun (N. Y.) 372, 11 N. Y. S. R. 841.—*APPLYING Sheehan v. New York C. & H. R. R. Co.*, 91 N. Y. 332; *Dana v. New York C. & H. R. R. Co.*, 92 N. Y. 639.—*APPLIED IN Nary v. New York, O. & W. R. Co.*, 9 N. Y. Supp. 153.

302. Weight of expert testimony.

—In an action against a railway company for negligence in the construction of their line, it was proved that the embankment which had given way and caused the death of the party on whose account the action was brought, was so constructed that a pool of considerable extent was formed, in which the drainage of 60 or 70 acres of land would remain and saturate the railway track upon occasion of heavy or continued rains. The jury, although several of the most eminent engineers of the province gave their opinion that the embankment was properly and skilfully constructed, and the learned judge who tried the case cautioned them against valuing such evidence lightly, gave a verdict for plaintiff. *Held*, that it was a question of fact for the jury. *Braid v. Great Western R. Co.*, 10 U. C. C. P. 137.

303. Whether co-servants were competent.

—In an action for the death of plaintiff's intestate, who was struck and killed by defendant's engine upon the track, the petition alleged that defendant was negligent in that the engine was managed and controlled by incompetent employes, and in that said employes failed to see the deceased in time to give any alarm signal. The proof showed that other persons, who were not specially charged with the duty of watching the track, saw the deceased before he was struck, and it revealed no reason why defendant's employes should not have seen him, and showed, also, that the man in charge of the engine was a fireman, and that he failed to stop the engine with promptness. *Held*, that the court was warranted, both by the pleadings and evidence, in submitting to the jury the questions whether defendant's employes were negligent in not being on the lookout for persons on the track, and whether the engine was in the control of a competent person. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa 757, 45 N. W. Rep. 1065.

304. Whether signals were given.

—Plaintiff's intestate was killed while shoveling snow from defendant's track on a stormy morning by an engine without a

headlight, which was backed down upon him. Defendant's witnesses testified that the whistle was blown, but several witnesses for plaintiff testified that they were near the place and did not hear the whistle. *Held*, that the question whether the whistle was blown was for the jury. *Wall v. Delaware, L. & W. R. Co.*, 28 N. Y. S. R. 132, 54 Hun 454, 7 N. Y. Supp. 709.

2. What Instructions are Proper.

305. Duty of the court as to instructions.—In an action for the death of an engineer, caused by the explosion of a boiler, which was alleged to be in a dangerous condition, it is error to fail to instruct the jury upon the knowledge of the engineer, or his want of knowledge, of the alleged dangerous condition of the boiler. *Chicago & St. L. R. Co. v. Ashling*, 34 Ill. App. 99.

Where an intoxicated passenger was ejected from a train at night and several hours later was killed by another train a half mile further on, in an action for damages the attention of the jury should have been called to the distance between the place where the deceased was left and that where he was killed, the time which elapsed between his removal from the cars and his death, as presenting a material question for their determination; whether or not his faculties had so far recovered with the power of locomotion as to enable him to understand the danger of being upon the track while the trains of cars were passing. *Haley v. Chicago & N. W. R. Co.*, 21 Iowa 15.

The plaintiff charged defendant with various acts of negligence which defendant alleged had been waived by the deceased. No evidence of plaintiff's allegations was introduced, and the court in its instructions withdrew the same from the jury. *Held*, that under the circumstances the question of waiver was properly withheld from the jury. *Brooke v. Chicago, R. I. & P. R. Co.*, 81 Iowa 504, 47 N. W. Rep. 74.

306. Instructions sufficiently favorable to objecting party.—An instruction which fairly and tersely states all of the material facts necessary to be established by the plaintiff to entitle him to recover is not objectionable on the ground that the jury might fail to make the necessary connection between the prefatory

statement, "If you shall find from the evidence," and the propositions that follow. The defendant cannot complain of a clause in said instruction which informed the jury that to entitle the plaintiff to recover the intestate must have been "without any fault or negligence on his part." *Pennsylvania Co. v. McCormack*, 53 Am. & Eng. R. Cas. 107, 131 Ind. 250, 30 N. E. Rep. 27.

Defendant company permitted water to run from its pipe onto a sidewalk and freeze, and plaintiff's intestate fell on the ice and was killed by reason of a tanner's knife, which he was carrying wrapped up, entering his side. *Held*, that a charge that the company could not be held liable unless it appeared that the freezing of the water made the sidewalk more dangerous, was sufficiently favorable to the company. *McGoldrick v. New York C. & H. R. R.* 49 N. Y. S. R. 566, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 914.

307. Non-prejudicial or harmless instructions.—In an action to recover for the death of plaintiff's intestate, who was killed while assisting in loading cars, the court instructed the jury in substance, that in order to recover it must appear that the act was committed without the fault or wrong of the intestate, and that a person approaching the track in sight of a moving train should take notice of the fact, and take all reasonable care to avoid injury; that it must appear that the deceased was rightfully upon the track, and that the death must have been produced solely by the wrongful act of the company; that it was not enough to show the defendant negligent, but it must also appear that the injured party was not negligent. *Held*, that the company could not have been prejudiced by such instructions. *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280.—CRITICISED IN *Sherman v. Western Stage Co.*, 24 Iowa 515. FOLLOWED IN *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279; *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa 661. REVIEWED IN *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.

Where the petition charged negligence upon the engineer alone, and the instruction stated the cause of complaint was that the "parties in charge of the engine" were negligent—*Held*, that no possible prejudice could result from such use of the plural number, and that the variance between the petition and the instruction was immaterial.

Beems v. Chicago, R. I. & P. R. Co., 6 Am. & Eng. R. Cas. 222, 10 Am. & Eng. R. Cas. 658, 58 Iowa 150, 12 N. W. Rep. 222.

308. Instructions which did not mislead the jury.—In an action for causing the death of defendant's intestate by negligently exploding a blast, the court charged that plaintiff was entitled to recover if the company, through its employés, negligently exploded the blast as charged in the complaint, and it resulted in the death of the intestate. *Held*, that the instruction was not erroneous on the ground that it withdrew from the jury the consideration of other issues, except that of exploding the blast and causing the death. *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303.

Where the negligence on the part of a railroad complained of consisted in cutting a train in two, and allowing the rear section to run down a grade, through a village, on a dark night, unlighted and unattended, whereby plaintiff's decedent was killed, it is not error to instruct the jury that there can be no recovery if they believe that the killing was done by the first section of the train, the evidence being almost conclusive that the killing was done by the second section. *Cincinnati, N. O. & T. P. R. Co. v. Conley*, (Ky.) 20 S. W. Rep. 816.

309. Instructions as to cause of death.—There was proof of deceased's injury by defendant's negligence, and that he died about one month thereafter. There was evidence tending to show that the death resulted from this injury, and other evidence tending to show that it resulted from independent pre-existing disease. *Held*, not error for the court to charge, upon these facts, that defendant was liable if the death resulted from the injury, but not liable if it resulted from the disease; and that the injury must be deemed the cause of the death, if, co-operating with the disease, it hastened the death, but not if it merely aggravated the disease without hastening death. *Louisville & N. R. Co. v. Northington*, 53 Am. & Eng. R. Cas. 262, 91 Tenn. 56, 17 S. W. Rep. 880, 16 L. R. A. 268.

310. Instructions as to the different degrees of negligence.—The law applicable to different degrees of negligence should be clearly given. *Missouri Pac. R. Co. v. Brown*, 75 Tex. 267, 12 S. W. Rep. 1117.

In an action brought under Tex. Rev. St. art. 2899, giving a right of action for causing death by gross negligence, the jury should be charged that there can be no recovery unless the evidence shows gross negligence on the part of the defendant, and they should be told what constitutes gross negligence. *Galveston, H. & S. A. R. Co. v. Cook*, (Tex.) 16 S. W. Rep. 1038. *San Antonio St. R. Co. v. Cailloutte*, 79 Tex. 341, 15 S. W. Rep. 390.

If the trial judge, after defining gross negligence in accurate terms, proceeds to submit the question of fact to the jury whether the deceased was guilty of gross negligence in attempting to cross a railroad track, and illustrates his remarks by stating the case of one going upon a track for the purpose of committing suicide, adding, "That would be an extreme case of wilfulness," such charge is not misleading as leaving the jury to infer that there could be no gross negligence on the part of the deceased unless she went upon the track for the purpose of committing suicide. *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.

311. Instructions as to precautions to prevent accidents.—An instruction that the jury may find for the plaintiff, if the company was negligent in inspecting cars received from another company and the deceased was himself free from fault and negligence in the use of the appliances, is not open to the objection that it authorizes a verdict for the plaintiff upon proof of the negligence of the company or its agents, without showing that the deceased was exercising due care. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287.

An instruction that, if decedent remained in the engine cab, in violation of the regulations of defendant, until it was too late for him, by applying the brakes, to have slackened the speed of the train sufficiently to avert the accident, and that the engineer knew the fact, and could, by the exercise of ordinary care, have averted the accident, but failed to do so, then the negligence of decedent would not defeat a recovery, is proper when the evidence shows that had the engineer used the appliances at his command to reduce the rate of speed when he saw that decedent was not setting the brakes, the accident might perhaps have

been avoided. *Connors v. Burlington, C. R. & N. R. Co.*, (Iowa) 53 N. W. Rep. 1092.

In an action to recover for the death of a fireman who was killed by reason of a bridge having washed out, it appeared that the bridge was on a road leased and operated by defendant company, and the defendant was charged with negligence in using the bridge after it knew, or ought to have known, that its abutments were defective. After instructing the jury as to the liability of the company for defects in a leased bridge, the court further charged that there was no evidence to show that the south abutment was not properly constructed, and that if "the abutment" was properly constructed and properly inspected, the company was not liable. Then the court instructed the jury, under evidence tending to show that the space between the abutments was not sufficient for the passage of water, and concluded by saying, "it is for you to say whether the plaintiff has established by all the evidence that these abutments were improperly constructed, and whether defendant was negligent in not finding it out and making necessary repairs." *Held*, that the expression "these abutments," as used in the latter part of the instruction, only related to the amount of space between the abutments, and not to the structural strength of the south abutment. *Bogart v. Delaware, L. & W. R. Co.*, 55 N. Y. S. R. 291, 72 Hun 412, 25 N. Y. Supp. 175.

The following instructions are not erroneous in an action to recover for the death of a husband and parent: "(2) The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. (3) The Kanawha & Ohio Railway company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Daniel Searle upon his journey. (4) The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death." *Searle v. Kanawha & O. R.*

Co., 37 Am. & Eng. R. Cas. 179, 32 W. Va. 370, 9 S. E. Rep. 248.

312. Instructions as to duty of employes after discovering person on track.—An instruction which, referring to the time immediately before the accident occurred, authorizes a recovery, if the jury find that after the dangerous condition of the deceased was discovered, or, by the exercise of ordinary care, would have been discovered, the defendant could have prevented the accident, is proper where the person injured is not a trespasser on the railroad track. *Keim v. Union R. & T. Co.*, 90 Mo. 314, 2 S. W. Rep. 427.—*APPROVING Kelly v. Hannibal & St. J. R. Co.*, 75 Mo. 138; *Donohue v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 357. **RECONCILING Rine v. Chicago & A. R. Co., 88 Mo. 392.**

Where there is some evidence tending to show that the deceased might have been seen by the engineer, properly on the lookout, in time to have prevented the accident, it is not error for the court to charge the law as to the observance of the statutory precautions for prevention of accidents. *East Tenn. & W. N. C. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. Rep. 790.

Applied to the killing of a deaf and dumb man by a construction train running backwards, the charge is correct in the following language: "Under this statute (§§ 1208-1300 M. & V. Code), if the proof shows that the plaintiff's intestate appeared upon the track of the road in front of the running train, then it was the duty of the defendant's employes to have a person on the lookout ahead to sound the whistle, put down the brakes, and use every possible means to stop the train and prevent an accident." *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. Rep. 348.

The plaintiff's petition charged defendant with negligence in rapidly running its cars over the deceased, "after it was known by those in charge of the train that he was injured and in a dangerous situation." The court instructed the jury that they would be warranted in finding the defendant negligent if they found that its cars were run over the deceased after those in charge knew that "either the said Brooke was injured or was in a dangerous situation." *Held*, that the instruction was proper, and that it was supported by evidence that after the engineer saw the lamp carried by deceased go over his head, and supposed he had

fallen, and that there was trouble, the engine went over the deceased twice, and a stock car once. Whether the fatal result was caused by the first or second movement of the train was immaterial. *Brooke v. Chicago, R. I. & P. R. Co.*, 81 *Iowa* 504, 47 *N. W. Rep.* 74.

313. Instructions as to assumption of risk.—In an action for the death of an employé who was injured while attempting to couple cars, on the ground that the company did not use ordinary care in the selection of the couplings, by reason of which the deceased was killed, an instruction to the effect that the question of negligence was for them to decide, under all the evidence of the case, even if it appeared that the deceased knew the character, kind, and dangerous nature of the couplings, and that such knowledge is a circumstance to be considered by the jury, but is not necessarily decisive, is correct. *Martin v. California C. R. Co.*, 94 *Cal.* 326, 29 *Pac. Rep.* 645. —FOLLOWED IN *Long v. Coronado R. Co.*, 96 *Cal.* 269.

314. Instructions as to contributory negligence, generally.—Although the court charged that if the officers of the railroad and the deceased were both at fault, the jury "would be authorized to make such reasonable deduction," yet where, in the same connection, he charged the rule of contributory negligence in the language of the statute, that "the damages shall be diminished by the jury," there was no error which requires a new trial. *Georgia R. Co. v. Pittman*, 26 *Am. & Eng. R. Cas.* 474, 73 *Ga.* 325. —FOLLOWED IN *Krogg v. Atlanta & W. P. R. Co.*, 77 *Ga.* 202.

Under a statutory provision that in order to recover for injuries caused by negligence it must appear that the injured party was "without fault," it is not error to charge, in an action for causing death, that if the deceased "immediately or remotely" caused the injury, or any part of it, there can be no recovery. *Prather v. Richmond & D. R. Co.*, 80 *Ga.* 427, 9 *S. E. Rep.* 530.

Where the question of the care or negligence of the deceased while upon the track, and the conduct of the company, are fully and fairly before the jury, the question of the deceased's due care should be left to them without any reference by the court to the fact that there was no direct evidence of what he did at the time of the injury. *Chicago, M. & St. P. R. Co. v. Halsey*, 133

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Ill. 248, 23 *N. E. Rep.* 1028; reversing 31 *Ill. App.* 601.—QUOTED IN *Chicago, R. I. & P. R. Co. v. Fitzsimmons*, 40 *Ill. App.* 360.

The court charged that if the course pursued by the deceased was one which persons of prudence and self-possession would adopt under the same circumstances, he was not negligent in so doing; that the standard by which his conduct was to be judged was that of an ordinarily careful, prudent man. *Held*, correct. *Salter v. Utica & B. R. R. Co.*, 8 *Am. & Eng. R. Cas.* 437, 88 *N. Y.* 42; affirming 24 *Hun* 494.—FOLLOWING *Kellogg v. New York C. & H. R. R. Co.*, 79 *N. Y.* 76; *Stackus v. New York C. & H. R. R. Co.*, 79 *N. Y.* 468.

A charge "that in riding on the train of the defendant it was the duty of the deceased to conduct himself as a man of ordinary prudence and care would have done under the circumstances in which he was, and if he failed to use ordinary care, and by so doing brought about or contributed to his own death, he would be guilty of contributory negligence," supplemented by telling the jury that "if the deceased was guilty of contributory negligence the plaintiff could not recover," approved. *Taylor, B. & H. R. Co. v. Taylor*, 79 *Tex.* 104, 14 *S. W. Rep.* 918.

315. — in cases where children are killed.—An instruction in an action to recover for the death of a child six years old by negligence of the defendant, based upon the fact that the child itself was in the exercise of ordinary care when he was killed, need not contain any reference to the care or negligence on the part of its parents. *Chicago City R. Co. v. Robinson*, 36 *Am. & Eng. R. Cas.* 66, 127 *Ill.* 9, 4 *L. R. A.* 126, 18 *N. E. Rep.* 772; affirming 27 *Ill. App.* 26.

In an action for killing a child five years old by being run over by a horse-car, it is proper to instruct the jury that the plaintiff is entitled to recover if the death was caused by want of ordinary care on the part of the car driver, if the jury further find that the injury could not have been avoided by the exercise of such care as might be reasonably expected of a child of its age, or by the exercise of ordinary care on the part of its parents or persons having it in charge. *Baltimore & O. R. Co. v. State*, 30 *Md.* 47.

In an action by a parent for the death of

a son about nine years old, the court charged that there could be no recovery if the child, considering his age and intelligence, was not in the exercise of ordinary care, though the company was negligent in the management of its train; and if the child was of such tender years as to be unfit to go alone on a railroad track, it was negligence on the part of his parents to permit him to do so. And the court refused to instruct, at the request of the defendant, that if the mother sent the child, or knew it was being sent across the tracks, and failed to caution him as to the danger, it was such negligence as to defeat a recovery. *Held*, that there was no error, as to the company, in either the instructions given or the one refused. *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

316. — in cases where employees are killed.—A charge that if the plaintiff's intestate was guilty of negligence, "however slight that negligence may have been, if it was such that but for it the accident would not have happened, then plaintiff cannot recover," though not strictly accurate in failing to limit the contributory negligence to that which was proximate, is not a reversible error when construed in connection with the evidence, which only showed proximate negligence, if any, as by failing to get out of the ditch when ordered by the superintendent of the work. *Holland v. Tennessee C., I. & R. Co.*, 91 Ala. 444, 8 So. Rep. 524.

In an action for killing a mail agent a charge is correct which submits to the jury the question whether the agent believed it necessary to put his head out of the car window when approaching a station, and was led thus to believe by the conduct of the employes of the railway company. *Houston & T. C. R. Co. v. Hampton*, 22 Am. & Eng. R. Cas. 291, 64 Tex. 427.

317. Instructions as to duty to stop, look, and listen.—An instruction submitting to the jury the question whether the deceased, who was killed while crossing a railroad on a highway, was at the time of the accident in the exercise of due care is not faulty as limiting the inquiry to the precise moment of collision. The words "at the time," as used, refer to the whole transaction, and it will be held that the jury so understood them when there is evi-

dence showing the general habit of the deceased as to care in crossing railroad tracks and the jury specially find that the deceased, on approaching the track and before driving upon it, looked and listened for the approach of an engine or train. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.—DISTINGUISHING *Chicago, M. & St. P. R. Co. v. Halsey*, 133 Ill. 248.

The court properly instructed the jury that while it was the duty of the deceased to look and listen before stepping on the track, yet that if she saw the train she had the right to presume, unless she knew to the contrary, that the person in charge of said train would run it at a rate of speed not exceeding six miles an hour, and to act on that presumption. *Sullivan v. Missouri Pac. R. Co.*, 117 Mo. 214, 23 S. W. Rep. 149.

Where a company is sued for killing a person at a crossing an instruction to the effect that "negligence is a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such person, under the existing circumstances, would not have done," is not open to the objection that it made the question of the negligence of the deceased dependent on the circumstances as disclosed at the trial instead of the circumstances as they appeared to him. *McDonald v. International & G. N. R. Co.*, 86 Tex. 1, 22 S. W. Rep. 939.

318. Instructions ignoring the question of contributory negligence.

—The court instructed the jury that if they believed from the evidence the plaintiff had made out his case as laid in the declaration to find for him, and in another instruction told the jury that if they found from the evidence that the defendant was guilty of the wrongful act, neglect, or default as charged, and that the same resulted in the death of the plaintiff's intestate, then the plaintiff was entitled to recover such damages as they might deem, from the evidence, a fair and just compensation therefor, having reference to the pecuniary injuries resulting from such death to the plaintiff and next of kin, not exceeding the amount in the declaration, and that sorrow or grief for the deceased, or any pain caused to the next of kin by the manner of his death, should not be considered. The second instruction was claimed to be erroneous, as ignoring the question of the care or negligence of the deceased. *Held*, that as the

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The declaration averred that the plaintiff's intestate when struck by the defendant's train of cars was in the exercise of due care and diligence and that his death was the result of the carelessness and negligence of the defendant. The court instructed the jury that if they believed from the evidence that the plaintiff had made out his case as laid in the declaration they should find for him. *Held*, that such instruction was not obnoxious to the objection of ignoring the question whether the deceased was in the exercise of due care for his personal safety. *Pennsylvania Co. v. Marshall*, 119 Ill. 399, 10 N. E. Rep. 220; affirming 18 Ill. App. 639.—APPLIED IN *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48.

319. Instructions as to comparative negligence.—An instruction to the jury that if they believed from the evidence that G. was killed in the manner stated in the declaration, through the fault of the defendant's employes, and was exercising due care himself at the time, or if the jury believed from the evidence that G. was guilty of slight negligence contributing to his death and that the employes of the defendant were guilty of gross negligence contributing to the death of G., but that the negligence of G. was slight and that of defendant's employes gross when compared with each other, the plaintiff was entitled to recover, is not misleading. *Chicago & A. R. Co. v. Fietsam*, 123 Ill. 518, 15 N. E. Rep. 169, 12 West. Rep. 844; affirming 24 Ill. App. 210.

The defendant asked this instruction: "If the jury believe from the evidence that the deceased was guilty of more than slight negligence, then the jury will find for the defendant," to which the court added, "If the jury believe from the evidence he was guilty of negligence." *Held*, that while the instruction as asked stated a correct proposition of law, there was no error in the modification, it in no manner changing the meaning of the instruction. *Chicago & A.*

R. Co. v. Fietsam, 123 Ill. 518, 15 N. E. Rep. 169, 12 West. Rep. 844; affirming 24 Ill. App. 210.

Where the jury is properly instructed as to the right to recover, another instruction relating to the measure of damages in case of a recovery is not erroneous merely on the ground that it ignores the question of comparative negligence or the care on the part of the deceased. *Pennsylvania Co. v. Marshall*, 119 Ill. 399, 10 N. E. Rep. 220; affirming 18 Ill. App. 639. *Chicago, M. & St. P. R. Co. v. Dowd*, 115 Ill. 659, 4 N. E. Rep. 368.—FOLLOWING *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534.—APPLIED IN *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48.

320. Instructions as to absence of headlight.—In an action for the death of a deaf man at a crossing at night the company was charged with negligence in not providing the engine with a headlight sufficient to enable him to see the approach of the train. The court charged the jury that the defendant was liable if the deceased was free from negligence, and that the absence of a headlight prevented him from seeing the train. *Held*, that under this instruction the issues were limited to due care on the part of the deceased and as to whether a failure to provide the headlight was the cause of the death, and a finding for the plaintiff should not be disturbed. *Daniels v. Staten Island R. T. R. Co.*, 28 N. Y. S. R. 87, 55 Hun 606, mem., 7 N. Y. Supp. 725.

321. Instructions as to rate of speed.—In an action for the death of a person killed on a switch track, an instruction that the running of an engine at a speed in violation of the city ordinance was evidence of negligence was warranted where the jury could well have found that the deceased trusted to defendant's employes to obey the law, and that the engine might have been stopped in time to avoid the accident had it been running at lawful speed. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa 757, 45 N. W. Rep. 1065.

Where a company is sued for killing a man by a train running at a high rate of speed at night near a station, it is not error to charge "that the running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such trains," as such instruction meant no more than that running of trains at a high rate of speed is

not negligence *per se*. *McDonald v. International & G. N. R. Co.*, 22 S. W. Rep. 939, 86 Tex. 1.

322. Instructions respecting the damages, generally.—A jury should not be confined to any strict rule in measuring the value of a life. His age, health, habits, and the money he is making are all data from which the jury may determine what the life of the deceased was worth to his family. *Central R. Co. v. Thompson*, 76 Ga. 770.

An instruction to the jury that they might assess as damages what the deceased "might have earned," not to exceed \$10,000 during the period of his life in which he would have probably earned money, less proper deductions for cost of support and for the present payment of the damages assessed, is a proper instruction as to the measure of damages, where the jury, in addition, are instructed as to taking into consideration, as bearing upon the sum he would earn, his industry, sobriety, health, etc. *Ohio & M. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. Rep. 774.

It seems that an instruction stating that in assessing the damages the jury should take into consideration the probable earnings, the age, health, business capacity, habits, and experience, also the value of his services in care of his family and education of his child, one of the plaintiffs, but should not take into consideration the distress of mind of the plaintiffs, or either of them, caused by the death of deceased, or any personal suffering of the deceased, correctly states the law as to measure of damages. *Openshaw v. Utah & N. R. Co.*, 6 Utah 132.

In an action under the Utah statute for causing death, which provides that such damages shall be given "as under all the circumstances may be just," it is proper to instruct the jury that they may consider, in estimating the damages, the number and ages of the persons constituting the family of the deceased. *Pool v. Southern Pac. Co.*, 7 Utah 303, 26 Pac. Rep. 654.

The court instructed the jury that in estimating the amount of damages they should take into consideration the age of the deceased, "his health and strength, his family, who they were, and of whom they consist." *Held*, that this was correct, there having been evidence of the physical strength; nor would it have been error had there been no evidence, since the expression

"health and strength" was evidently used as an emphatic manner of calling attention to the state of the deceased's health. *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282.

Nor was it error to call the attention of the jury to the age of the deceased, his family, and "who they were and of whom they consist," since the damages to be recovered should be much less where the deceased is an old man with no children and supported by others, than it should be in the case of a young man with a large number of children entirely dependent upon him. *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282.

The court instructed that plaintiff was entitled to such reasonable sum as damages as the death of the deceased had occasioned, but that in no event could the sum exceed twenty-five thousand dollars, the sum claimed. *Held*, not open to the objection that it directed the jury to find in the sum of twenty-five thousand dollars. *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa 757, 45 N. W. Rep. 1065.

323. — In action by widow for death of husband.—Prior to the Georgia Act of 1887, forbidding any deduction from the value of a life on account of personal or other necessary expenses of the deceased, the value of a life was found by deducting from the total present worth of the life the amount of the necessary expenses of the deceased; so where an instruction allows the deduction not only of necessities, but of luxuries also, the company cannot complain. *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.—*APPROVING* *Central R. Co. v. Rouse*, 77 Ga. 393.

There was no error in charging the jury that "if you find it your duty to find for the plaintiff, you will look to the evidence and determine from that how much you will find. You will, in arriving at a conclusion, look to the evidence as to the age of plaintiff's husband, the probable length of his life, the amount that he earns or would probably earn during his life, and the state of his health." *Georgia R. Co. v. Pittman*, 26 Am. & Eng. R. Cas. 474, 73 Ga. 325.

It is not error, in an action by a widow to recover damages for an injury resulting in the death of her husband, for the court, after giving a correct instruction to the jury

as to the measure of damages, to add, "much is left, and much must always be left, to your sound discretion." It must be intended that this discretion is to be exercised within the limitation previously prescribed to them by the court. *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60.

As juries are given so much discretion in the allowance of damages, and the supreme court can only grant new trials where it sees clear evidence of passion, prejudice, or disregard of law, it is the duty of circuit judges to impress upon juries the necessity of great watchfulness on their part to guard themselves from being influenced in the slightest degree, in an action by a widow for the killing of her husband, by the fact that the defendants are corporations, and that only even-handed justice and at least approximate compensation for the real injury sustained should be rigorously adhered to. *Nashville & C. R. Co. v. Smith*, 11 Heisk. (Tenn.) 455.

324. — in action by parent for death of child.—In an action for the wrongful death of a boy, where the conditions of the evidence make it very difficult for the jury to adopt any specific method of calculating the damages, because of the youthfulness and inexperience of the boy and a lack of data from which to calculate his future earnings, an instruction will not be held objectionable for indefiniteness in failing to point out a specific method of calculating the possible amount of his accumulations or in providing an abatement of interest from the probable amount of such accumulations during the expectancy of life as shown by the evidence. *Andrews v. Chicago, M. & St. P. R. Co.*, 52 Am. & Eng. R. Cas. 252, 86 Iowa 677, 53 N. W. Rep. 399.

In an action by a parent for the wrongful death of his minor child, where the circumstances of the case afford a safe standard by which the compensation in damages can be measured, such standard should be given to the jury by stating the reasonable limits within which their calculations should be confined. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 12 West. Rep. 615, 6 S. W. Rep. 464.

In an action by a mother for negligence causing death of her son, the court charged "that it is not necessary, to enable plaintiff to recover damages for the death of her son, that the evidence should show the pre-

cise amount of the damages in dollars and cents. But the evidence must clearly show that plaintiff did actually sustain damages, pecuniary damages or loss." *Held*, to be correct. *Pennsylvania R. Co. v. Keller*, 67 Pa. St. 300.

Where a married woman has been abandoned by her husband for many years, and her son has been supporting her, she may maintain an action under the Texas statute in her own name for the death of the latter; and it is proper to instruct the jury that if they find from the evidence that the father would not have received any pecuniary benefit from the son if he had lived, they are not to find anything for him, but to render a verdict for the mother alone. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 12 S. W. Rep. 828.

In an action under the Utah statute, by a father for the death of his infant child, it is error to permit evidence of the grief of the father, and to instruct the jury that they might consider the comfort that the parents might take with the child in bringing it up, if it had lived; but not reversible error where there is no claim made that the damages allowed are excessive. *Hyde v. Union Pac. R. Co.*, 7 Utah 356, 26 Pac. Rep. 979.

325. — in action by child for death of parent.—In a suit by a child for the homicide of its parent, where damages could not be exactly estimated, the court charged the jury that they might consider, in estimating the probable support which the mother would give to the child, whether a greater or less sum would be required as the child advanced in years. *Held*, not error. *Atlanta & W. P. R. Co. v. Venable*, 67 Ga. 697.

326. — in action by personal representative.—The court instructed the jury that if they should find for the plaintiff they might assess the plaintiff's damages at such a sum as would be a fair compensation, "with reference to the pecuniary injuries resulting from such death, to the widow and next of kin of J. C. P., the deceased, not exceeding the sum of \$5000." *Held*, that the instruction was not open to the objection that it required a verdict for not less than \$5000. By it the measure of recovery was the pecuniary loss sustained by the widow and next of kin, not to exceed that sum. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill.

557, 23 N. E. Rep. 237; affirming 33 Ill. App. 405.—DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426.

The court, among other things, instructed the jury that "if they found from the evidence and instructions that the defendant was guilty of the wrongful acts, neglect, or default as charged in the declaration, then the plaintiff was entitled to recover such damages as they might deem, from the evidence and proof, a fair and just compensation therefor, having reference to the pecuniary injuries resulting from such death to the said plaintiff and next of kin, not exceeding the amount in the declaration," etc. *Held*, that the instruction was not one in respect to the grounds of liability, but related merely to the measure of damages in the event a legal right of recovery was shown, and therefore was not erroneous. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. Rep. 398.

In an action, for the benefit of the widow and next of kin, for causing death, and as having reference to the question of the reasonable expectation of pecuniary benefit to them if the deceased had survived, it was not error for the court to instruct the jury that they might consider his age, health, capacity to earn money, and the injury to his business as disclosed by the evidence. *Clapp v. Minneapolis & St. L. R. Co.*, 36 Minn. 6, 29 N. W. Rep. 340.

In an action by a father, as administrator of his wife, who was killed by the negligence of the defendants, it is not improper for the judge to charge the jury that, in estimating the pecuniary injury, they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the mother gives to the children. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.—DISTINGUISHED IN *Illinois C. R. Co. v. Weldon*, 52 Ill. 290. FOLLOWED IN *Dickens v. New York C. R. Co.*, 1 Abb. App. Dec. (N. Y.) 504. QUOTED IN *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32.

Such a charge does not imply that the children are necessarily subjected to such a loss, but leaves it to be determined whether any such loss has been in fact sustained; and, if so, the amount of the loss. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.

There is no sufficient legal reason for limiting the damages, in such an action, to

the minority of the children, if the jury are legally persuaded that they will be continued after that period. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.

It is not erroneous to instruct the jury, in such a case, that while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death of the mother, they are not limited to the losses actually sustained at the precise period of her death, but may include also prospective losses, provided they are such as the jury believe, from the evidence, will actually result to the next of kin as the proximate damages arising from the wrongful death. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.

The court instructed the jury that they might compute the damages by the probable accumulations of a man of the age, habits, health, and pursuit of the deceased, during what would have probably been his lifetime; and added, that if the jury could find a better rule, they were at liberty to adopt it. *Held*, that there was no error. *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526.—DISTINGUISHED IN *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318. QUOTED IN *Holland v. Brown*, 13 Sawy. (U. S.) 284.

The jury were instructed that in estimating the damages they should include any loss which the widow and daughter of the deceased have sustained, or may hereafter sustain, by being deprived of the support, care, nurture, companionship, assistance, and protection of the deceased. *Held*, that the instruction was not erroneous in that it led the jury to believe that they might give compensation for mental suffering flowing from the loss of companionship, where another instruction expressly told the jury that they should allow nothing for the mental pain of the widow and child, or as a mere solace to their feelings. *Wells v. Denver & R. G. W. R. Co.*, 7 Utah 482, 27 Pac. Rep. 688.—FOLLOWING *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 363, 24 Pac. Rep. 616.

In an action under the Utah statute, it is proper to instruct the jury that they may consider "the benefits of association, comfort, and pleasure the family of the deceased would have received from him had his life been spared, as well as the number and ages of his children." *Chilton v. Union Pac. R. Co.*, 8 Utah 47, 29 Pac. Rep. 963.

After defendant's demurrer to the evi-

dence had been joined in by plaintiff, it was proper for the trial court to instruct the jury that, if plaintiff was entitled at all, she was entitled to the full amount which they might lawfully give if there had been no demurrer to the evidence, and that they ought, in its opinion, to find the full amount claimed in the declaration, that amount not exceeding the amount the law allows to be recovered. *Johnson v. Richmond & A. R. Co.*, 84 Va. 713, 5 S. E. Rep. 707.

327. Instructions assuming facts as proven.—Where the fact of employment is in issue, but such fact is admitted by the opposite party and testified to by a large number of witnesses on both sides, it is not error for the court to instruct the jury that the decedent was when killed in the employ of the defendant as a brakeman. *Louisville, E. & St. L. Cons. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. Rep. 881.

Where a railroad company is sued for injury to an employé which causes death, and the evidence is not conflicting as to the "loss of time, pain, and suffering," the court may assume, in instructing the jury, such facts as true. *Louisville & N. R. Co. v. Earl*, (Ky.) 22 S. W. Rep. 607.

328. Expression of opinion.—Where suit is brought in a federal court against a railroad, under a state statute, to recover for negligently causing death, after the court has instructed the jury that the right of recovery will be determined by the construction given the statute by the highest state court, it is not error to add that he had formerly been of a different opinion, and had so instructed juries. *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. Rep. 579.

329. Errors cured by other parts of the charge.—An instruction held that the failure of the defendant to ring a bell or sound a whistle on approaching a highway crossing was such negligence as to make the defendant liable, without requiring the jury to find that such negligence contributed to the happening of the accident. In another instruction, in the same series, the jury were required to find, from the evidence, that "the causes of the collision were the obstructions upon the said side track, the rate of speed of said train, and the failure to ring a bell or sound a whistle," etc. Held, that if the first-named instruction was erroneous it could have done the defendant no harm, in view of the explana-

tion and qualification in the other one. *Cleveland, C., C. & St. L. R. Co. v. Monaghan*, 140 Ill. 474; affirming 41 Ill. App. 498, 30 N. E. Rep. 869.

Where the court instructed the jury to find for the plaintiff, if they found that "all the material allegations of the declaration were proved," and in six other instructions given for the defendant informed the jury what was necessary to be proved to entitle the plaintiff to recover, the error in the first instruction was rendered harmless by the others so given. *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. Rep. 1089.

In an action for causing death at a crossing it is not error to give an instruction for plaintiff that deceased was bound to exercise care "at" the crossing, where another instruction told them that he was bound to the same care in "approaching" the crossing. *Atchison, T. & S. F. R. Co. v. Feehan*, 47 Ill. App. 66.

In an action to recover for the death of plaintiff's infant daughter by being run over by a car on a street, in charging as to the contributory negligence of the father, the court stated that the railroad being in the street, all persons had, *prima facie*, a right to be on the street for all lawful purposes, and that this fact ought to impose on the driver and conductor of a street-car extraordinary vigilance. Held, that the use of the word "extraordinary" was not ground for reversal, where no objection was made to its use at the time and where another instruction must have remedied any misapprehension as to the law, that may have been created by its use. *Etherington v. Prospect Park & C. I. R. Co.*, 4 Am. & Eng. R. Cas. 617, 88 N. Y. 641; affirming 24 Hun 235, mem.—REVIEWED in *Ganiard v. Rochester C. & B. R. Co.*, 7 N. Y. S. R. 103.

330. Direction of verdict.—If but one inference can legally be drawn from the facts, and that is that the deceased was guilty of negligence contributing to the injury, and it would have become the duty of the court to set aside a verdict for the plaintiff had the issue been submitted to the jury, then an instruction to find for the defendant is correct. *Horn v. Baltimore & O. R. Co.*, 54 Fed. Rep. 301, 4 C. C. A. 346.

If a person ejected was intoxicated at the time, but not to such an excess as to render him unconscious or unable to take care of himself; and he was put off about

dark at a place within a mile of his house, a locality with which he was familiar, and where another train was due in half an hour, and two others passed during the night; and his dead body, badly mangled, was found near the spot, but on the opposite side of the track—on these facts the railroad company is entitled to a general affirmative charge on the evidence. *Louisville & N. R. Co. v. Johnson*, 47 Am. & Eng. R. Cas. 611, 92 Ala. 204, 9 So. Rep. 269. —DISTINGUISHING *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624. FOLLOWING *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

Where a railroad is sued for negligently causing the death of a brakeman while coupling cars, caused by the company providing its cars with improper couplings and mismatched bumpers or drawheads, whereby one drawhead overrode the other, if there is any evidence tending to establish negligence on the part of the company in the use of cars of a dangerous construction, it is proper for the court to refuse to direct a verdict for the defendant, and to submit the case to the jury. *Muldowney v. Illinois C. R. Co.*, 32 Iowa 176, 10 Am. Ry. Rep. 58. —DISTINGUISHED IN *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52. FOLLOWED IN *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279; *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa 661.

Plaintiff's intestate, a lad about sixteen years old, and a number of other lads got on a coal train at one end of a tunnel to ride through it. The other boys sat on the coal, but the intestate sat on the end of the car, with his feet hanging down between the cars. A sudden jerk of the train threw him between the cars, and he was killed. *Held*, that a verdict for the defendant was properly directed, on the ground that the evidence was not sufficient to show negligence on the part of the company, but did show contributory negligence on the part of the intestate. *Mitchell v. New York, L. E. & W. R. Co.*, 146 U. S. 513, 13 Sup. Ct. Rep. 259.

3. What Instructions are Improper.

331. In general.—In an action for the death of an engine driver, caused by the explosion of the boiler, it was error to instruct the jury that if the deceased used due care in running the engine, and it was no part of his duty to make a critical ex-

amination to ascertain the condition of the boiler, the bursting of the same was *prima facie* evidence of negligence which the company must rebut by a preponderance of evidence. *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217.

It is error to charge the jury that although damages for the death of a person, caused by a railroad before July 10, 1884, are not recoverable, yet they are recoverable for the loss of support by the deceased, because that is the direct consequence of the death. *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517.

Under Md. Code, art. 65, § 1, making corporations responsible for the "wrongful acts, neglect, or default of their agents or employes," they are liable for all damage occasioned by any neglect, where the other party is not in fault, or has not contributed to the injury; and proof of want of ordinary care is sufficient. Therefore, in an action for causing death, an instruction requiring a greater amount of proof on the part of the plaintiff than is required under the statute, to wit, "that the defendant or its agents were so grossly careless as that the exercise of proper caution on the part of the deceased could not have protected her from injury," is error. *Baltimore & O. R. Co. v. State*, 29 Md. 460.

The killing of a child, for which the suit was instituted, having occurred in 1886, when in order to fix liability gross negligence had to be proved, a charge which required the servants of the company to exercise "unusual care" and "extraordinary diligence," was erroneous. *Sabine & E. T. R. Co. v. Hanks*, 2 Tex. Civ. App. 306, 21 S. W. Rep. 947.

What particular facts would constitute gross negligence should not be stated in the charge, but be determined by the jury, with reference to all of the circumstances disclosed by the evidence; and if they showed so slight a degree of care as evidenced a disregard of or indifference to the safety of the child, and if the death of the child was caused thereby, then, and not otherwise, defendant would be liable. *Sabine & E. T. R. Co. v. Hanks*, 2 Tex. Civ. App. 306, 21 S. W. Rep. 947.

332. Instructions not within the issue.—Where gross negligence on the part of the defendant is not alleged in the complaint, and there is no evidence tending to establish it, it is error for the court to

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Where a complaint alleges that the injury resulted from the explosion of a boiler, and charges that the boiler was composed of bad iron, that it was defectively made, and that it was old, decayed, and worn to unfitness for use, it is error to instruct the jury that they must find that the explosion resulted from all these causes, or they must find for the defendant. *Long v. Doxey*, 50 Ind. 385.

Where the petition charges the negligent starting of the train before the passengers had time to get aboard, an instruction is improper which authorizes a recovery if the company's servants started the train before the deceased, who assisted his daughters on the train, had time to alight. *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 21 S. W. Rep. 1.

333. Instructions assuming facts not proven.—Where the evidence tends to show mutual negligence, an instruction which assumes as a fact that the intestate at the time of the injury was in the exercise of reasonable and ordinary care, is error. *Wabash, St. L. & P. R. Co. v. Moran*, 13 Ill. App. 72.

334. Instructions unsupported by evidence.—Where all the evidence showed that the proximate cause of the death was the frightening of a team, it was error to direct a verdict for plaintiff if the jury found that the injury to his intestate was caused by defendant's negligence either in blowing off steam or in failing to keep the crossing in repair. *St. Louis, I. M. & S. R. Co. v. Roberts*, 56 Ark. 387, 19 S. W. Rep. 1055.

There being no evidence to show that the person killed was drunk, or in such a condition of intoxication as to put the engineer on notice of the fact in time to have checked his engine, charges based on that hypothesis were erroneous. *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.

Where the evidence adduced by the defendant itself showed that its servants were negligent, it was error to charge the jury that "if the company did what the statutes required, and was otherwise guilty of no negligence as charged in the declaration, and the plaintiff's father was killed notwithstanding, his children could not recover." *Woodruff v. Georgia Pac. R. Co.*, 86 Ga. 318, 12 S. E. Rep. 749.

The cause of action in a petition was the alleged unfitness, gross negligence, and carelessness of the superintendent and managers of the defendant company, causing the death. No allegation of unfitness was made against the employes handling the two colliding trains causing the injury. There was no evidence whatever of the unfitness of the superintendent or managers. *Held*, that it was error and ground for reversal that the trial judge instructed the jury that the plaintiffs should recover if the death was caused by the unfitness, etc., of the superintendent, etc. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 Am. & Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47.

335. Instructions invading the province of the jury.—Upon the trial of an action brought under Ala. Code 1886, § 2589, it is an invasion of the province of the jury to charge that they might assess only nominal damages. *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 So. Rep. 800.

An engineer having jumped from his engine and been killed, and the question being whether or not he was without fault, the necessity for jumping, his ability to jump, and the safety with which he could do so, are all for the consideration of the jury, and it was error for the judge to charge that "the fact that he jumped is proof that he thought jumping the safest course." *Central R. & B. Co. v. Roach*, 8 Am. & Eng. R. Cas. 79, 64 Ga. 635.

The question of negligence is one of fact for the jury to find from the evidence, and the court has no right to instruct the jury that one thing is negligence and another is not. The jury should be left free and untrammelled to determine from all the evidence who has been negligent and who has not. *Illinois C. R. Co. v. Slater*, 139 Ill. 190; *affirming* 39 Ill. App. 69, 28 N. E. Rep. 830.

In an action for the carelessness, negligence, and unfitness of defendant's employes and agents in running an engine over and killing the deceased, the fitness or qualification of the employes who were acting as engineers at the time the accident occurred, for the business in which they were engaged, is properly a subject of inquiry for the jury, and instructions limiting their inquiries as to whether the accident was the result of carelessness or negligence alone, are improper. *Bowler v. Lane*, 3 Metc. (Ky.) 311.

A switchman was killed while in the discharge of his duties by striking a shed built too near the track on the company's grounds. The evidence showed culpable negligence on the part of the company in building the shed too close to the track, but there was circumstantial evidence tending to prove both that the switchman did and did not know of its nearness to the track. *Held*, that the case should have been submitted to the jury, and it was error to instruct the jury to find for the defendant. *Whalen v. Illinois & St. L. R. & C. Co.*, 16 Ill. App. 320.

336. Instructions that mislead the jury.—A charge which instructs the jury that "if the evidence leaves them in doubt and uncertainty as to whether the accident or the poison caused the death of plaintiff's intestate, and because of such doubt fails to produce in their minds a proper conviction or satisfaction that his death was caused by the injuries he received," then they must find for the defendant, exacts too high a measure of proof, and is misleading. *Thompson v. Louisville & N. R. Co.*, 48 Am. & Eng. R. Cas. 517, 91 Ala. 496, 8 So. Rep. 406.

Where a wagon and a railroad train collide, and thereby a person riding on the wagon is killed, if it appear that the wagon was driven against the engine of the train as it passed and was not on the track in front of it, the statute prescribing certain precautions for prevention of accidents when "any person, animal, or other obstruction appears on the track" has no application; and it is erroneous and misleading for the court to give it in charge in an action for damages against such railroad company for such killing. *Nashville, C. & St. L. R. Co. v. Seaborn*, 32 Am. & Eng. R. Cas. 9, 85 Tenn. 391, 4 S. W. Rep. 661.

Where there is proof tending to show negligence on the part of both the deceased and the railroad company, but no evidence that the act causing the death was wilful, it is error for the court to charge in effect that the plaintiff, if repelled on account of the deceased's contributory negligence, can nevertheless recover if the act causing the death was wilfully done. Such charge is not called for by the facts and is misleading. *Nashville, C. & St. L. R. Co. v. Seaborn*, 32 Am. & Eng. R. Cas. 9, 85 Tenn. 391, 4 S. W. Rep. 661.

In a suit by a parent for causing the death of his son a charge that "If at the time of

the injury to the deceased which resulted in his death he from fear or any other cause jumped or ran upon the track of defendant, after having before left it, in front of a moving engine and train of defendant, and in such close proximity to the train as that the servants of the company in charge of such train by the exercise of ordinary care could not have prevented the injury, then the defendant would not be liable in damages for the death of the deceased; and should you so find and believe from the evidence that the child, or deceased, went upon the track under such state of surroundings and in such way, then you should find for the defendant," is calculated to confuse and mislead the jury, and is ground for reversal of judgment for the plaintiff, there being no proof of gross negligence. *Sabine & E. T. R. Co. v. Hanks*, 79 Tex. 642, 15 S. W. Rep. 476.

337. Instructions as to cause of death.—Where the law only makes railroad companies liable for death caused by gross negligence, an instruction which authorizes the jury to believe that the proximate cause of the injury was the gross negligence of the company's employes if they could, in connection with their other duties, "by the exercise of proper care and attention have seen him, and could by the use of ordinary care and caution" have avoided the injury, is erroneous. *Missouri Pac. R. Co. v. Brown*, 75 Tex. 267, 12 S. W. Rep. 1117.

In an action by an administrator to recover for the death of an employe (Ala. Code, §§ 2590-91) the evidence showed that the immediate cause of death was several grains of corrosive sublimate, which had been left by his attending physician to be used as a wash for his wounds, and which by mistake his wife administered to him internally. His attending physicians testified that the wounds were mortal, but that the poison killed him sooner than he would have died from the wounds; while other physicians testified that the wounds were not necessarily fatal, but they accelerated his death from the effect of the poison. *Held*, that a charge instructing the jury that his death must have been caused either by the wounds or by the poison, and could not be the result of both, was erroneous; and that a further charge was erroneous which instructed the jury that, if he died from the effects of the poison, though the death was

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338. Instructions as to safety of track or switch.—Where the declaration avers that plaintiff's husband was killed by reason of a defective switch, to charge the jury that if the running of the train at a rate of speed that was in violation of the rules of the company was caused by the fault of other employés they should find for the plaintiff, is erroneous in leaving out of view the question as to the defendant's fault in regard to the switch. *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410, 7 Am. Ry. Rep. 143.—FOLLOWED IN *Central R. Co. v. Hubbard*, 86 Ga. 623.

339. Instructions as to precautions to prevent accidents.—Where the person killed was unloading a freight car which was run into by other cars, it was error for the court to instruct the jury that if they believed from the evidence that the employés of the defendant, shortly before the accident, saw the deceased upon the car at the place where the injury occurred, yet as a matter of law they had a right to presume that he was a reasonable being, and would not place himself or remain in a position of danger, until they saw something in his conduct to the contrary. *Chicago & N. W. R. Co. v. Goebel*, 119 Ill. 515, 10 N. E. Rep. 369; *affirming* 20 Ill. App. 163.—DISTINGUISHING *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 579.

In an action for killing a brakeman the complaint, assuming that the signal given to stop the train when the brakeman fell was seen by the engineer, charged the latter with negligence for not stopping the train when the signal was given. *Held*, that an instruction which permitted the jury to find the defendant guilty of negligence if the engineer did not see the signal to stop, or failed to use all the appliances to stop the train when he felt the brakes, was erroneous. *McDermott v. Iowa Falls & S. C. R. Co.*, 85 Iowa 180, 52 N. W. Rep. 181.

Where there is no evidence that the company's servants saw or knew of the danger of deceased in time to have avoided the accident, an instruction is erroneous which permits a recovery on the ground of such knowledge on the part of the company's servants. *Williams v. Kansas City, S. &*

M. R. Co., 37 Am. & Eng. R. Cas. 329, 96 Mo. 275, 9 S. W. Rep. 573.

In an action for causing death at a crossing a charge that if the company was guilty "of any negligence in notifying the approach of trains, or anything else you may think it their duty to do, they should be responsible for an act which was the result of its omission or commission," is error, in that it leaves it to the jury to determine what the company should have done. *Semel v. New York, N. H. & H. R. Co.*, 9 Daly (N. Y.) 321.—APPROVING *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9. QUOTING *Grippen v. New York C. R. Co.*, 40 N. Y. 34. REVIEWING *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 529.

340. Instructions as to failure to sound signals or show headlight.—It is error to give an instruction which authorizes a recovery against a railroad upon the ground of negligence in omitting to sound the whistle or ring the bell, without containing a requirement of any care or caution on the part of the person killed. *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88.—DISTINGUISHED IN *Pennsylvania Co. v. Marshall*, 119 Ill. 399. FOLLOWED IN *Peoria & P. U. R. Co. v. O'Brien*, 18 Ill. App. 28.

In an action for the killing of D. it appeared that the accident occurred at a village crossing; that D. was familiar with the locality and knew that there were two railroad tracks upon which trains passed in opposite directions; that defendant had failed to comply with a request of the village authorities to erect gates at this crossing, but kept a flagman there, who, as he saw D. approaching from the south, on which track a train was then passing, the headlight on the engine of which was lighted, shouted to him that another train was approaching on the north track; D. was deaf, and the headlight on that train was either not lighted or was turned down so low that the light was practically invisible. It appeared, however, that if D., after crossing the south track before stepping on the north track, had looked in the direction from which trains were to be expected, he would have seen the approaching train which struck and killed him, as it was plainly visible. The court submitted to the jury the question as to whether the absence of the headlight was the cause of the accident. *Held*, error, as

it was not shown, nor could an inference be drawn from the evidence, that the absence of the headlight did contribute to the accident; and plaintiff failed to show absence of contributory negligence on the part of D. *Daniels v. Staten Island R. T. Co.*, 125 N. Y. 407, 26 N. E. Rep. 466, 35 N. Y. S. R. 435; reversing 55 Hun 606, 28 N. Y. S. R. 87, 7 N. Y. Supp. 725.—DISTINGUISHED IN *Puff v. Lehigh Valley R. Co.*, 71 Hun (N. Y.) 577.

§41. Instructions on question of contributory negligence.—An instruction to the effect that notwithstanding the deceased was engaged in a dangerous business, requiring constant and watchful care upon his part to save himself from injury, still, if he did not always bear these things in mind and act upon them, and was thereby injured, he could recover, is erroneous, where there is no evidence showing sudden danger or emergency, and the only danger was the ever-present one incident to the act of coupling cars. An injury received under such circumstances would be the direct result of contributory negligence which would defeat a recovery. *Martin v. California C. R. Co.*, 94 Cal. 326, 29 Pac. Rep. 645.

An instruction which confines the care that the deceased must exercise to the time that he was killed, is erroneous, as ignoring any negligence of which he may have been guilty before the moment of the killing. *Chicago & N. W. R. Co. v. Clark*, 2 Ill. App. 116. *Chicago, B. & Q. R. Co. v. Colwell*, 3 Ill. App. 545. *Peoria & P. U. R. Co. v. Herman*, 39 Ill. App. 287.

The court erred in instructing the jury that no fault on the part of the intestate in occupying an unsafe position on the train, which did not contribute to the wrecking of the train, would authorize them to find for the defendant. *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160.

The court had no right to presume that the decedent recklessly or carelessly imperiled his own life, or entered upon the track knowing of the train's approach. *Eskridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 176, 89 Ky. 368, 12 S. W. Rep. 580.

It is error for the court to charge the jury that they may take into consideration, upon the question of the intestate's care upon the occasion of the injury, their knowledge of the habits of thought and mind, and the

natural instincts of men to preserve themselves from injury. *Chase v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 356, 77 Me. 62, 52 Am. Rep. 744.

In an action under section 2 of the Missouri act, entitled "An act for the better security of life, property, and character" (1 Rev. Code, 647), an instruction that if the company's agents permitted a person to stand on the steps of one of their cars, and while standing there he is killed, the deceased is not guilty of contributory negligence, is erroneous, in that it excludes the idea of his voluntarily standing in such place. *Huelsenkamp v. Citizens' R. Co.*, 34 Mo. 45.

In an action for causing death at a highway crossing, it was error to instruct the jury that it was the duty of the deceased "to make such use of his eyes and ears, and all his faculties, as would enable him to avoid danger, provided the managers of the railroad train were doing their duty; if he did that he was free from blame." *Toledo, W. & W. R. Co. v. Shuckman*, 50 Ind. 42. —QUOTING *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9.

In an action by a widow for the loss of her husband's life, the court instructed the jury that if the deceased knew that "the fast line" was approaching, and knew his danger in time to escape, and did not, then the fault was his own, and there could be no recovery. Held, that the instruction should have been, that he was charged with knowledge or regard for his own safety, knowing if he had such warnings or opportunities of knowledge as would, with ordinary caution in those circumstances, have saved him from the danger. *Pennsylvania R. Co. v. Henderson*, 43 Pa. St. 449.—REVIEWED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.

Plaintiff's intestate, a woman, started to walk along the side of a track where it was very near to a raised platform, in the face of an approaching train, which did not stop at the station. When near the end of the platform she stopped and leaned against it, but was struck by the train and killed. It was not necessary for her to walk where she did in going to her destination, and it also appeared that she could have avoided the injury by getting under the platform, which was more than three feet high. The court instructed that "if plaintiff's intestate got herself in a position of danger without

negligence, she is not to be held responsible for contributory negligence for an honest, though erroneous, exercise of judgment, in getting out." *Held*, error. If the danger was patent to a person of ordinary intelligence she was negligent in going where she did. *Nashville & C. R. Co. v. Smith*, 15 *Am. & Eng. R. Cas.* 469, 9 *Lea (Tenn.)* 470. —APPROVED IN *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 *Tenn.* 671, 13 *S. W. Rep.* 694, 14 *S. W. Rep.* 428.

A charge that it was the duty of B. when he entered upon or unto defendant's switch, to have used his senses of hearing and sight, and if he failed to do so, even though defendant should be found by you to be guilty of gross negligence, still his heirs cannot recover, as such failure to use his senses would be in law contributory negligence, unless you should find the motion of defendant's engine was so rapid as to render the exercise of his senses by him useless and of no avail to avert the injury, is erroneous. *Texas & N. O. R. Co. v. Brown*, 2 *Tex. Civ. App.* 281, 21 *S. W. Rep.* 424.

342. Instructions ignoring question of contributory negligence.—

(1) *In general*.—In an action for the death of an employe, an instruction asked, which otherwise correctly defines negligence and contributory negligence, is faulty if it fails to clearly and directly charge that the defendant is not liable if the injured party's own negligence caused, or directly contributed to, the injury. *Muldowney v. Illinois C. R. Co.*, 32 *Iowa* 176, 10 *Am. Ry. Rep.* 58.

An instruction which leaves wholly out of view the question of contributory negligence by the deceased, and under which the jury would be bound to find for the plaintiff, although they might also find that the deceased by his negligence contributed directly to the accident, is erroneous. *Murphy v. Chicago, R. I. & P. R. Co.*, 38 *Iowa* 539.—DISTINGUISHED IN *Holmes v. Oregon & C. R. Co.*, 6 *Sawyer (U. S.)* 262, 5 *Fed. Rep.* 75.

Where the complaint distinctly alleges that the deceased was free from contributory negligence, and the defendant pleads the general issue, the question of decedent's contributory negligence is, *inter alia*, put in issue, and where the evidence is conflicting on this point, it is error for the court to disregard it in its instructions to the jury. *Wabash, St. L. & P. R. Co. v. Shacklet*, 12 *Am. & Eng. R. Cas.* 166, 105 *Ill.* 364.

In an action by the administratrix of a brakeman to recover for his death, alleged to have been caused by the negligent construction of a wooden wall near the track, which fell and crushed him, it is error for the court to entirely disregard in its charge the question of the contributory negligence of the decedent when this has been raised and is material. *North Chicago Rolling Mill Co. v. Morrissey*, 18 *Am. & Eng. R. Cas.* 47, 111 *Ill.* 646.

Where there is a question as to whether the deceased was guilty of negligence or not, an instruction which directs the jury, if they believe certain facts, to find absolutely for plaintiff, without containing the requirement of any degree of care whatever on the part of the deceased, is erroneous. *Chicago & A. R. Co. v. Mock*, 72 *Ill.* 141.

Where the proof clearly shows negligence on the part of the deceased, it is error to instruct the jury that the law presumes that he exercised proper care and caution on the occasion. *Chicago, B. & Q. R. Co. v. Van Patten*, 74 *Ill.* 91.

Where the evidence showed that the deceased voluntarily placed herself in a position of great peril, an instruction that if deceased, at the time of the accident, was using ordinary care for her safety, and if defendant was guilty of negligence, as charged in the declaration, and this negligence of defendant caused the accident, the jury should find defendant guilty, was erroneous. *Chicago & E. I. R. Co. v. Roberts*, 44 *Ill. App.* 179.—FOLLOWING *Chicago, M. & St. P. R. Co. v. Halsey*, 133 *Ill.* 248.

It is error for the trial court to charge the jury, respecting testimony which the defendant claimed conclusively showed that the deceased did not exercise ordinary care, that such "testimony must be such as to drive you to that conclusion—to prevent your arriving at any other conclusion." *Mynning v. Detroit, L. & N. R. Co.*, 67 *Mich.* 677, 12 *West. Rep.* 427, 35 *N. W. Rep.* 811.

(2) *Illustrations*.—An instruction that if the death of a locomotive engineer was caused by explosion of the boiler of the locomotive, and the explosion was caused by the defective condition of the boiler, and the company operating the locomotive knew of such condition of the boiler, and could have repaired it, even if the engineer knew of such condition of the boiler, but had ground to believe that the company

would immediately cure the defects, the jury must find for the plaintiff in a suit to recover for the death of the engineer, is erroneous (1) because it contains no element of a promise to repair, express or fairly implied; (2) if it did, it takes it from the jury to say whether the engineer's continuing to run the engine, with knowledge of its condition, was, from the character of the defects, under all the circumstances, such contributory negligence in the engineer as to prevent recovery. *McKelvey v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 230, 35 *W. Va.* 500, 14 *S. E. Rep.* 261.

The court instructed the jury that if they believed from the evidence that the plaintiff was administratrix of the estate of deceased, and that he left surviving him a widow and next of kin who had suffered pecuniary loss by his death, and that, under the instructions and evidence, the defendant is guilty as charged in the declaration, then they should find for the plaintiff, etc. *Held*, erroneous, in ignoring the question of contributory negligence and omitting the requirement of any care or caution on the part of the deceased. *North Chicago Rolling Mill Co. v. Morrissey*, 18 *Am. & Eng. R. Cas.* 47, 111 *Ill.* 646.

In an action to recover damages for the alleged negligent killing of plaintiff's intestate, it appeared that he was in defendant's employ, engaged in tiering up freight in the hold of one of its vessels, and received the injuries which caused his death while coming up from the hold on an elevator used in the work, by being caught between the elevator and the combing of the hatch. There was room enough upon the elevator for him to stand without being exposed to danger, and there was no evidence from which it could be inferred that he used the precautions of a prudent man. At the request of the plaintiff's counsel the court charged that "if the deceased was rightfully on the elevator at the time of his injury, in the absence of the testimony of an eye-witness of the accident, the jury may assume that he received his injury in the performance of his duty, and had not omitted the precautions which a prudent man would take in the presence of known danger." *Held*, error. *Riordan v. Ocean Steamship Co.*, 124 *N. Y.* 655, 26 *N. E. Rep.* 1027, 36 *N. Y. S. R.* 476; *affirming* 32 *N. Y. S. R.* 328, 11 *N. Y. Supp.* 56.—DISTINGUISHING *Galvin v. Mayor of N. Y.*, 112 *N.*

Y. 223. QUOTING *Dobbins v. Brown*, 119 *N. Y.* 188.

In an action for causing the death of plaintiff's intestate, the jury were instructed that the plaintiff could not recover if the jury found that the deceased had "done something" by his own acts by which he lost his life. *Held*, error, in that the finding of the jury must be based on the whole evidence, and not upon one act. *Schappert v. Ringler*, 13 *J. & S. (N. Y.)* 345.

343. Instructions as to comparative negligence.—A charge that though the deceased may have been guilty of some negligence, this does not excuse the road if the jury believe that the officers were greatly more at fault than deceased, is not precisely right. *Yonge v. Kinney*, 28 *Ga.* 111.

An instruction that, if the employes neglected to ring a bell or sound a whistle, as required by statute, plaintiff was entitled to recover for the killing of her husband, unless he was guilty of a greater degree of negligence, is too broad, as it should have limited the liability of the company to the injury caused by a failure to ring the bell or sound the whistle, and it should have been modified so as to have informed the jury that the negligence of deceased must have been slight as compared with that of the company. *Chicago, B. & Q. R. Co. v. Lee*, 60 *Ill.* 501, 12 *Am. Ry. Rep.* 321.

Where there is no evidence of gross negligence on the part of the defendant, it is error to charge that "there may be mutual negligence and yet one party have a right of action against the other;" and it is likewise error to instruct that plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him; and such error is not cured by a further instruction that there can be no recovery if the negligence of deceased contributed to the injury. *Scott v. Third Ave. R. Co.*, 36 *N. Y. S. R.* 838, 59 *Hun* 456, 13 *N. Y. Supp.* 344.—DISTINGUISHING *Thomas v. Kenyon*, 1 *Daly* 142; *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 *N. Y.* 326; *Murphy v. Orr*, 96 *N. Y.* 14; *Seybolt v. New York, L. E. & W. R. Co.*, 95 *N. Y.* 562; *Moebus v. Herrmann*, 108 *N. Y.* 349, 13 *N. Y. S. R.* 648. EXPLAINING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 *Ohio St.* 172; *Trow v. Vermont C. R. Co.*,

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24 Vt. 494; *Davies v. Mann*, 10 M. & W. 546; *Butterfield v. Forrester*, 11 East 60.

344. Instructions as to damages, generally.—(1) *General rules.*—When the statute limits the damages to the pecuniary loss to the next of kin, an instruction to the jury that, if they found defendant guilty, to assess such damages as they believed right, is erroneous, as under it the jury might give damages for mental suffering, etc. *Chicago & A. R. Co. v. Becker*, 76 Ill. 25.

Instructions to the jury that, in estimating the damages, they may take into consideration the actual pecuniary loss to the plaintiff, occasioned by the death of her son and servant, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness, are erroneous. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366.

An instruction as to the measure of damages is improper which does not state the elements of damages for which compensation is allowed. *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. Rep. 924.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25. QUOTED IN *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

Where there is proof that the deceased was administrator of an estate at the time of his death, it is error to instruct the jury that in estimating the damages they may consider the amount of assets and debts of the estate, and the commissions usually allowed in administering estates. *Burton v. Wilmington & W. R. Co.*, 82 N. Car. 504.

An instruction to consider the question of damages "from a broad and sensible point of view, and liberal, because it is not a case to cut off corners too closely," is unwise, to say the least, though perhaps not of itself requiring reversal. *Steinbrunner v. Pittsburgh & W. R. Co.*, 146 Pa. St. 504, 23 Atl. Rep. 239.

In a suit by parents for damages for loss of services of their minor son, it was error to instruct the jury that they could consider "the comfort of his society had he not died," in determining the amount of recovery, and such charge is ground for reversal. *Taylor, B. & H. R. Co. v. Warner*, 84 Tex. 122, 19 S. W. Rep. 449, 20 S. W. Rep. 823.

(2) *Illustrations.*—The court instructed the jury that the measure of damage is the pecuniary loss suffered by the parties entitled to the sum recovered, without any

allowance for distress of mind; and that loss—the loss which the parties are in such a case entitled to recover—is what the deceased would have probably earned by his labor in his business or calling during the residue of his life, and which would have gone for the benefit of his heirs or personal representatives, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure. *Held*, the instruction was more favorable to the defendant than the law justifies, inasmuch as the statute gives to the jury the power to assess such damages "as under all the circumstances of the case may be just." *McKee v. Market St. R. Co.*, 19 Am. & Eng. R. Cas. 123, 59 Cal. 294.—DISTINGUISHED IN *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303; *Morgan v. Southern Pac. Co.*, 95 Cal. 510.

The court instructed the jury that if they believed, from the evidence, that plaintiff was entitled to recover, they should render a verdict for no more than \$5000. *Held*, that the instruction, in a doubtful case, was calculated to improperly influence the jury to render a verdict for a large amount. *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426.

The court instructed the jury on what grounds they might find for the plaintiff, and if they did so find, that then they might give such damages as they should deem a fair and just compensation for the pecuniary loss resulting from such death to the widow and next of kin, not exceeding \$5000. *Held*, that the instruction was erroneous in not requiring the jury to find the damages from the evidence. *North Chicago Rolling Mill Co. v. Morrissey*, 18 Am. & Eng. R. Cas. 47, 111 Ill. 646.—FOLLOWING *Chicago, B. & Q. R. Co. v. Sykes*, 96 Ill. 162.—*Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. Cas. 254, 96 Ill. 162; reversing 1 Ill. App. 520.—FOLLOWED IN *North Chicago Rolling Mill Co. v. Morrissey*, 111 Ill. 646.

The court instructed the jury that the measure of damages was such a sum, not exceeding the amount claimed, as they should find from the testimony would compensate for the loss sustained. *Held*, that the instruction should have been more explicit in defining the measure of damages. *Coates v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 265, 62 Iowa 486, 17 N. W. Rep. 760.—DISTINGUISHED IN *Andrews v. Chicago, M. & St. P. R. Co.*, (Iowa) 52

Am. & Eng. R. Cas. 252, 53 N. W. Rep. 399.

Where the court instructed the jury that compensation for loss of services during the minority of a child was a proper matter for their consideration, and improperly added that they should give such damages as fairly represent the value or chance of the pecuniary benefit which the father and mother lost by the death of the child; and the verdict was not larger than the jury might find under that part of the instruction relating to the loss of services during minority—to which no exception was taken—the case will not be reversed. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306.

It is error to charge that "it would perhaps be a fair way to estimate the amount of damages to take the probable amount of (decedent's) accumulations for the time he might reasonably have been expected to live, and find that for the plaintiffs. This may be a fair way of calculating the damages sustained, but if you can find a better rule you are at liberty to adopt it. In estimating his accumulations, you will remember that it might not be fair to deduct his family expenses, because his family lived out of it, and now they do not have it to live upon." *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335.—QUOTED IN *Lehigh Iron Co. v. Rupp*, 7 Am. & Eng. R. Cas. 25, 100 Pa. St. 95, 12 W. N. C. 47.

The court instructed the jury that they might consider as an element of damage the loss by deceased's children of the society and protection of their mother. *Held*, this was error, as in an action under Tenn. Code, section 2291, plaintiff can recover only such damage as deceased could claim had she lived. *Nashville & C. R. Co. v. Smith*, 15 Am. & Eng. R. Cas. 469, 9 Lea (Tenn.) 470.

Where there was evidence that deceased contributed to the support of a married daughter and the son lacked but a few months of his majority, it was error to allow a verdict in their favor for \$2500 each. The court should have instructed the jury to allow them nothing. *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. Rep. 104.

§45. — In suit by widow for death of husband.—In an action by a widow for the wrongful killing of her husband, it is error for the court to positively

direct the jury to measure the damages by a mathematical calculation based on the yielding power of money when invested in an annuity; and such error is not cured by a subsequent statement of the court that in the end the whole matter of damages is left to the sound judgment of the jury. *St. Louis, I. M. & S. R. Co. v. Needham*, 54 Am. & Eng. R. Cas. 88, 52 Fed. Rep. 371, 10 U. S. App. 339.—FOLLOWING *Phillips v. Railway Co.*, 49 L. J. Q. B. 237; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554, 7 Sup. Ct. Rep. 1; *Fordyce v. McCants*, 51 Ark. 514, 11 S. W. Rep. 694.

It is also error for the court to direct the jury that in case they believed plaintiff's expectancy of life was greater than that of her husband, to add to the amount that would purchase the annuity the present value of any property that she would probably have received from her husband as dower if he had not been killed. *St. Louis, I. M. & S. R. Co. v. Needham*, 54 Am. & Eng. R. Cas. 88, 52 Fed. Rep. 371, 10 U. S. App. 339.

In an action for the death of a track repairer, for the benefit of the widow and minor children, it is error to instruct the jury that in estimating the damages they may take into consideration the support of the widow and minor children, and the instruction and physical, moral, and intellectual training, as well as the age of the children, where there is no evidence to show that the deceased was fitted by nature or education to furnish the children such training. *Peoria & P. U. R. Co. v. O'Brien*, 18 Ill. App. 28.—FOLLOWING *Illinois C. R. Co. v. Weldon*, 52 Ill. 290.—*Illinois C. R. Co. v. Weldon*, 52 Ill. 290.—DISTINGUISHING *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.—REVIEWED IN *Chicago & G. W. R. Co. v. Travis*, 44 Ill. App. 466.—*Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426.—DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237.

In an action for the death of plaintiff's husband it is error to charge the jury as follows: "The question of damages is for you; should you feel it necessary to examine that question, let fair and exact justice be your guide, and your own good sense will determine it." *Pennsylvania R. Co. v. Vandever*, 36 Pa. St. 298.—FOLLOWING *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318.—QUOTED IN *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.

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The court charged as follows: "The pecuniary damages to the wife from the homicide are to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation, and prospects in life; and when the annual money value of that support has been found, to give as damages its present worth, according to the expectation of the life of deceased, as ascertained by the mortuary tables of well-established reputation." *Held*, that under the facts of this case the court should have amplified this charge, and the attention of the jury should have been called to the declining years of the deceased and the probable decrease year by year of his capacity to labor at his calling. *Central R. & B. Co. v. Roach*, 8 *Am. & Eng. R. Cas.* 79, 64 *Ga.* 635.

340. — In suits by personal representatives.—In an action under the Illinois statute, an instruction to the jury that in estimating the damages they are not to be limited to the actual present loss that may have been proved, but may compensate for the relative injury with reference to the future, [and for pecuniary injuries both present and future, is error in that it is too general. *Chicago & N. W. R. Co. v. Swett*, 45 *Ill.* 197.

In such action, where the damages will go to the mother, the questions to be determined by the jury are whether the deceased assisted his mother in his lifetime, and whether he was bound to do so, and as to the amount of her loss by the death; and it is error to instruct the jury that they may consider the disposition that he may have shown to support his mother. *Chicago & N. W. R. Co. v. Swett*, 45 *Ill.* 197.

The damages recoverable under Tenn. Code, § 2291, do not include anything for grief; therefore it is error to instruct the jury, in an action for killing a fireman, that they may consider the "shock to the feelings of the wife." *Nashville & C. R. Co. v. Stevens*, 9 *Heisk. (Tenn.)* 12, 19 *Am. Ry. Rep.* 363.—APPROVED in *Collins v. East Tenn., V. & G. R. Co.*, 9 *Heisk.* 841.

An instruction is erroneous which tells the jury that damages may be recovered for the mental pain and suffering caused to the mother, who is the heir. *Webb v. Denver & R. G. W. R. Co.*, 44 *Am. & Eng. R. Cas.*

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683, 7 *Utah* 17, 24 *Pac. Rep.* 616.—*DISTINGUISHING Cook v. Clay St. Hill R. Co.*, 60 *Cal.* 604; *Nehrbas v. Central Pac. R. Co.*, 62 *Cal.* 320. *QUOTING Matthews v. Warner*, 29 *Gratt. (Va.)* 570. *REVIEWING Beeson v. Green Mountain Gold Min. Co.*, 57 *Cal.* 20.

347. Erroneous direction of verdict.—Plaintiff's intestate was killed while in the employ of the defendant company by the explosion of a lamp which he was using in burning old paint from cars. Plaintiff's evidence tended to prove negligence in the company in failing to supply him with a reasonably safe lamp, and in giving him one which exploded while being used with reasonable care, and without knowledge by the deceased of its unsafe and defective condition. *Held*, that the case should have been submitted to the jury, and it was error to instruct them to find for the defendant. *Wood v. Illinois C. R. Co.*, 23 *Ill. App.* 370.

4. Prayers for Instructions.

348. Form and sufficiency of the prayer.—Instructions for the defense, in an action for negligence resulting in death, are fatally defective if they ignore the fact that defendant was required to use care and caution in running its trains. *Lake Shore & M. S. R. Co. v. O'Conner*, 115 *Ill.* 254, 3 *N. E. Rep.* 501.

In an action by an administratrix for the death of an employé, a charge to the jury that "if they believe from the evidence that the deceased came to his death through the wrongful act, default, or negligence of defendant or its servants or employés, and not through his own wrongful act or negligence, then they will find for plaintiff and assess her damages at such sum as they believe from the evidence she should recover, not exceeding the sum claimed in her petition," is too broad and indefinite, and fails to distinguish between the acts of a vice-principal and fellow-servant. *Chicago, B. & Q. R. Co. v. Sullivan*, 41 *Am. & Eng. R. Cas.* 463, 27 *Neb.* 673, 43 *N. W. Rep.* 415.

349. What requests for instructions should be granted.—In an action for killing plaintiff's intestate at a street crossing, the evidence tended to show that he had lived in the vicinity for a long time and must have known that the gates at the crossing were not operated after seven

o'clock in the evening, and that he was killed about nine o'clock. *Held*, that it was error to refuse to charge that if the intestate knew the gates were not operated after seven o'clock that he was not entitled to rely upon them for protection. *Rainey v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 677, 23 N. Y. Supp. 80, 68 Hun 495.

In an action for killing plaintiff's intestate at a street crossing, the evidence tended to show that the approaching train could have been plainly seen at any point between the rail and ten to fifteen feet away. *Held*, that it was error to refuse to charge that if such was the fact plaintiff could not recover. *Rainey v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 677, 23 N. Y. Supp. 80, 68 Hun 495.

In a suit for the death of an employé, a trackman, killed in the act, averred to have been done under the order of a superior, of alighting from a slowly moving train, it is error for the court to refuse, upon defendant's request, to give to the jury the following instruction, there being material evidence of the state of facts therein assumed, viz.: "If you shall find from the proof that the supervisor said to the hands, 'If the train is moving slow enough, get off where Hussey is at work; if not, go on over to Faxon and come back on the gravel train,' and the hands so spoken to were accustomed to getting off and on moving trains, and a discretion was left the hands whether they would jump off or not, then the plaintiff cannot recover on account of the supervisor's order or direction." *Louisville & N. R. Co. v. Pitt*, 91 Tenn. 86, 18 S. W. Rep. 118.

Such error is not cured by the following proposition, itself erroneous, in the general charge, viz.: "If the instructions (of the supervisor) left it to the discretion of the deceased and other hands whether they should get off or not, and the deceased negligently exercised this discretion in attempting to get off at the time he did, or in the act of getting off, and the negligence of the deceased was the direct cause of his injury, then he cannot recover, and you should so find." *Louisville & N. R. Co. v. Pitt*, 91 Tenn. 86, 18 S. W. Rep. 118.

350. What prayers are properly refused, generally.—A charge requested by the defendant that the jury in assessing the damages might consider the fact of the pendency of other suits against the defend-

ant resulting from the same cause of action is properly refused. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

It is not error to refuse to instruct the jury as to what evidence would or would not evince a willingness on the part of the defendant to inflict the injury complained of. *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89.

The jury are supposed to know without instruction that the Carlisle tables of the expectancy of life are not to be regarded as proving plaintiff's right to recover for the years therein mentioned, and that the decedent would have been liable to die at any time, and that there is no presumption that he would have been diligent in acquiring or successful in saving property; accordingly, it is not error for the court to refuse an instruction embodying such statements. *Andrews v. Chicago, M. & St. P. R. Co.*, 52 Am. & Eng. R. Cas. 252, 86 Iowa 677, 53 N. W. Rep. 399.—**DISTINGUISHING** *Coates v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 265, 62 Iowa 486.

The court may rightly refuse to charge that the jury, in estimating the damages, might take into consideration the fact that plaintiff would be entitled to the property of the deceased as her next of kin. *Terry v. Jewett*, 78 N. Y. 338; *affirming* 17 Hun 395.—**FOLLOWED IN** *Kellogg v. New York C. & H. R. Co.*, 79 N. Y. 72.

Where there was evidence on the trial that the conductor forcibly removed the hands of the deceased, a passenger, from the car railing so that he fell on the track of the road, and that he died from the injuries then received, it was not error to refuse to instruct the jury "that under all circumstances of the case their verdict should be for defendant." *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365.

An engineer was running his locomotive and cars thereto attached, within the limits of an incorporated town, at the speed of twenty miles an hour, when, under an ordinance, he had the right to run only at the rate of eight miles an hour, and while so running he saw a switchman running upon or near the track swinging a lantern. The switchman was struck by the engine and killed. *Held*, that an instruction for the defense, to the effect that when the engineer saw the lantern of the switchman and

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others upon or near the track upon which he was running, he had the right to assume that they would get out of the way of his engine before he reached them, was properly refused. It may be, if the train was running only at the rate of speed permitted by the ordinance, that he might have assumed that the deceased might have observed the approach of his train, and would get out of the way; but as he was running at a high rate of speed at a place where the switchman was authorized to believe the approaching train would run only at the rate of eight miles an hour, the engine driver had no right to assume that the switchman would get out of the way. *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 254, 3 N. E. Rep. 501.

Plaintiff's intestate was killed at a crossing where there were several tracks. He stopped on the first track, which was used only for the storage of cars, when a backing train on another track struck a cart and threw it against him with such force as to cause death. The court refused to charge that if the negligence of the driver of the cart caused the accident, plaintiff could not recover, but charged that there could be no recovery if the accident was caused exclusively by the driver of the cart. *Held*, that there was no error either as to the charge refused or as to the one given. *Quill v. New York C. & H. R. R. Co.*, 16 Daly (N. Y.) 313, 32 N. Y. S. R. 612, 11 N. Y. Supp. 80; *affirmed* in 126 N. Y. 629, *mem.*, 36 N. Y. S. R. 1012.

Plaintiff's intestate, a boy about eight years of age, attempted to steal a ride as a train was approaching the station, but in swinging up he fell between the cars and was killed. *Held*, that a charge that plaintiff should recover unless the company showed by satisfactory affirmative proof that its employes were not at fault, was properly refused. Where a trespasser is killed, mere proof of the killing does not cast the burden of proof upon the defendant. *Sommers v. Mississippi & T. R. Co.*, 7 Lea (Tenn.) 201.

351. — because covered in the general charge.—In an action for killing a child eight years old, plaintiff's evidence tended to show that the child was caught up by a slowly moving switch-engine and carried a considerable distance before it was killed; that the company's employes, though seeing it, did nothing to

render assistance, nor stop the train, which might easily have been done; but on the other hand the company gave evidence that the child suddenly ran on the track so near that the engine could not be stopped in time to avoid the accident. In instructing the jury the court referred to these conflicting theories and said that the company would not be liable if its theory was true, but if plaintiff's theory was true, in order to find for the plaintiff, the jury must believe that the train employes knew of the perilous position of the child, or that the warning was such that they should have known it, and could have stopped the train in time to have saved the child's life. *Held*, that the charge was sufficient, and it was not error to refuse a further charge as to the law that would render the company liable for wanton and reckless misconduct, notwithstanding the contributory negligence of the child or its mother. *Eason v. East Tenn., V. & G. R. Co.*, 51 Fed. Rep. 935, 2 U. S. App. 272, 2 C. C. A. 549.

Where an employe was killed in a railway wreck, and the testimony was undisputed that employes in passing along the road to their work on construction trains rode where they pleased, in the caboose or on the flat cars, the general charge of the court upon contributory negligence being full, it was not error to refuse to further charge the jury that the absence of any rule on the part of the defendant company prohibiting the riding upon the flat cars did not absolve the employes from taking proper care for their safety. *Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. Rep. 918.

352. — because not supported by the evidence.—It is not error to refuse an instruction, correct in itself, which is not applicable to the facts of the case. So it is held not error in a suit for negligently causing death, to refuse to charge that slight negligence by deceased would not defeat a recovery, if the negligence of the company's servants was gross, where the evidence did not tend to establish such conditions. *McDonald v. International & G. N. R. Co.*, 86 Tex. 1, 22 S. W. Rep. 939.

In an action for the death of a switchman where the evidence shows that the accident occurred on a dark and stormy night, and where there is no evidence to show that he knew of a defect in the track, which caused the accident, an instruction to the

effect that if the defect was easily and readily seen, and that the switchman was accustomed to work there, then plaintiff could not recover, is properly refused. *Little Rock, M. R. & T. R. Co. v. Leverett*, 28 Am. & Eng. R. Cas. 459, 48 Ark. 333, 3 S. W. Rep. 50.

Instructions submitting to the jury whether the homicide was the result of an unavoidable accident, and whether the engineer might rightfully have presumed that the deceased would not attempt to cross the track, would have been inapplicable to the facts. *Atlanta & W. P. R. Co. v. Newton*, 45 Am. & Eng. R. Cas. 211, 85 Ga. 517, 11 S. E. Rep. 776.

A request to charge based upon the hypothesis that the defendant's agent killed plaintiff's husband in a quarrel "as an act of personal resentment" was properly refused, the evidence for the defense on this subject, if true, showing that the agent killed the deceased, not from resentment, but under circumstances which would make the homicide justifiable by the law of self-defense. *Christian v. Columbus & R. R. Co.*, 90 Ga. 124, 15 S. E. Rep. 701.

In an action for causing the death of a switchman it is not error to refuse to charge that if the jury believe from the evidence that the proximate cause of the death was the darkness of the night or stormy weather, plaintiff would not be entitled to recover, where there is no evidence tending to show that such was the fact. *Missouri Pac. R. Co. v. Lamothe*, 76 Tex. 219, 13 S. W. Rep. 194.

353. — because invading the province of the jury.—In a suit by a widow for the killing of her husband, an employé, a request to charge, grouping together certain alleged facts tending to show negligence on the part of the deceased, and instructing the jury that if these facts be true the plaintiff cannot recover, without leaving the jury to determine whether such facts did or did not constitute negligence on his part, was properly refused. *Central R. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. Rep. 1020.

Where the jury are required to find whether or not the death was caused by the act of defendant, it is not error for the court to refuse to instruct that they should find whether or not the act of defendant was the proximate cause of the death, nor to refuse to instruct the jury that the injury

complained of cannot be regarded as the proximate cause of death if the deceased had a tendency to insanity and disease and the injury received by him, producing his death, would not have produced the death of a well person. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325.

An instruction that the mere fact that the deceased was found dead upon the defendant's track, and that it was afterwards discovered that the brake-staff on one of the cars which was part of his train had no brake-wheel upon it, and that a brake-wheel was found near deceased, is not sufficient to show that his death was caused by any defect in the brake-staff or wheel, infringes upon the province of the jury and is properly refused. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287.

Whether a failure to ring a bell or blow a whistle as a train approaches a crossing is negligence or not is a question for the jury; and therefore, where a company is sued for causing death at a crossing by negligently failing to give such signals, the company is not entitled to an instruction, as a proposition of law, that such failure would not constitute negligence. *Sauerborn v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 784, 23 N. Y. Supp. 478, 69 Hun 429; affirmed in 141 N. Y. 553.

After the trial judge has properly defined negligence and gross negligence, it is the exclusive province of the jury to determine whether the facts proved in a given case constitute negligence or gross negligence, and it is not error for the court to refuse to instruct the jury specifically with reference to the actions of the deceased in attempting to cross in front of an approaching train, or in regard to her duty to look and listen. *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.

In an action for negligence whereby plaintiff's father was killed, a warning of danger to the deceased was but evidence of negligence and, as such, for the jury; and where the court charged that knowledge of the danger would be proof of negligence, giving the legal consequences and leaving the jury to apply the law to the facts, but declined to instruct them that the warning constituted negligence, it was not error. *North Pa. R. Co. v. Robinson*, 44 Pa. St. 175.

354.—because withdrawing from the jury matter proper for their consideration.

—In an action by the personal representative of a person killed by passing cars, if the proof shows the killing only and there is no evidence tending to show negligence on the part of the defendant or its servants, the court should, on request of defendant, instruct the jury to find for the defendant; but if there is any evidence from which such negligence may be inferred, no matter by which party introduced, the court should not take the case from the jury by instruction. *Chicago & A. R. Co. v. Carey*, 115 Ill. 115, 3 N. E. Rep. 519.

Where a recovery is sought for the killing of a person while engaged in unloading coal from a freight car left on a side track for the purpose of being unloaded, by violently running other cars against the same, without previous warning, on the ground that the company had so acted as to justify the deceased in assuming that there was no danger in being upon the freight car and to throw him off his guard and excuse his want of care, there is no error in refusing an instruction which virtually would take this feature of the case from the jury. *Chicago & N. W. R. Co. v. Goebel*, 119 Ill. 515, 10 N. E. Rep. 369; *affirming* 20 Ill. App. 163.

In refusing to charge that, if the jury believed that the accident was caused by the effort of the deceased to open the torpedo which he found upon the track, the verdict must be for defendant, the circuit judge committed no error, as such a charge would have taken from the jury a matter which was for their determination, to wit, whether the alleged act amounted to contributory negligence. *Carter v. Columbia & G. R. Co.*, 15 Am. & Eng. R. Cas. 414, 19 So. Car. 20, 45 Am. Rep. 754.

Where it was alleged that the death of plaintiff's intestate was caused by negligence of the company in providing a defective brake-beam, whereby deceased was tripped and run over, a charge was properly refused withdrawing consideration of the brake-beam from the jury; its condition was a matter of fact for their consideration. *Texas & P. R. Co. v. Robertson*, 82 Tex. 657, 17 S. W. Rep. 1041.

355.—because stating doctrine of contributory negligence too strongly.—In an action for the death of an engineer by an open switch, an instruc-

tion which makes it the absolute duty of the engineer to see a switch-target which shows that the switch is open, regardless of the care and diligence used by him, and of the fact that the track could not be seen by reason of smoke and steam, is properly refused. *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; *affirming* 33 Ill. App. 405.—**DISTINGUISHING** *Chicago & N. W. R. Co. v. Snyder*, 117 Ill. 376; *Lombard v. Chicago, R. I. & P. R. Co.*, 47 Iowa 494.

A prayer that the plaintiff could not recover for an injury to a person deceased if the deceased "by his own neglect or want of care" contributed to the accident, fails to define the character of neglect or want of care, and is properly rejected. *Northern C. R. Co. v. State*, 31 Md. 357.

Plaintiff's intestate was killed by a backing train at a city crossing. The train had nearly stopped when its motion was again accelerated and it struck the intestate as she was crossing the track. After the court had instructed the jury that if the intestate saw the train approaching or failed to look she was guilty of negligence, it was further asked to charge that the fact of her being on the track was conclusive evidence of contributory negligence if she could have seen the approaching train; but the court declined to charge that it was conclusive evidence, but said it was strong evidence. *Held*, that the charge was as favorable as the defendant had a right to ask for. The fact that the deceased might have seen the train would not constitute negligence in going on the track if she was unable to discover that it was in motion. *Maginnis v. New York C. & H. R. R. Co.*, 52 N. Y. 215, 4 Am. Ry. Rep. 506.

The court was requested by defendant's counsel, but refused, to charge "that if the jury believe the deceased was standing on the platform as the train approached, and with knowledge of its approach placed himself in such a position as to be struck by the train, the plaintiff cannot recover." *Held*, no error; as the request, if granted, would have required the deceased not only to exercise proper care and diligence, but to guard against the improper construction of defendant's cars, of which he had no knowledge. *Dobiecki v. Sharp*, 8 Am. & Eng. R. Cas. 485, 88 N. Y. 203.

356.—because misleading.—In an action for causing the death of the plain-

tiff's husband, an instruction that the burden is on the plaintiff in the first instance to show that "plaintiff" was in the exercise of due care at the time of the accident is properly refused, as calculated to mislead the jury, though it may appear to the court that the use of the word "plaintiff" is but a clerical error for the word "deceased;" and especially is this true where the court, in another instruction, has fully stated the law that must govern the conduct of the deceased. *Union Pac. R. Co. v. O'Brien*, 49 Fed. Rep. 538, 4 U. S. App. 221, 1 C. C. A. 354.

When a person, walking over a long trestle on a railway, let himself down under the ties to avoid being run over by an approaching train, but, being unable to get upon the track again, fell and was killed, a charge which submitted to the jury the question of his negligence in attempting to cross the trestle, but which ignored the question of due caution in regaining his position, on which there was evidence, was misleading and properly refused. *Cook v. Central R. & B. Co.*, 67 Ala. 533.

On the trial of an action by an administrator for killing the intestate at a highway crossing, the defendant asked the court to instruct the jury that if they believed, from the evidence, that the person in charge of the team stopped forty or fifty feet from the track, and the horses afterwards became unmanageable and ran upon the track, defendant was not responsible for the action of the horses or for any damage to them, which was refused. *Held*, properly refused, for the reason that the damages to the horses were not involved, and because calculated to mislead the jury as to whether defendant was responsible for what the horses did. That was a question of fact to be determined from a consideration by the jury of all the facts and circumstances which occurred at the time. *Illinois C. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. Rep. 830; *affirming* 39 Ill. App. 69.

357. Modifying the prayer.—In an action by an administrator for the killing of an employé the defendant asked this instruction: "The jury are instructed that the first duty of the deceased, T. K., was to take reasonable care of his own safety, *even though to do so required his whole time*," which the court modified by striking out the words in italics, and then gave it. *Held*, that the modification was proper. *Pitts-*

burgh, C. & St. L. R. Co. v. McGrath, 115 Ill. 172, 3 N. E. Rep. 439; *affirming* 15 Ill. App. 85.

Where there was no evidence that the deceased went upon the track in a reckless manner, or failed to exercise that degree of care and caution that a prudent man would observe to avoid danger, it was no error to modify an instruction asked by the defendant, to the effect that if the deceased knowingly attempted to cross the track without looking for the approach of a train he was guilty of negligence; so that it left as a question for the jury to determine whether, under the facts, he was guilty of negligence. *Pennsylvania Co. v. Marshall*, 119 Ill. 399, 10 N. E. Rep. 220; *affirming* 18 Ill. App. 639.—FOLLOWED IN *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 40 Ill. App. 369.

XII. VERDICT.

358. What special findings are sufficient.—Where the jury find the pecuniary loss to be a certain sum (in this case \$1320), and, in answer to a specific question, say that the loss consisted of notes and mining stocks, and there is testimony that the deceased had notes and mining stocks which were lost on account of his death, and the amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld, although the amount named by the jury cannot be deduced from the testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the statute of limitations or otherwise, the death of the deceased brought about the loss of the notes and stocks. *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471.—QUOTING *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282; *McIntyre v. Central R. Co.*, 37 N. Y. 287; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471.

In an action under the statute for wilful neglect resulting in the death of plaintiff's husband, an employé, a special finding by the jury that the death was not caused by the wilful neglect of the defendant was sufficient to authorize a verdict for defendant, even though the other findings were not sufficient to enable the court to determine whether there was wilful neglect. Therefore the plaintiff's motion to set aside the

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verdict and award a new trial, upon the ground that there was not a complete verdict, was properly overruled. *Nedham v. Louisville & N. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797, 11 S. W. Rep. 306.

In an action against a railroad company for the death of a switchman, caused by the proximity of a shed to a side track, a finding by the jury that "the shed was so close to the track as to render the place unnecessarily dangerous to employes in performing their duties at that place" is a sufficient finding of defendant's negligence. *Kelleher v. Milwaukee & N. R. Co.*, 80 Wis. 584, 50 N. W. Rep. 942.

In an action for death at a crossing, a special finding by the jury that the deceased did not exercise any caution to protect himself will not justify the court in entering judgment for the defendant. *Treffert v. Ohio & M. R. Co.*, 36 Ill. App. 93.—REVIEWING *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132.

The jury, in their special verdict, found facts sufficient to show that the railroad company did not provide a safe place for the deceased to work; that the foreman, intrusted with the superintendency of the work and acting for the master, had full knowledge of the dangerous character of the tunnel and the liability of the rock to fall and kill the deceased; that he might, with reasonable diligence, have guarded against the danger; that the death of the deceased was caused by the foreman's negligence, and that the deceased was without fault and had no knowledge of the dangerous condition of the tunnel or the crack in the rock, or its liability to fall and injure him. *Held*, that the plaintiff was entitled to judgment. *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. Rep. 668.

Plaintiff's intestate, a boy about two years old, got upon the defendant's track about 5 o'clock P. M., and a few minutes later was killed by a passing train. He got upon the track at a farm crossing, either through an open gate or through an opening about twenty inches wide at one end of the gate. Two of defendant's section men testified that immediately after the train started on, after the accident, they found the gate open, and closed it. Two witnesses for the plaintiff testified that they left the gate closed about noon on that day, and no one had been seen to pass through the gate after-

wards. No one had any occasion to open the gate, except said two witnesses and the plaintiff. The jury found specially that the boy passed through the opening in going upon the track; that the gate was closed at the time; and that the section men did not close the gate after the accident. *Held*, that these findings were warranted by the evidence. *Stuetgen v. Wisconsin C. Co.*, 80 Wis. 498, 50 N. W. Rep. 407.

359. What special findings are not inconsistent with general verdict.—A special finding that a switchman knew of the absence of run-boards from the switch-engine, and that the danger was unusual, is not in conflict with a general verdict in favor of his estate where the jury fail to find whether or not there was a promise or assurance that the defect should be repaired. *Pieart v. Chicago, R. I. & P. R. Co.*, 82 Iowa 148, 47 N. W. Rep. 1017.

In an action for the death of an assistant brakeman while attempting to uncouple cars in motion, the jury found specially that the accident occurred while the train was moving at the rate of four miles an hour; that the deceased knew that the train would soon stop where the uncoupling could be done with safety, but further found that the work was not unusually hazardous. *Held*, that the special findings were not inconsistent with a general verdict for plaintiff. *Hammer v. Chicago, R. I. & P. R. Co.*, 10 Am. & Eng. R. Cas. 772, 61 Iowa 56, 15 N. W. Rep. 597.

360. Setting aside verdict for errors in special findings.—In an action for the death of a person at a crossing, a finding "that both parties were to blame, but the railway company should bear the greater responsibility," is not a verdict for the defendant, but is so vague that a new trial should be ordered. *South Eastern R. Co. v. Smitherman*, 47 J. P. 773.

In an action for the death of a switchman, the company was charged with negligence in the construction of its roadbed and track, and its failure to keep the latter in proper repair. At the trial all of the witnesses were introduced by the plaintiff except one, every one of whom, who knew or claimed to know the condition of the track, testified that it was in a safe condition. The jury, nevertheless, found specially that the track was not in proper repair, and upon such findings found a general verdict for the plaintiff. *Held*, that

the special findings were not reconcilable with the facts proven, and the general verdict should be set aside. *St. Louis Bridge Co. v. Fellows*, 31 Ill. App. 282.

A boy nearly ten years of age was killed while attempting to cross a track in a city by a train that was running at an unlawful speed. The jury found specially that he was old enough to comprehend the danger, and that he was in a position to see the train before he went on the track, but further found that he could not have avoided the accident by the exercise of ordinary care. *Held*, in the absence of any evidence showing that there was any necessity of his attempting to cross the track, that the findings were inconsistent, and that a verdict for the plaintiff should be set aside. *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.—FOLLOWED IN *Burns v. North Chicago Rolling Mill Co.*, 19 Am. & Eng. R. Cas. 412, 60 Wis. 541; *Kearney v. Chicago, M. & St. P. R. Co.*, 47 Wis. 144.

M., a young and vigorous man, whose sight and hearing were sound and unimpaired, being at a point about 253 feet west of a railroad, in a village, and having his horses hitched on the same street about 225 feet east of the railroad, heard the long whistle of an approaching locomotive, and immediately began running down the street towards his horses. At that time the train was about half a mile distant from the street crossing, and it whistled again when about a quarter of a mile distant; it was hidden from M.'s sight until he was within about twenty feet of the track, when he might have seen it by looking in that direction; and, being a light special train, it was running about forty miles an hour, and without ringing the bell on its approach. The passenger trains of the company usually ran at the rate of twenty miles, and its freight trains at the rate of twelve miles, an hour; and a freight train was due near that time. M. did not cease running, or diminish his speed, until he was in the act of stepping on the first rail of the main track, when he was struck by the train and killed, the whistle for brakes being sounded at the same moment. The jury, by special verdict, found that M., after hearing the whistle and the noise of the train, and seeing it, attempted to cross the track in front of the locomotive; that if he had stopped just before going upon the land included within defendant's right of way, and looked in the

proper direction, he could have seen the train; and that he was not guilty of any want of ordinary care in running upon the track as he did. *Held*, that in view of the evidence, these findings were inconsistent, and it was error to refuse a new trial. *Kearney v. Chicago, M. & St. P. R. Co.*, 47 Wis. 144, 2 N. W. Rep. 82, 21 Am. Ry. Rep. 43.—FOLLOWING *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.—FOLLOWED IN *Burns v. North Chicago Rolling Mill Co.*, 19 Am. & Eng. R. Cas. 412, 60 Wis. 541.

301. Apportioning the award of damages.—Where the complaint apportioned the amount claimed among the widow and children of the deceased, a verdict apportioning to the widow or children sums in excess of that claimed for them is erroneous. *International & G. N. R. Co. v. McDonald*, 42 Am. & Eng. R. Cas. 211, 75 Tex. 41, 12 S. W. Rep. 860.

It is no ground for a new trial that the jury have not made separate awards of damages to the wife and children respectively. The court can distribute the amounts if desired. *McLeod v. Windsor & A. R. Co.*, 23 Nov. Sc. 69.

302. Interpreting the verdict.—A verdict that the death "was caused by the gross negligence of the defendant, without any fault" of the deceased, is substantially an affirmative finding that the deceased during the whole transaction resulting in his death exercised due care and diligence to protect himself from injury, and to do his duty toward his employer. *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512.—QUOTED IN *Hannibal & St. J. R. Co. v. Fox*, 15 Am. & Eng. R. Cas. 325, 31 Kan. 586.

XIII. DAMAGES.

1. Statutory Provisions—Limit of Amount.

303. Alabama.—The statute which gives a right of action to the personal representative of a person whose death was caused by the "wrongful act or omission of another," and declares that he may "recover such sum as the jury may deem just" (Code, § 2641), only applies to cases in which death resulted from the wrongful act or omission, leaving other actions for personal injuries to be governed, as to the measure of damages, by other statutory provisions (Code, §§ 1699, 1700) or by the principles of the common law. *East Tenn.*,

have seen the guilty of any thing upon the in view of the inconsistent, a new trial. *U. P. R. Co.*, 47 *1 Am. Ry. Rep.* Chicago & N. W. WED IN Burns Ill Co., 19 Am. 541.

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uit of Amount. statute which personal repreose death was or omission of he may "reay deem just" es to cases in the wrongful her actions for rned, as to the ther statutory oo) or by the *v. East Tenn.*,

V. & G. R. Co. v. King, 31 *Am. & Eng. R. Cas.* 385, 81 *Ala.* 177, 2 *So. Rep.* 152.

Section 2589 of the Code (Homicide Act) does not limit the recovery for a death caused by wrongful act to actual damages sustained by surviving relatives of the deceased, although there is an absence of evidence of wanton or wilful negligence. *Kansas City, M. & B. R. Co. v. Sanders*, 58 *Am. & Eng. R. Cas.* 140, 98 *Ala.* 293, 13 *So. Rep.* 57.

304. Connecticut.—The act of 1853, (Rev. St. 1866, p. 202), making railroad companies liable for negligently causing death, in a sum not less than \$1000 nor more than \$5000, is a remedial statute and not a penal one. *Lamphear v. Buckingham*, 33 *Conn.* 237.

Under that act such damages are based upon the injury to the deceased, and not upon the pecuniary loss to the relatives, to whom the damages would be distributed. *Goodsell v. Hartford & N. H. R. Co.*, 33 *Conn.* 51.

If the plaintiff is entitled to recover at all, the lowest sum that can be allowed is the minimum one of \$1000 fixed by the statute. *Lamphear v. Buckingham*, 33 *Conn.* 237.

Where the action is under the above statute, and a demurrer by the defendant is overruled, and the court hears the case in damages, the demurrer admits, among other things, the question of the defendant's negligence, and the plaintiff is entitled to recover at least the minimum fixed by the statute, though the court may find as a fact that the defendant was not guilty of negligence. *Lamphear v. Buckingham*, 33 *Conn.* 237.

305. Georgia.—Though an amending statute may have different objects and purposes from those of the original, it is germane thereto if it be upon the same subject. This applies to the statute amendatory of the code section upon the subject of giving a right to recover damages for homicide. *Clay v. Central R. & B. Co.*, 42 *Am. & Eng. R. Cas.* 76, 84 *Ga.* 345, 10 *S. E. Rep.* 967.

That the amending statute prescribes the measure of damages to be the full value of the life of deceased, with no deduction for his necessary or personal expenses had he lived, does not render it unconstitutional. It is as general a law as the law it amends; and the legislature is not prohibited from prescribing a rule for the measure of damages. *Clay v. Central R. & B. Co.*, 42 *Am.*

& Eng. R. Cas. 76, 84 *Ga.* 345, 10 *S. E. Rep.* 967.

306. Illinois.—Under the statute, the amount of recovery for the death of one killed by the negligence of a railroad, is limited to the pecuniary loss to the wife or next of kin, not to exceed \$5000; but the amount must depend very much on the good sense and sound judgment of the jury, under the facts of the case. *Illinois C. R. Co. v. Barron*, 5 *Wall. (U. S.)* 90.—APPLIED IN *Kansas Pac. R. Co. v. Lundin*, 3 *Colo.* 94. QUOTED IN *Holland v. Brown*, 13 *Sawyer. (U. S.)* 284; *James v. Richmond & D. R. Co.*, 92 *Ala.* 231; *Kansas Pac. R. Co. v. Cutter*, 19 *Kan.* 83; *Johnson v. Wells*, 6 *Nev.* 224. REVIEWED IN *Howard v. Delaware & H. Canal Co.*, 40 *Fed. Rep.* 195.

307. Maine.—The forfeiture provided by the Act of 1855, ch. 161, against railroad companies for negligently causing death, cannot be enforced against a company where its road is in the hands of mortgagees, and operated and controlled by them. *State v. Consolidated European & N. A. R. Co.*, 67 *Me.* 479, 16 *Am. Ry. Rep.* 371.

308. Missouri.—(1) *Not to exceed \$5000.*—The measure of damages in an action brought by the legal representative of an employé against the company for his death, is not the fixed sum of \$5000, but a sum not exceeding \$5000. The right of action is given by section 3 and not section 2 of the Damage Act. *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 18 *Am. & Eng. R. Cas.* 23, 78 *Mo.* 195.—FOLLOWED IN *Schlereth v. Missouri Pac. R. Co.*, 96 *Mo.* 509, 10 *S. W. Rep.* 66.—*Schlereth v. Missouri Pac. R. Co.*, 96 *Mo.* 509, 10 *S. W. Rep.* 66.—FOLLOWING *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 *Mo.* 201; *Holmes v. Hannibal & St. J. R. Co.*, 69 *Mo.* 536; *Elliott v. St. Louis & I. M. R. Co.*, 67 *Mo.* 272.—*Tetherow v. St. Joseph & D. M. R. Co.*, 98 *Mo.* 74, 11 *S. W. Rep.* 310.

A statutory provision that a company shall be liable for a penalty of \$5000, "when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof," has no application to the case of a person killed while crossing a railroad because of negligence in failing to provide a proper crossing, and it is error for the court in such case to direct the jury that if they find for the plaintiff the verdict must be for

the fixed sum of \$5000. *Crumpley v. Hannibal & St. J. R. Co.*, 37 *Am. & Eng. R. Cas.* 357, 98 *Mo.* 34, 11 *S. W. Rep.* 244.

If death results from the failure of the railroad company to erect a sign-board at the crossing, the amount of damages is governed by section 2123, Rev. St. 1879, not exceeding five thousand dollars, as the jury may deem fair and just, having reference to the necessary injuries. *King v. Missouri Pac. R. Co.*, 98 *Mo.* 235, 11 *S. W. Rep.* 563.—FOLLOWING *Crumpley v. Hannibal & St. J. R. Co.*, 98 *Mo.* 34.

Under the Damage Act, Rev. St. 1889, § 4425, the statutory sum of \$5000 is not recoverable of a railway company, when the party killed was not a passenger, and his death resulted from other negligence than that occurring in the "running, conducting, or managing any locomotive, car, or train of cars." *Rapp v. St. Joseph & I. R. Co.*, 106 *Mo.* 423, 17 *S. W. Rep.* 487.—FOLLOWING *Crumpley v. Hannibal & St. J. R. Co.*, 98 *Mo.* 34.

(2) *Fixed penalty of \$5000.*—Where a railroad neglects to ring the bell or to sound the whistle of its locomotive at a public crossing as required by Rev. St. 1889, § 2608, and the death of a person crossing the track is thereby occasioned, a recovery of \$5000 under Rev. St. 1889, § 4425, is authorized. *Kenney v. Hannibal & St. J. R. Co.*, 105 *Mo.* 270, 15 *S. W. Rep.* 983, 16 *S. W. Rep.* 837. *King v. Missouri Pac. R. Co.*, 98 *Mo.* 235, 11 *S. W. Rep.* 563. *Crumpley v. Hannibal & St. J. R. Co.*, 37 *Am. & Eng. R. Cas.* 357, 98 *Mo.* 34, 11 *S. W. Rep.* 244.—REVIEWING *Sullivan v. Missouri Pac. R. Co.*, 97 *Mo.* 113.—FOLLOWED IN *King v. Missouri Pac. R. Co.*, 98 *Mo.* 235, 11 *S. W. Rep.* 563; *Rapp v. St. Joseph & I. R. Co.*, 106 *Mo.* 423.

The term "damages," in section 2608, includes damages accruing under section 4425 (Rev. St. 1889) where death results, in the circumstances described in the latter, from negligence consisting of the failure to give the signals mentioned in the former. *Kenney v. Hannibal & St. J. R. Co.*, 105 *Mo.* 270, 15 *S. W. Rep.* 983, 16 *S. W. Rep.* 837.

Where one is killed at a railroad crossing by reason of the negligence of an employé of the company in failing to have the head-light burning on the locomotive, the case falls under Mo. Rev. St. 1879, § 2121, and the damages assessed are fixed at \$5000.

Becke v. Missouri Pac. R. Co., 45 *Am. & Eng. R. Cas.* 174, 102 *Mo.* 544, 13 *S. W. Rep.* 1053.

Where deceased was killed on the tracks of a railroad company while using them in towing sand-boats, his widow, in case she prevails in the action, is entitled to recover \$5000, and an instruction fixing that amount in case of recovery is proper. *Le May v. Missouri Pac. R. Co.*, 105 *Mo.* 361, 16 *S. W. Rep.* 1049.

The damages to be recovered for killing one walking on the track by reason of gross negligence are the fixed sum of \$5000. *Guenther v. St. Louis, I. M. & S. R. Co.*, 108 *Mo.* 18, 18 *S. W. Rep.* 846.

Where a minor child is killed by negligence in running a locomotive, the measure of recovery by its parents, under the statute (Rev. St. 1889, § 2305), is \$5000. *Tobin v. Missouri Pac. R. Co.*, (Mo.) 18 *S. W. Rep.* 996.

The statute provides that, whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unreasonableness, or criminal intent of any officer or employé while running or managing any locomotive or car, the employer shall forfeit \$5000 which may be sued for and recovered by the parent. *Held*, that the provisions of the statute covered a case where a child was killed by reason of the negligence of the street-car company to comply with an ordinance of the city requiring bells to be placed on the horses drawing the car. *Lynch v. Metropolitan St. R. Co.*, 56 *Am. & Eng. R. Cas.* 571, 112 *Mo.* 420, 20 *S. W. Rep.* 642.

The representative of the deceased employé killed by the negligence of a vice-principal is entitled to recover the fixed sum of \$5000 under the second section of the Damage Act. *Miller v. Missouri Pac. R. Co.*, 53 *Am. & Eng. R. Cas.* 598, 109 *Mo.* 350, 19 *S. W. Rep.* 58.—APPROVING *Sullivan v. Missouri Pac. R. Co.*, 97 *Mo.* 113. CRITICISING *Elliott v. St. Louis & I. M. R. Co.*, 67 *Mo.* 272. FOLLOWING *Proctor v. Hannibal & St. J. R. Co.*, 64 *Mo.* 117. REVIEWING *Schultz v. Pacific R. Co.*, 36 *Mo.* 14; *Connor v. Chicago, R. I. & P. R. Co.*, 59 *Mo.* 285.

The deceased and the engineer not being fellow-servants, the damages are the fixed statutory penalty of \$5000 prescribed by Rev. St. 1879, § 2121. *Schlereth v. Missouri Pac. R. Co.*, 115 *Mo.* 87, 21 *S. W. Rep.* 1110.

(3) *Not to exceed \$2000.*—In actions for

injuries resulting in the death of an employé by negligence, under Rev. St. ch. 25, § 2123, the measure of damages is "such damages, not exceeding two thousand dollars, as the jury may deem fair and just, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default." In the absence of evidence tending to show aggravation the word "necessary" means the same as "pecuniary," and the damages are merely compensatory. *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344.

360. New Hampshire.—The damages recoverable under the Act of 1879, ch. 135, for negligently causing death, are confined to the suffering before the death of the deceased, and do not extend to injuries beyond his life, or loss to his next of kin. *Clark v. Manchester*, 62 N. H. 577.

370. New York.—The limitation imposed by the laws of this state upon the amount of recovery must be applied where plaintiff has voluntarily availed herself of our remedial procedure, although no limitation is imposed by the law of the state where the accident occurred. *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. Rep. 1050, 36 N. Y. S. R. 387; *affirming* 35 N. Y. S. R. 685, 12 N. Y. Supp. 908.

371. Pennsylvania.—That portion of section 2 of the act of April 4, 1868 (P. L. p. 58), limiting the amount which can be recovered against railroad companies for negligence causing loss of life to \$5000, is still operative and was not avoided by art. 3, section 21 of the present constitution. Such act, having been formally adopted by the Pennsylvania Railroad Co. under the provisions of section 4 thereof, the same has become a part of the charter of said company, and charters of all private corporations are left exactly as the new constitution found them. *Pennsylvania R. Co. v. Langdon*, 1 Am. & Eng. R. Cas. 87, 92 Pa. St. 21. —DISTINGUISHED IN *Lewis v. Hollahan*, 103 Pa. St. 425. EXPLAINED IN *Philadelphia, W. & B. R. Co. v. Conway*, 112 Pa. St. 511. OVERRULED IN PART IN *Pennsylvania R. Co. v. Bowers*, 37 Am. & Eng. R. Cas. 353, 124 Pa. St. 183.

The act of April 4, 1868 (P. L. p. 58), § 2,

limiting the liability of railroad companies to \$5000 in case of death caused by their negligence, was a general law, applicable to non-accepting as well as to accepting carriers or corporations of the class therein mentioned. The only effect of a refusal to accept its provisions was to deprive the non-accepting corporation of the means of indemnity provided in § 3 of said act, and also of the benefits resulting from a modification of its charter as provided for in § 4. *Lewis v. Hollahan*, 103 Pa. St. 425.—FOLLOWED IN *Conway v. Philadelphia, W. & B. R. Co.*, 17 Phila. (Pa.) 71. OVERRULED IN PART IN *Pennsylvania R. Co. v. Bowers*, 37 Am. & Eng. R. Cas. 353, 124 Pa. St. 183.

The constitution of 1874, art. 3, § 21, providing that "no act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property," abrogated section 2 of the act of 1868, limiting the liabilities of railroads to \$5000 in case of death from negligence. *Lewis v. Hollahan*, 103 Pa. St. 425.—DISTINGUISHING *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 34.—*Conway v. Philadelphia, W. & B. R. Co.*, 17 Phila. (Pa.) 71.

A statutory provision that the amount to be recovered in actions against railroad companies shall be limited to \$3000 in cases of personal injuries, and \$5000 in cases of death, and that "upon the acceptance of the provisions hereof by any carrier or corporation, the same shall become a part of its act of incorporation," does not, by acceptance of the provisions of the act by a company incorporated before its enactment, become a contract between the company and the state which cannot be abrogated by the repeal of the statute. *Pennsylvania R. Co. v. Bowers*, 37 Am. & Eng. R. Cas. 353, 124 Pa. St. 183, 16 Atl. Rep. 836.—OVER-RULING IN PART *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; *Lewis v. Hollahan*, 103 Pa. St. 425.—DISTINGUISHED IN *Glovinger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13.

372. Texas.—Rev. St. art. 2909, authorizing a jury, in an action for causing death, to give such damages as they may think proportioned to the injury, includes not damages for the pain and suffering of the deceased, but refers only to the pecuniary loss resulting to the relatives. *Southern C. P. & M. Co. v. Bradley*, 52 Tex. 587.

2. *Elements and Measure of Damages.*a. *In General.*

373. General rules for assessing damages.*—In case by the administrator to recover for injuries occasioned by negligence and resulting in the death of his intestate, the jury, in estimating the damages, should take the facts in proof, and, connecting them with the knowledge and experience possessed by them in common with men in general, arrive at a rule which should be just between the parties. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

In an action by a widow for the death of her husband, caused by a failure of the company to maintain a sufficient crossing, as required by the Missouri act of March 27, 1885, in assessing the damages, the jury may consider the age, health, and habits of the husband, and his capacity for earning money. *Hogue v. Chicago & A. R. Co.*, 32 *Fed. Rep.* 365.

Also his ability to furnish care and attention to his family, and the probable diminution of that ability to labor with the lapse of time. *Chattanooga, R. & C. R. Co. v. Cloudis*, 90 *Ga.* 258, 17 *S. E. Rep.* 88.

The jury should give what they consider fair compensation, and are not required to estimate the damages according to the value of the deceased's life calculated by annuity tables. *Armstrong v. South Eastern R. Co.*, 11 *Jur.* 758.—APPROVED IN *Rowley v. London & N. W. R. Co.*, 29 *L. T.* 180, *L. R.* 8 Ex. 221, 21 *W. R.* 869.

There is no invariable rule for estimating the value of a life. Age, health, habits, money made by one's labor, furnish data from which such value may be decided by a jury. Tables of the probable length of life and its probable worth may be useful, but are not conclusive or absolutely essential for that purpose. *Savannah, F. & W. R. Co. v. Stewart*, 71 *Ga.* 427.

A charge to a jury that they are not to take into consideration the pain suffered by the deceased, or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man

of his age, with the business and means which he had, or a possibility of a decrease of the same—*held*, under the circumstances of the case, to present no error. *Kansas Pac. R. Co. v. Cutter*, 19 *Kan.* 83, 17 *Am. Ry. Rep.* 471.

The reasonable expectancy of decedent's life as shown by the testimony of a physician and by mortality tables is a proper fact to be considered by the jury in estimating the damages. *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 *Mo.* 205, 21 *S. W. Rep.* 503. *Scheffler v. Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 173, 32 *Minn.* 518, 21 *N. W. Rep.* 711.

In an action for the death of an intestate, brought by an administrator for the benefit of the next of kin, the jury in assessing damages should look not merely to the degree of relationship the deceased bore to his kindred, but his condition of life at the time of his death, and the reasonable expectation they might have had of pecuniary assistance from him if he had survived. *Groff v. Cincinnati & I. R. Co.*, 1 *Cin. Super. Ct.* 264.—APPROVING *Franklin v. Southeastern R. Co.*, 3 *H. & N.* 211. FOLLOWING *Johnston v. Cleveland & T. R. Co.*, 7 *Ohio St.* 336. QUOTING *Pym v. Great Northern R. Co.*, 4 *B. & S.* 396.

Under the statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property, are all to be considered in estimating the damages; and this would include skill in the management of wealth, or capacity to manage affairs which would be of an advantage to an estate, and the loss of which would prove a detriment to it. *Skottowe v. Oregon S. L. & U. N. R. Co.*, 51 *Am. & Eng. R. Cas.* 444, 22 *Oreg.* 430, 30 *Pac. Rep.* 222, 16 *L. R. A.* 593.

374. Discretionary power of the jury.—There is no fixed rule to determine compensation in case of death caused by the negligence of another; each particular case must stand on the facts of that case, and in every such case the jury may give such damages as they may think apportionate to the injuries resulting from such death. *Missouri Pac. R. Co. v. Perego*, 36 *Kan.* 424, 14 *Pac. Rep.* 7. *Houston & T. C. R. Co. v. Shaw*, 2 *Tex. Unrep. Cas.* 553.—QUOTING *Houston & G. N. R. Co. v. Randall*, 50 *Tex.* 261.

They may give such damages as to them

* What matters are to be considered by jury in estimating damages for wrongfully causing death, see 44 *AM. & ENG. R. CAS.* 458, *alstr.*

"may seem fair and just." *Matthews v. Warner*, 29 *Gratt. (Va.)* 570.—QUOTED IN *Webb v. Denver & R. G. W. R. Co.*, 7 *Utah* 17.

The question as to the amount of damages sustained by reason of the death is for the jury to determine, under such testimony as to the measure of damages as may be submitted to them. *Johnson v. Missouri Pac. R. Co.*, 23 *Am. & Eng. R. Cas.* 429, 18 *Neb.* 690, 26 *N. W. Rep.* 347. *Hooghkirk v. Delaware & H. Canal Co.*, 63 *How. Pr. (N. Y.)* 328, 11 *Abb. N. Cas.* 72.

If the jury believe that pecuniary injury has resulted from the death, they may fix the damages at anything they may believe just and right within the statutory limitation. *Cornwall v. Mills*, 12 *J. & S. (N. Y.)* 45.

But they are not warranted in giving damages not founded upon the testimony, or beyond the measure of compensation for the injury inflicted, or founded upon their fancy, or based upon visionary estimates of probabilities or chances; and it has been held, with rare exceptions, that they must be confined to those damages which are capable of being measured by a pecuniary standard. *Batch v. Grand Rapids & I. R. Co.*, 67 *Mich.* 394, 11 *West. Rep.* 476, 34 *N. W. Rep.* 884.—QUOTING *Cooper v. Lake Shore & M. S. R. Co.*, 66 *Mich.* 271.

375. The measure of damages, generally.*—Where a personal representative sues under the Illinois statute for the benefit of the father and brothers and sisters of the deceased, proof that the latter contributed a portion of his wages to the support and education of his younger brothers will entitle the plaintiff to recover more than nominal damages. *Illinois & St. L. R. Co. v. Whalen*, 19 *Ill. App.* 116.

Where death results instantly from injuries caused by neglect of a railroad company other than wilful neglect, the jury, in estimating damages, can only inquire as to the value of the decedent's power to earn money, which is the measure of damages; it is error to instruct the jury that upon

* Measure of damages in actions for death, see notes, 21 *AM. & ENG. R. CAS.* 201; 7 *Id.* 30; 19 *Id.* 176; 31 *Id.* 336; 12 *AM. ST. REP.* 378; 2 *L. R. A.* 520.

The various state decisions reviewed, see note, 17 *L. R. A.* 71.

Actions for causing death of various relatives. Amount of recovery therein, see note, 17 *L. R. A.* 76.

proof of simple negligence they may "give such damages as they deem just and proper by way of compensation, not exceeding the amount claimed in the petition." *Louisville, C. & L. R. Co. v. Case*, 9 *Bush (Ky.)* 728.—FOLLOWED IN *Givens v. Kentucky C. R. Co.*, 89 *Ky.* 231.

The plaintiffs are only entitled to such damages as the deceased himself could have claimed had he recovered at the moment when he died; that is, compensation for the suffering endured by him between the accident and death. *Towns v. Vicksburg, S. & P. R. Co.*, 37 *La. Ann.* 630, 55 *Am. Rep.* 508.

The damages recoverable under *Oreg. Civ. Code*, § 367, by an administrator for the death of his intestate, are general assets of the estate, and are given merely as a pecuniary compensation for the death, and not as a *solutum*; nor are they to be exemplary or vindictive, but according to the value of the life, having due regard to the capacity and disposition of the deceased to be useful—to labor and to save. *Holmes v. Oregon & C. R. Co.*, 6 *Sawyer. (U. S.)* 262.

As to the measure of damages, compensation is the rule, where from the nature of the case it can be applied. *Nashville & C. R. Co. v. Smith*, 6 *Heisk. (Tenn.)* 174.—APPROVED IN *Louisville, N. & G. S. R. Co. v. Guinan*, 11 *Lea (Tenn.)* 98.

Under *Tenn. Code*, §§ 2291–2293, the rule as to the amount of damages recoverable is the same whether the injured party lives a time, and suit is brought in his lifetime, or whether death is instantaneous. *Fowlkes v. Nashville & D. R. Co.*, 5 *Baxt. (Tenn.)* 663.—APPROVED IN *Roach v. Consolidated Imperial Min. Co.*, 7 *Sawyer. (U. S.)* 224.

In an action for the death of a person who had covenanted to pay the plaintiff an annuity, the jury may estimate the damages by calculating what sum would buy an equally good annuity. This sum may be determined by tables of mortality and the practice of life insurance companies. *Rowley v. London & N. W. R. Co.*, 42 *L. J. Ex.* 153, *L. R.* 8 *Ex.* 221, 21 *W. R.* 869, 29 *L. T.* 180.—FOLLOWED AND EXPLAINED IN *Phillips v. London & S. W. R. Co.*, 27 *W. R.* 797, *L. R.* 4 *Q. B. D.* 406, 40 *L. T.* 813.

376. Elements of damage.*—The ordinary grounds of damage are the ex-

* Elements of damages for causing death, see note, 12 *AM. ST. REP.* 375.

pense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought to be given for distress and anxiety of mind in view of approaching death while in imminent danger from the injury received, and to the close of life. *Corliss v. Worcester, N. & R. R. Co.*, 21 *Am. & Eng. R. Cas.* 208, 63 *N. H.* 404.

As to pecuniary injury sustained by the next of kin, in case of death by negligence, the statute has set no bounds to the sources thereof; and they may be such as arise from the loss of personal care, intellectual culture, or moral training which would have been received had the deceased lived. *McIntyre v. New York C. R. Co.*, 37 *N. Y.* 287, 35 *How. Pr.* 36; *affirming* 47 *Barb.* 515.—*APPLYING* *Tilley v. Hudson River R. Co.*, 24 *N. Y.* 471, 29 *N. Y.* 252.—*QUOTED IN* *Kansas Pac. R. Co. v. Cutter*, 19 *Kan.* 83. *REVIEWED IN* *Little Rock & Ft. S. R. Co. v. Barker*, 39 *Ark.* 491; *Mitchell v. New York C. & H. R. Co.*, 2 *Hun (N. Y.)* 535.

377. Suffering of deceased.*—Where the action is under the Iowa statute, nothing can be allowed for the wounded feelings or grief of the relatives, nor for the pain and suffering of the deceased. *Kelley v. Central R. Co.*, 48 *Fed. Rep.* 663. *Dwyer v. Chicago, St. P. & O. R. Co.*, 84 *Iowa* 479, 51 *N. W. Rep.* 244.—*QUOTING* *Rose v. Des Moines R. Co.*, 39 *Iowa* 246.

Where the action is under the Louisiana Code, to recover for the death of one by drowning, the sufferings of the deceased, between the time of falling into the water and that of drowning, are deemed simultaneous with the death, and therefore cannot be taken into account in assessing the damages. *Cheatham v. Red River Line*, 56 *Fed. Rep.* 248.—*FOLLOWING* *The Corsair*, 145 *U. S.* 335, 12 *Sup. Ct. Rep.* 949.

Where the action is under the Massachusetts statute for causing death, and the evidence shows that the deceased fell some twenty feet, and upon striking became unconscious, and remained so until the time of his death, there can be no recovery for the physical or mental suffering endured by the deceased during the fall. *Kennedy v. Standard Sugar Refinery*, 125 *Mass.* 90.

In an action under *How. (Mich.) Stat.* §

*When damages are allowed in actions for causing death, for suffering of deceased, see note, 12 *AM. ST. REP.* 377.

8314, by personal representatives for the death of their decedent, the mental sufferings and injured feelings, or any other injuries not susceptible of being compensated for by a money consideration to the beneficiaries, under the statute, should be excluded by the jury in determining the amount of damages. *Mynning v. Detroit, L. & N. R. Co.*, 23 *Am. & Eng. R. Cas.* 317. 59 *Mich.* 257, 26 *N. W. Rep.* 514.

378. Extent of recovery by personal representative.—The plaintiff is entitled to recover the damages suffered by the loss of the support and maintenance of the widow and minor children of the deceased, in addition to any prospective accumulation of property. *Lake Erie & W. R. Co. v. Mugg*, 132 *Ind.* 168, 31 *N. E. Rep.* 564.—*DISTINGUISHING* *Howard v. Delaware & H. Canal Co.*, 40 *Fed. Rep.* 195.

Where, after commencing an action to recover for injuries sustained, the plaintiff dies, and his administrator is substituted, he may, as such, recover the amount due his decedent at the time suit was brought, including compensation for his bodily pain and suffering. In such action the plaintiff may recover for everything which was a proper charge against him, and which he was obliged to pay in consequence of the injury, including nursing and use of the house which afforded him shelter. *Muldowney v. Illinois C. R. Co.*, 36 *Iowa* 462.

Where the action is by an administrator, under the Iowa statute, to recover damages for the death of a minor child, there can be no recovery for damages accruing during the minority of the child. During that time the father is entitled to the damages. *Morris v. Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 22.

In an action of trespass by an administrator to recover for injury to property of his intestate, happening in his lifetime from the gross negligence of the defendant, whereby the intestate was mortally injured, neither the personal injury to the deceased, nor the injury to his feelings, nor his death, can be considered on the question of damages. *Sawyer v. Concord R. Co.*, 58 *N. H.* 517.

Section 5498, *S. Dak. Comp. Laws*, which provides that, "if the life of any person * * * shall be lost, * * * the personal representative may institute suit, and recover damages in the same manner that the person might have done for any injury when

death did not ensue," is a survival statute, and the only damages recoverable under the section are such as the estate has sustained, but not for the loss of the life of the deceased. *Belding v. Black Hills & Ft. P. R. Co.*, (S. Dak.) 52 Am. & Eng. R. Cas. 624, 53 N. W. Rep. 750.

The damages claimed in this action are those alleged to have been sustained by the widow and children, and not the estate. The personal representative is not authorized to institute an action in behalf of or for the benefit of the widow and children under that statute. The complaint, therefore, is fatally defective under sections 5498 and 5499. *Belding v. Black Hills & Ft. P. R. Co.*, (S. Dak.) 52 Am. & Eng. R. Cas. 624, 53 N. W. Rep. 750.

In an action by the administrator, or the widow, or next of kin, the damages recoverable are those suffered by the party killed, and which he could have recovered if he had lived, and not those suffered by his widow and children, in consequence of his death. *Louisville & N. R. Co. v. Burke*, 6 *Coldw.* (Tenn.) 45.

Damages are to be allowed not only for the pain and suffering of the deceased, but also for the loss and deprivation occasioned to the wife and children. *Nashville & C. R. Co. v. Smith*, 6 *Heisk.* (Tenn.) 174.—QUOTING *Nashville & C. R. Co. v. Prince*, 2 *Heisk.* 585.

In an action by the administrator of a decedent to recover damages for causing his death, under the provisions of sections 2291 *et seq.* of the Tenn. Code, the loss or injury to the children or next of kin occasioned by the death does not constitute an element of damage. *Chicago, St. L. & N. O. R. Co. v. Pounds*, 15 Am. & Eng. R. Cas. 510, 11 *Lea* (Tenn.) 127.—FOLLOWING *Trafford v. Adams Exp. Co.*, 8 *Lea* 96.

In an action by the administrator of the wife, for injuries to her, no damages can be recovered for any loss of the labor of the intestate that belonged to her husband. *Earl v. Tupper*, 45 *VI.* 275.

379. Deducting insurance money.—The amount of damages to which a widow is entitled from a railroad company for the homicide of her husband should not be reduced by an insurance on his life received by her. *Western & A. R. Co. v. Meigs*, 74 *Ga.* 857. *Althorff v. Wolfe*, 22 *N. Y.* 355; *affirming* 2 *Hill.* 344.

The amount of life insurance left by the

deceased should be deducted from the damages where relatives sue for his death. *Hicks v. Newport, A. & H. R. Co.*, 4 *B. & S.* 403, *n.* But see *Yates v. White*, 4 *Bing. N. C.* 272, 5 *Scott.* 640.

The amount of life insurance on the life of a man killed by the negligence of a railway cannot be deducted from the amount of damages. *Grand Trunk R. Co. v. Beckett*, 16 *Can. Sup. Ct.* 713, *affirming* 13 *Ont. App.* 174, *which affirms* 8 *Ont.* 601.

Although the right to recover damages for the death of a relative occasioned by the wrongful act, neglect, or default of another is, under the R. S. O. (1887), ch. 135, limited to the actual pecuniary loss sustained by the plaintiff, the amount of a policy falling in by the death is not necessarily to be allowed or disallowed in computing the damages. It is merely a circumstance to be taken into consideration by the jury on viewing the whole question of pecuniary loss or gain in consequence of the death. *Jennings v. Grand Trunk R. Co.*, 15 *Ont. App.* 477.—APPROVING *Beckett v. Grand Trunk R. Co.*, 13 *Ont. App.* 174.

Where the widow of deceased is plaintiff, and her husband had made provision for her by a policy on his own life in her favor, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. *Grand Trunk R. Co. v. Jennings*, 13 *App. Cas.* 800.—APPLYING *Beckett v. Grand Trunk R. Co.*, 13 *Ont. App.* 174.

b. Pecuniary Loss to Beneficiaries.

380. Pecuniary loss the sole measure of damages.*—The damages for death by negligence are the pecuniary loss sustained by the parties entitled to maintain the action. *Caldwell v. Brown*, 53 *Pa. St.* 453. *Gaither v. Kansas City, etc., R. Co.*, 27 *Fed. Rep.* 544.

Under the Ill. St. of 1874 a recovery is limited to the financial or pecuniary loss by the death of the deceased. Expenses in-

* Pecuniary loss sustained as measure of damages, see note, 48 AM. & ENG. R. CAS. 528.

curred or paid for medical attendance, care, and nursing, or otherwise, in the endeavor to effect a cure, the agony and pain suffered by the injured party, the loss of earnings while sick, or the disability by the injury cannot be considered in estimating the amount of damages. The sole measure of damages is the pecuniary loss of the widow and next of kin, occasioned by the destruction of the life of the deceased person. *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105.

In an action by an administrator to recover for injury to the state of his intestate, whose death was caused by the negligence of the company's employes, the measure of damages is the amount which will compensate the estate for the pecuniary loss sustained by the death of the deceased. *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326.—QUOTED IN *Dwyer v. Chicago, St. P. & O. R. Co.*, 84 Iowa 479. REVIEWED IN *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.

In an action under How. Stat. §§ 3391, 3392, for the negligent killing of plaintiff's intestate the damages recoverable are limited to the pecuniary injury sustained by the persons entitled to share in the distribution of his personal estate, which distribution is governed by the statute existing at the time of the death of the intestate. *Richmond v. Chicago & W. M. R. Co.*, 49 Am. & Eng. R. Cas. 367, 87 Mich. 374, 49 N. W. Rep. 621. *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530, 44 N. W. Rep. 321. *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 N. W. Rep. 44.—FOLLOWED IN *Charlebois v. Gogebic & M. R. R. Co.*, 91 Mich. 59.

In case of a verdict in favor of the plaintiff he is entitled to recover such a sum as the jury may deem, from the evidence, a fair and just compensation to the next of kin for the pecuniary loss sustained by them, resulting from the death which is made the basis of the suit, not exceeding the statutory amount. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 52 N. W. Rep. 840.

The measure of damages, under the Pa. Act of April 26, 1855, where death results through negligence, is such compensation only as the evidence shall clearly prove to have been pecuniarily suffered by the surviving relatives—in this case by the widow and children of the deceased. *Huntingdon*

& B. T. R. & C. Co. v. Decker, 84 Pa. St. 419.

The language of the statute (Paschal's Dig. 16), "damages proportioned to the injury resulting from such death," is the same as in the English statute, and it is well settled that the damages given by such statutes are measured by the pecuniary injury to the respective parties entitled, including the loss of prospective advantage. *March v. Walker*, 48 Tex. 372.

The measure of damages is not the same as when a party himself sues for injuries received, and recovers compensation for physical and mental suffering. *March v. Walker*, 48 Tex. 372.—FOLLOWED IN *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

The wealth of a defendant cannot be taken into consideration, in arriving at the measure of compensation for the pecuniary loss suffered. The amount of the loss must be settled by proof. *Conant v. Griffin*, 48 Ill. 410.

The action, being a creature of the statute, must be governed by its provisions, and they provide only for compensatory damages, or approximate thereto, not for vindictive or exemplary damages. The verdict cannot exceed the amount of the loss proved. *Conant v. Griffin*, 48 Ill. 410.

381. Nothing allowed as a solatium.*—In an action to recover damages for the death of a relative, caused by negligence, sorrow and mental anguish caused by the death are not elements of damage, and nothing can be recovered as a solatium for wounded feelings, and the loss of society can only be considered for the purpose of estimating the pecuniary loss. *Morgan v. Southern Pac. Co.*, 54 Am. & Eng. R. Cas. 101, 95 Cal. 510, 30 Pac. Rep. 603.—DISTINGUISHING *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604; *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320. EXPLAINING *Beeeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20. FOLLOWING *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. OVERRULING *Cleary v. City R. Co.*, 76 Cal. 240.—FOLLOWED IN *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536.—*Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. Rep. 360.—FOLLOWED IN *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350.—*Kansas Pac. R.*

* Mental anguish not an element of damage in actions for causing death, see note, 13 L. R. A. 860.

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The damages recoverable are limited to a pecuniary compensation for the loss, except where exemplary damages are allowable. In determining the compensation no uniform rule can be given, but much should be left to the sound judgment of the jury; but the property, business, and financial prospects of the deceased may be considered, excluding the consideration of the grief or bereavement of the family. *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.—FOLLOWING *Chicago v. Major*, 18 Ill. 349; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400.—FOLLOWED IN *Conant v. Griffin*, 48 Ill. 410.—*Conant v. Griffin*, 48 Ill. 410.—FOLLOWING *Chicago v. Major*, 18 Ill. 349; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.

The damages are purely compensatory for pecuniary loss. No compensation can be given for wounded feelings or for the
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loss of the comfort or companionship of a relative, nor for the pain and suffering of the deceased. The basis on which the damages are to be estimated is the probable pecuniary loss of the widow or next of kin by reason of the death of the deceased, in view of all the facts and circumstances in evidence; and if the verdict is greatly in excess of the sum thus arrived at the court should set it aside or reduce it. *Hutchins v. St. Paul, M. & M. R. Co.*, 44 Minn. 5, 46 N. W. Rep. 79.

Under the Ohio statute the widow or next of kin may recover damages for the loss sustained by them; but the compensation is limited to the loss of the value of the services of the deceased as a supporter of the family, and does not include anything as a solace for wounded feelings. *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72. *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 22 Ohio L. J. 151.

382. What may be considered in estimating the pecuniary loss.*—The damages are limited to the amount that the deceased would probably have saved if he had lived, to be determined by considering the circumstances of the deceased, his occupation, age, health, habits as to industry, sobriety, and economy, the amount of his property, and the probable duration of his life. *Kelley v. Central R. Co.*, 48 Fed. Rep. 663.—REVIEWED IN *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

A pecuniary injury resulting from the death of a person can only be measured by the standard of the pecuniary value of the life of such person and its loss to the person entitled to damages. *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 20, 41 N. W. Rep. 847.

In estimating such damages the jury are entitled to consider the expectancy of the life of the deceased, the nature of his calling, the wages he was receiving, and his physical condition and habits of industry. *Wheeler v. Chicago, M. & St. P. R. Co.*, 49 Am. & Eng. R. Cas. 693, 85 Iowa 167, 52 N. W. Rep. 119.

The question as to what the deceased usually earned is material and important. *McIntyre v. New York C. R. Co.*, 37 N. Y. 287, 35 How. Pr. 36; affirming 47 Barb. 515.

* Facts which may be considered in estimating the pecuniary injury, see note, 48 AM. & ENG. R. CAS. 529.

Where the action is for the death of a woman the jury must consider her age and any other facts in evidence which tend to throw light upon her ability to earn money. *Morris v. Chicago, M. & St. P. R. Co.*, 26 *Fed. Rep.* 22.

383. What may not be considered.

—In an action under the statute to recover for the death of a person caused by the wrongful act, neglect, or default of defendant, the only question to be determined in estimating the damages is the pecuniary loss resulting from his death to the widow and next of kin. The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury cannot be considered in assessing the damages. The fact that the widow is deformed and disabled can in no wise increase or diminish the amount of damages she may be entitled to recover. But the support the widow would have been likely to receive from her husband is the controlling element in arriving at the measure of compensation for the pecuniary loss sustained. *Illinois C. R. Co. v. Baches*, 55 *Ill.* 379, 1 *Am. Ry. Rep.* 585.—QUOTED IN *Pennsylvania Co. v. Keane*, 143 *Ill.* 172. REVIEWED IN *Chicago & G. W. R. Co. v. Travis*, 44 *Ill. App.* 466.

Under *Mich. Comp. L. §§ 2350, 2351*, allowing the widow or next of kin of a person killed by the negligence of a railroad company to recover damages measured by the "pecuniary injuries" resulting to them—*held*, that their actual pecuniary circumstances are not to be considered; nor defendant's wealth. *Chicago & N. W. R. Co. v. Bayfield*, 37 *Mich.* 205.—DISAPPROVING *Potter v. Chicago & N. W. R. Co.*, 21 *Wis.* 372.—DISTINGUISHING *Dalton v. Southeastern R. Co.*, 4 *C. B. N. S.* 296; *Franklin v. Southeastern R. Co.*, 3 *H. & N.* 211.

Where death is caused by the wrongful act or neglect of another, the personal representative of the deceased can recover damages therefor only with reference to the pecuniary injury resulting from such death to the widow and next of kin of the deceased, and the intestate's cause of action cannot be taken into the account in assessing the damages. *Needham v. Grand Trunk R. Co.*, 38 *Vt.* 294.

384. Degree of relationship unimportant.—Under the Illinois statute, only nominal damages can be given for causing

death, unless there is proof of pecuniary loss to the next of kin; and this is so regardless of whether such next of kin are closely related to the deceased or not. A father is entitled to compensatory damages for the death of his minor son whose wages the father was entitled to. *Chicago & A. R. Co. v. Shannon*, 43 *Ill.* 338.

385. Reasonably expected advantages recoverable.—The damages recoverable for death are a sum reasonably sufficient to make good to the heirs of the deceased the pecuniary loss to them, occasioned by his death, not to exceed the statutory limit; and in determining the question the jury may consider any evidence tending to show what was the reasonable expectation of pecuniary benefit to said heirs from the continuance of the life of the deceased. *Collins v. Davidson*, 19 *Fed. Rep.* 83; *Scheffler v. Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 173, 32 *Minn.* 518, 21 *N. W. Rep.* 711; *Kesler v. Smith*, 66 *N. Car.* 154.—FOLLOWING *Dalton v. South-Eastern R. Co.*, 4 *C. B. N. S.* (93 *E. C. L.*) 296; *Pym v. Great Northern R. Co.*, 4 *B. & S.* (116 *E. C. L.*) 396; *Collier v. Arrington, Phil.* (N. Car.) 356.—*Nashville & C. R. Co. v. Stevens*, 9 *Heisk. (Tenn.)* 12, 19 *Am. Ry. Rep.* 363.—FOLLOWING *Nashville & C. R. Co. v. Prince*, 2 *Heisk.* 580. QUOTING *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 *N. Y.* 317; *McIntyre v. New York C. R. Co.*, 37 *N. Y.* 287.—*Franklin v. South Eastern R. Co.*, 3 *H. & N.* 211, 4 *Jur. N. S.* 565, 29 *L. J. Ex.* 25.—DISTINGUISHED IN *Sykes v. North Eastern R. Co.*, 32 *L. T.* 199, 44 *L. J. C. P.* 191, 23 *W. R.* 483.

If the plaintiff have a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, he can recover for it. The greater the value of the life in a pecuniary sense the more perfect the right of recovery. *Collins v. East Tenn., V. & G. R. Co.*, 9 *Heisk. (Tenn.)* 841, 20 *Am. Ry. Rep.* 46.

386. Measure of damages under this rule.—The damages recoverable, for injuries which resulted in the death of an employé, are limited to the pecuniary loss or injury sustained by the person or persons to whose benefit the recovery accrues; and the fact that the abstract right of recovery, in any particular case, depends on proof of gross negligence, wilful or intentional wrong, overcoming the defense of contributory negligence, does not increase

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In a statutory action against the employer, by the personal representative of a deceased employé (Code, §§ 2590, 2591), the recovery enuring to the benefit of the distributees of the decedent's estate, the proper measure of damages is not the aggregate amount of his net earnings during the probable duration of his life, estimated on the basis of his health, ability to labor, habits of sobriety, industry, and economy, gross annual earnings and expenditures, but such a sum as estimated on that basis, and with legal interest added, would aggregate that amount at the probable termination of his life, calculated by the American Mortuary Tables. *McAdory v. Louisville & N. R. Co.*, 94 *Ala.* 272, 10 *So. Rep.* 507.

The estimated accumulations of the deceased during the probable remainder of his life, having reference to his age, occupation, habits, bodily health, and ability, furnish the true measure of compensatory damages under the statute. *Denver, S. P. & P. R. Co. v. Woodward*, 4 *Colo.* 1. See also *Denver, S. P. & P. R. Co. v. Woodward*, 4 *Colo.* 162.

The amount of damages for death from negligence should be just compensation with reference to the pecuniary injury resulting to the beneficiary from such death. *Union Pac. R. Co. v. Dunden*, 34 *Am. & Eng. R. Cas.* 88, 37 *Kan.* 1, 14 *Pac. Rep.* 501. —REVIEWING *Atchison, T. & S. F. R. Co. v. Brown*, 26 *Kan.* 443; *Waite v. Teeters*, 36 *Kan.* 604; *Atchison, T. & S. F. R. Co. v. Weber*, 33 *Kan.* 543.

Under the Pa. Act of April 26, 1855, the damages to be recovered by the surviving relatives for an injury resulting in death, are confined to such as are capable of a pecuniary estimate; nothing is to be allowed for the mental sufferings of the survivors, or the corporal sufferings of the injured party. In case of loss in a minor son, the measure of damages is the pecuniary value of his services during his minority. It is error to instruct the jury that, in such case, the question of damages is one entirely for them. *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 318.—DISTINGUISHING *Pennsylvania R. Co. v. McCloskey*, 23 *Pa. St.* 526.—DISTINGUISHED IN *Walters v. Chicago, R. I. & P.*

R. Co., 36 *Iowa* 458; *Pennsylvania R. Co. v. Adams*, 55 *Pa. St.* 499; *Boss v. Providence & W. R. Co.*, 15 *R. I.* 149. FOLLOWED IN *Pennsylvania R. Co. v. Vandever*, 36 *Pa. St.* 298.

The jury are entitled to give damages for a death caused by the defendant's negligence equivalent to the loss which the surviving relatives have sustained, whatever the deceased would probably have earned by his intellectual and bodily labor at his business or profession during the residue of his life, which would have gone for the benefit of his wife and children, taking into consideration his ability and disposition to labor, his habits of living and expenditure. *Boyd v. Hutchinson*, 18 *Phila. (Pa.)* 283.

Where deceased has left a wife and children the jury, in ascertaining damages, may properly assess the same with reference to the pecuniary loss sustained by wife and children—first, by fixing the same at such sum as would be equal to the probable earnings of the deceased during the probable period of his life, if he had not been killed, taking into consideration his age, business capacity, experience, habits, health, energy, and perseverance; and second, by adding thereto, the value of his services in the attention to and superintendence and care of his family, and in the education of his children, whereof they are deprived by his death. *Baltimore & O. R. Co. v. Wightman*, 29 *Gratt. (Va.)* 431, 17 *Am. Ry. Rep.* 351.—QUOTING *Tilley v. Hudson River R. Co.*, 29 *N. Y.* 252.—APPROVED IN *Warner v. Western N. C. R. Co.*, 25 *Am. & Eng. R. Cas.* 432, 94 *N. Car.* 250. FOLLOWED IN *Harper v. Norfolk & W. R. Co.*, 36 *Fed. Rep.* 102. REVIEWED IN *Goss v. Missouri Pac. R. Co.*, 50 *Mo. App.* 614.

Under *Wis. Rev. St. ch. 135, §§ 12, 13*, allowing the recovery of damages for an injury causing death, the recovery is limited to what are strictly pecuniary damages; but the jury may compensate all pecuniary injuries from whatever source they may proceed, so that the total amount does not exceed the statutory limit. *Ewen v. Chicago & N. W. R. Co.*, 38 *Wis.* 613.—QUOTING *Potter v. Chicago & N. W. R. Co.*, 21 *Wis.* 373.

387. The New York rule.—Under the act of 1847, giving a right of action for wrongfully causing death, proof of pecuniary or special damages to the next of kin, resulting from the death, is not necessary

in order to sustain the action; and the amount should be sufficient to compensate for all pecuniary loss, both present and future. *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *affirming* 3 E. D. Smith 103.—CRITICISED IN *Regan v. Chicago, M. & St. P. R. Co.*, 51 Wis. 599. DISTINGUISHED IN *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219. FOLLOWED IN *Keller v. New York C. R. Co.*, 2 Abb. App. Dec. (N.Y.) 480; *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317. QUOTED IN *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545; *Durkee v. Central Pac. R. Co.*, 25 Am. & Eng. R. Cas. 350, 56 Cal. 388, 38 Am. Rep. 59; *McIntyre v. New York C. R. Co.*, 43 Barb. (N. Y.) 532; *Owens v. Richmond & D. R. Co.*, 88 N. Car. 502. REVIEWED IN *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491; *Green v. Hudson River R. Co.*, 16 How. Pr. (N. Y.) 263; *Houghkirk v. Delaware & H. Canal Co.*, 63 How. Pr. (N. Y.) 328.—*Cornwall v. Mills*, 12 J. & S. (N. Y.) 45.—FOLLOWING *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317.

Where the action is to recover for the death of a widow who left surviving two children, any pecuniary loss which the children have suffered by reason of the death of their mother, such as the loss of bodily care, or intellectual culture, or moral training, is recoverable. *McIntyre v. New York C. R. Co.*, 37 N. Y. 287, 35 How. Pr. 36; *affirming* 47 Barb. 515.—APPLIED IN *Nash v. Sharpe*, 19 Hun 365. QUOTED IN *Nashville & C. R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12.

Under Laws of 1847, ch. 450, as amended by Laws of 1849, ch. 256, the pecuniary loss which a party named in the statute is entitled to recover may consist of special damages—i. e., of actual definite loss, and also of prospective general damages. *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *reversing* 28 Hun 407.—APPLYING *Murphy v. New York C. & H. R. R. Co.*, 88 N. Y. 446; *Leeds v. Metropolitan Gas-light Co.*, 90 N. Y. 26.

The special damages being capable of proof and of measurement with approximate accuracy, to entitle plaintiff thereto, evidence must be given not only that the damages were sustained, but also showing their character and amount. *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *reversing* 28 Hun 407.

As the prospective damages are incapable

of accurate estimate, the amount within the limit fixed by the statute is for the determination of the jury. *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *reversing* 28 Hun 407.

Such facts, however, as are naturally capable of proof, and which will give a basis for the judgment of the jury—i. e., the age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors, and their relation to the deceased—should be proved. *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *reversing* 28 Hun 407.

The amount of damages recoverable is the sum which would compensate the next of kin for what they might reasonably have expected from the deceased had he lived; and in all cases if plaintiff is entitled to recover at all he is entitled to at least nominal damages; but the fact that there is a chance that if deceased had not died from the accident he might have died from some other cause in a very short time, is not ground for restricting the damages to what are but nominal. The probability of his surviving for a longer or shorter time, as well as his health, ability to labor or support his family, and the like, are all questions to be considered by the jury. *Thomas v. Utica & B. R. R. Co.*, 6 Civ. Pro. (N. Y.) 353; *affirmed* in 98 N. Y. 649, *mem.*

c. Death of Parent.

388. In general.—Where a husband and father is dead a right of action arises in favor of the children for the homicide of their mother; but they have no such right of action where their father is alive. *Scott v. Central R. Co.*, 77 Ga. 450.

In actions under Md. Code, art. 65, §§ 1, 2, the adult children of one whose death was caused by the negligence of another are entitled to a compensation equivalent to the pecuniary benefits which they might reasonably have expected from the continuance of the life of the deceased. The statute makes no reference to the age or condition of the parties. (Miller and Robinson, JJs., dissenting.) *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.—REVIEWING *State v. Baltimore & O. R. Co.*, 24 Md. 84.—REVIEWED IN *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135.

The loss by a child of a parent's care in its education, maintenance, and pecuniary support, has a pecuniary as well as a moral value, and the verdict cannot, therefore, be limited to nominal damages because the evidence fails to show the amount of the earnings of the parent. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 *Am. & Eng. R. Cas.* 229, 91 *Mo.* 509, 10 *West. Rep.* 54, 4 *S. W. Rep.* 389.

An action for negligence in causing the death of a father is properly brought in the name of all the children; the recovery is for the benefit of all, the amount to be distributed as in case of intestacy. The value of the life lost, estimated by a pecuniary standard, is what is to be recovered, to be divided among all the children alike; though the action is in tort, yet under the statute there can be a joint recovery without showing that a joint damage had been sustained. *North Pa. R. Co. v. Robinson*, 44 *Pa. St.* 175.

The measure of damages which a minor child is entitled to recover against one negligently causing the death of his father is "what he could reasonably expect to have received from the father during the probable duration of his life." It is error to admit testimony as to the cost of raising a child in the county of the residence of the child. This is not a proper basis for damages. *International & G. N. R. Co. v. Kuehn*, 2 *Tex. Civ. App.* 210, 21 *S. W. Rep.* 58.

389. Loss of physical, moral, and mental training.—Where the action is for the death of a father, to recover damages for the benefit of the children, in estimating the pecuniary loss the jury may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father had he lived. *Searle v. Kanawha & O. R. Co.*, 37 *Am. & Eng. R. Cas.* 179, 32 *W. Va.* 370, 9 *S. E. Rep.* 248. *St. Louis, I. M. & S. R. Co. v. Maddy*, 58 *Am. & Eng. R. Cas.* 327, 57 *Ark.* 306, 21 *S. W. Rep.* 472.

390. Loss of support during minority.—In an action by infants for the death of their father, caused by the defendant's negligence, a fair and reasonable compensation to the infant plaintiffs for the loss of their father's services as a means of support during their minority is a correct measure of damages. *McPherson v. St. Louis, I. M. & S. R. Co.*, 97 *Mo.* 253, 10 *S. W. Rep.* 846.

The measure of damages being the sup-

port of the child till majority, they should be reckoned from the death, and not from the date of the injury. (Jackson, C. J., dissenting.) *Atlanta & W. P. R. Co. v. Venable*, 67 *Ga.* 697.—EXPLAINED IN *Savannah, F. & W. R. Co. v. Harper*, 70 *Ga.* 119.

If a widow die pending a suit by her for the homicide of her husband, the right of action for such homicide survives to the children, and in such last suit the measure of damages is the injury to the children, to be measured, as in the case of the widow, by a reasonable support for them, according to the condition in life, etc., of the father, and according to the expectation of his life as found by the mortuary tables. *David v. Southwestern R. Co.*, 41 *Ga.* 223.—FOLLOWING *Macon & W. R. Co. v. Johnson*, 38 *Ga.* 433.

391. Loss of services of deceased parent.—In an action under the Maryland statute for the death of a female passenger the evidence showed that the damages would go to a married daughter and two sons, all above twenty-one years of age. The deceased made her home with her daughter, and did the housework, which enabled the daughter to work out and earn six dollars a week, which she was unable to do after the death. The evidence also showed that the mother was in the habit of nursing the sick members of the sons' families, but there was nothing to show what was the value of this service, nor that the sons were obliged to employ a nurse. *Held*: (1) that the services rendered by the mother were the pecuniary benefit which the daughter had a right to expect from the continuance of her mother's life; (2) that the value of such services, under the circumstances, was the measure by which damages were to be assessed by the jury, and not what the daughter might earn by going out to work; (3) that there was no evidence legally sufficient to warrant the jury in finding that the sons had sustained any pecuniary loss, actual or in expectation, from the death of their mother. *Baltimore & O. R. Co. v. State*, 21 *Am. & Eng. R. Cas.* 202, 63 *Md.* 135.—DIS-INGUISHING *Dalton v. South Eastern R. Co.*, 4 C. B. N. S. (93 E. C. L.) 296; *Franklin v. South Eastern R. Co.*, 3 H. & N. 211.

392. Rules of computation.—The damages to which children are entitled for death by negligence are not to be arrived at by determining what would have been

a just compensation to the widow and children, and subtracting from this the sum to which the widow would have been entitled had she lived, but the fact that there had been a surviving widow is to be left entirely out of the case. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.—REVIEWED IN *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.

In an action by an infant for the death of its parents the jury are not confined, in estimating the damages, to any exact mathematical calculation, but are vested with considerable discretion with which the courts will not interfere unless it has been abused. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 Am. & Eng. R. Cas. 229, 91 Mo. 509, 10 West. Rep. 54, 4 S. W. Rep. 389.

In an action by a minor daughter for the death of her father, an instruction, on the measure of damages, telling the jury to give such damages as they may deem fair and just under the evidence in the case with reference to the necessary injury resulting to her from the death of her father, is error, as it fails to point out the distinct elements of damage, such as the deceased's business capacity, experience, and habits, health, energy, and perseverance, as well as his fitness for the moral training and advice of the plaintiff, and that plaintiff only had a claim on his wage-earning capacity during her minority, and was entitled to nothing for solatium for mental anguish or distress for death or loss of society of deceased. *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.—OVERRULING *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74. QUOTING *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74. REVIEWING *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *Kelley v. Central R. Co.*, 48 Fed. Rep. 663.

In assessing damages for the death of a person, where the amount recovered will belong to the children of the deceased, the jury may consider the number of years the deceased would probably have lived, the reasonable expectation of the amount of his or her property being increased, and the reasonable expectation of pecuniary benefit to the children, or any of them, by way of support or otherwise, had the deceased continued to live. *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505, 46 N. W. Rep. 897.

In an action for the death of a deck hand, the evidence showed that he was thirty-eight years old, and left three chil-

dren ranging from six months up to five years of age; that he was earning the usual wages of a deck hand, and devoted all to the support of the children. The death occurred in Louisiana where there was no statute limiting the amount that could be recovered for causing death. *Held*, in view of the fact that an act of congress and the statutes of many states limit the recovery to \$5000, and considering the facts and circumstances of the case, that \$2500 was a reasonable allowance. *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

d. Death of Husband.

393. In general.*—The assessment of damages to the wife and children from the homicide of the husband and father can only be the balancing of probabilities and chances. *Herman v. New Orleans & C. R. Co.*, 11 La. Ann. 5.—FOLLOWING *Hubgh v. New Orleans & C. R. Co.*, 6 La. Ann. 495.

The right of action which a wife has for the death of her husband is different from that which would have accrued to him had he survived the injury, and excludes all questions of exemplary damages, the damages being simply compensatory for the loss sustained by the surviving family. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.

In an action by a widow for the death of her husband damages may be awarded, not only for the mental and bodily suffering, loss of time, and necessary expenses resulting to the deceased, but also for the loss and deprivation resulting to the parties for whose benefit the right of action survives. *Collins v. East Tenn., V. & G. R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46. *East Tenn., V. & G. R. Co. v. Mitchell*, 11 Heisk. 400.—FOLLOWING *Nashville & C. R. Co. v. Prince*, 2 Heisk. 587. OVERRULING *Louisville & N. R. Co. v. Burke*, 6 Colo. 45.

The damages recoverable by a widow for the death of her husband include the value of her support and protection by the husband during the time he would probably have lived and supported her, but for the accident; and the jury may also consider the addition that the earnings of the husband would probably have made to his wealth and property had he continued to

* Damages recoverable by widow for death of husband, see note, 48 AM. & ENG. R. CAS. 528.

live, and a reasonable expectation of the wife to ultimately share in such earnings as an heir of her husband. *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 249, 64 *Wis.* 447, 24 *N. W. Rep.* 618, 54 *Am. Rep.* 634.

In an action by a wife for the death of her husband, the evidence showed that he was a laborer and earning \$400 a year. The defendant insisted that in no event could the recovery exceed a sum which when invested would yield an annual sum equal to one half of the husband's income, or \$200, the amount that she would be supposed to get from him. *Held*, that such basis of calculation was much too narrow. The life of an honest, industrious and kind-hearted husband has for his wife a money value in addition to what he may be able to earn by his personal labor. *Harkins v. Pullman Palace Car Co.*, 52 *Fed. Rep.* 724.

304. Rules of computation.—In an action by a widow for the wrongful killing of her husband, it is error for the court to positively direct the jury to measure the damages by a mathematical calculation based on the yielding power of money when invested in an annuity; and such error is not cured by a subsequent statement of the court that in the end the whole matter of damages is left to the sound judgment of the jury. *St. Louis, I. M. & S. R. Co. v. Needham*, 54 *Am. & Eng. R. Cas.* 88, 52 *Fed. Rep.* 371, 10 *U. S. App.* 339, 3 *C. C. A.* 129.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Farr*, 56 *Fed. Rep.* 994.

It is also error for the court to direct the jury that in case they believed plaintiff's expectancy of life was greater than that of her husband, to add to the amount that would purchase the annuity, the present value of any property that she would probably have received from her husband as dower if he had not been killed. *St. Louis, I. M. & S. R. Co. v. Needham*, 54 *Am. & Eng. R. Cas.* 88, 52 *Fed. Rep.* 371, 10 *U. S. App.* 339, 3 *C. C. A.* 129.

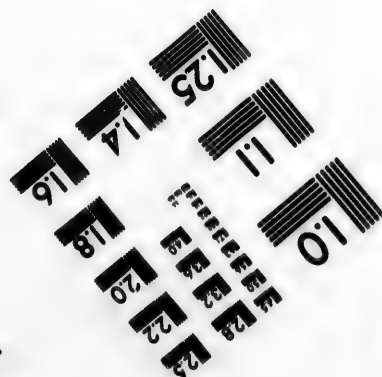
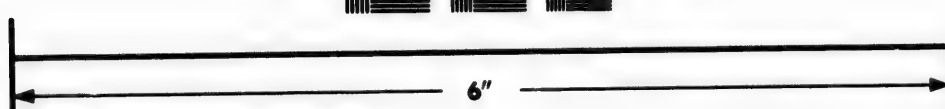
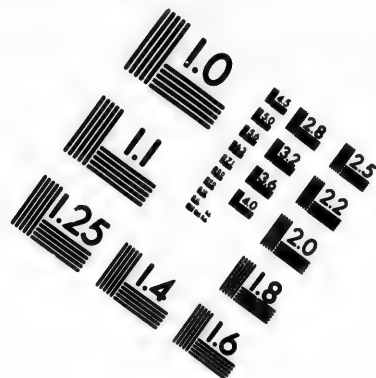
In an action for the homicide of a husband, under Irwin's Ga. Code, § 2920, where there was no fault on the part of deceased, the rule of damages is the actual pecuniary damage, to be ascertained by inquiring what would be a reasonable support for the wife, considering the habits, occupation, and prospects of the husband, and taking the present worth of such support, to be ascertained by mortuary tables of established

reputation. *Macon & W. R. Co. v. Johnson*, 38 *Ga.* 409.—FOLLOWED IN *David v. Southwestern R. Co.*, 41 *Ga.* 223. REVIEWED IN *Kansas Pac. R. Co. v. Lundin*, 3 *Colo.* 94.

In a suit by the wife of an engineer for his homicide, the jury should consider the age of the deceased, and if old, his consequent incapacity to labor long. *Central R. & B. Co. v. Roach*, 8 *Am. & Eng. R. Cas.* 79, 64 *Ga.* 635.

In an action under Md. Act of 1852, ch. 299, by the wife for the death of her husband, evidence was given of the age, habits, health and occupation of the deceased at the time of his death, and also of the number of his family and their condition before and after his death; but no evidence was offered of the specific wages paid the deceased at the time of his death. *Held*: (1) that a prayer "that in the absence of proof other than the death, age, and condition of health, and members and state of the family of said deceased, of actual damage, the verdict of the jury, in the event of its being for the plaintiff, must be for nominal damages only," was properly rejected by the court below; (2) that the jury, in the assessment of damages, should take into consideration only such compensation to the surviving members of the deceased's family as would supply to them the same results as would have followed from his labor during the probable period he would otherwise have lived and earned a livelihood; but that they might take into consideration his age, health, and occupation, and the comfort and support afforded his family at the time of his death. *Baltimore & O. R. Co. v. State*, 24 *Md.* 271.—QUOTING *Franklin v. South Eastern R. Co.*, 3 *H. & N.* 211. REVIEWING *Dalton v. South-Eastern R. Co.*, 4 *C. B. N. S.* (93 *E. C. L.*) 296.—REVIEWED IN *Missouri Pac. R. Co. v. Lehmborg*, 75 *Tex.* 61, 12 *S. W. Rep.* 838.

In an action by the widow and children of one who had been killed by an accident the jury should, in assessing the damages, take into consideration the reasonable probabilities of life of the deceased and award damages, not only for the past losses of the equitable plaintiffs, but for such as they will suffer as the direct consequence of the killing; the prospective damages for the children to be estimated to their majority, and those for the widow upon the probable duration of her life. *Baltimore & O. R.*



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Co. v. State, 33 Md. 542.—REVIEWED IN *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.

In an action under the Tennessee statute by a widow for the death of her husband it is error to charge the jury that in addition to damages which the deceased himself might have recovered if he had lived damages might also be allowed for the deprivation resulting to the next of kin. The damages are to be computed the same as if the husband had lived and brought the action himself. *East Tenn., V. & G. R. Co. v. Toppins*, 11 Am. & Eng. R. Cas. 222, 10 Lea (Tenn.) 58.

395. Ascertaining pecuniary value of husband's life.—In a suit by a widow for the homicide of her husband she may recover the full value of the life of the deceased, as shown by the evidence. The onus is upon the plaintiff to establish the amount of damages which she is entitled to recover, and one element of such proof is the number of years the deceased would probably have lived. If there is no proof on this point the plaintiff has failed to make out a case, and the verdict should be for the defendant. *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.

In an action by a wife for the death of her husband the pecuniary value of the husband's life should be considered, taking into consideration his age, health, probable length of life, and his capacity to earn wages; but nothing should be allowed for loss of companionship. *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. Rep. 924. *Georgia R. Co. v. Pittman*, 26 Am. & Eng. R. Cas. 474, 73 Ga. 325.

In estimating the value of the husband's life by age, habits, health, occupation, expectation of life, ability to labor and to furnish care and attention to the family, probable increase or diminution of that ability with lapse of time, rate of wages, etc., the necessary personal expenses of the husband should be deducted, and the balance, reduced to its present value, is the value of the life. *Central R. Co. v. Rouse*, 77 Ga. 393, 3 S. E. Rep. 307.—APPROVED AND DISTINGUISHED IN *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471. FOLLOWED IN *Central R. & B. Co. v. Rouse*, 80 Ga. 442.

The value of a husband's life to his wife is determined by ascertaining how much better off she would be pecuniarily with him than without him. *Catawissa R. Co. v.*

Armstrong, 52 Pa. St. 282.—QUOTED IN *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83.

In an action by a widow for the killing of her husband, he being at the time in the employ of the defendant, the jury in assessing the damages must estimate the reasonable probabilities of the life of the deceased when injured and give the plaintiff such pecuniary damages as will compensate her for losses already suffered as the direct consequence of her husband's death, and also for the prospective losses that she will suffer as the direct consequence of such death during the period the jury, under all circumstances, shall deem to be the probable duration of her life. *Baltimore & O. R. Co. v. State*, 41 Md. 268, 6 Am. Ry. Rep. 276.

396. Loss to children not to be considered.—In an action by a widow for the homicide of her husband, under Irvin's Ga. Code, § 2920, the loss to the children is not to be considered in estimating damages. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

In an action under Wis. Rev. St. §§ 4255, 4256, for the death of plaintiff's intestate, if the deceased leaves a surviving widow, the damages sustained by her alone are all that can be recovered. *Schadewald v. Milwaukee, L. S. & W. R. Co.*, 55 Wis. 569, 13 N. W. Rep. 458. *Liermann v. Chicago, M. & St. P. R. Co.*, 82 Wis. 286, 52 N. W. Rep. 91.

But the fact that the deceased left children whose support will be thrown upon the widow is proper to be shown in evidence and to be considered by the jury. *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. Rep. 1079.

397. Loss of society of husband.—In estimating the damages recoverable by a widow for the loss of her husband under the California statute, the jury have a right to take into consideration the relation between the plaintiff and her husband at the time of death, and the injury which she has sustained by the loss of his society. (Three judges dissenting.) *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20.—EXPLAINED IN *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303; *Morgan v. Southern Pac. Co.*, 95 Cal. 510. REVIEWED IN *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 17.

Where the action is under the Missouri statute by a widow for the death of her husband, the loss of companionship or society of the husband cannot be considered as an element of damages. *Atchison, T. & S. F.*

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**398. Widow suing as administra-
trix.**—In an action by a widow as adminis-
tratrix to recover for the wrongful death of
her husband, it is proper to instruct the jury
that in assessing her damages they may con-
sider the value of the support and protec-
tion which she would have received from
him in the future had it not been for the
accident; and that the jury are not to be
limited to the simple value of the support
and protection of herself, and the support
and education of her children, but that
they may consider what the earnings
of the deceased would have made his
property worth had he lived, and the
reasonable expectation of the plaintiff of
sharing in such property ultimately as one
of the heirs of her husband. *Castello v.*
Landwehr, 28 Wis. 522.—FOLLOWING *Pot-
ter v. Chicago & N. W. R. Co.*, 21 Wis. 372,
22 Wis. 615.

The action being brought by the de-
cedent's widow as administratrix, she being
the only member of his family, and the evi-
dence showing that the deceased earned
one dollar per day; that he "always carried
his money home and spent it on his family,"
and that he was forty years old, the recov-
ery should be for such a sum as, at legal in-
terest, would give the widow \$150 per year
for twenty-seven years, the probable dura-
tion of life of a person of that age, and ex-
haust the principal at the end of that pe-
riod. *Louisville & N. R. Co. v. Trammel*,
93 Ala. 350, 9 So. Rep. 870.

c. Death of Wife.

399. In general.—The damages re-
coverable by a husband against a railway
company for negligently causing the death
of his wife are the injuries resulting to the
plaintiff from her death and none other.
Galveston, H. & S. A. R. Co. v. Matula, 79
Tex. 577, 15 S. W. Rep. 573.

400. Loss of services.—In an action
by a husband for the negligent killing of his
wife, where the law limited the recovery to
pecuniary compensation, it was not error to
instruct the jury that they should measure

"plaintiff's loss by a just estimate of the
services and companionship of the wife."
The relation of husband and wife should be
considered in estimating the value of the
wife's services. *Pennsylvania R. Co. v.*
Goodman, 62 Pa. St. 329.

Although, on the death of a wife caused
by the negligence of a railway company, the
husband cannot recover damages of a sen-
timental character, yet the loss of household
services accustomed to be performed by the
wife, which would have to be replaced by
hired services, is a substantial loss for which
damages may be recovered, as is also the
loss to the children of the care and moral
training of their mother. *St. Lawrence &*
O. R. Co. v. Lett, 26 Am. & Eng. R. Cas. 454,
11 Can. Sup. Ct. 422; affirming 11 Ont. App.
1, which reverses 1 Ont. 545.—QUOTING
Pym v. Great Northern R. Co., 4 B. & S.
406; *Franklin v. South Eastern R. Co.*, 3
H. & N. 213; *Pennsylvania R. Co. v. Adams*,
55 Pa. St. 503; *Tilley v. Hudson River R.*
Co., 24 N. Y. 474; *Pennsylvania R. Co. v.*
Goodman, 62 Pa. St. 332; *McIntyre v. New*
York C. R. Co., 37 N. Y. 295.

**401. Expectancy of deceased's
earnings.**—Where the action is by a hus-
band for the death of his wife, who also left
children, the expectancy of the children to
share in the personal earnings of their
mother cannot be considered in estimating
the damages, inasmuch as such earnings
would go to the husband, and the contin-
gency of the father continuing in the pos-
session of the earnings and dying intestate
during the lifetime of the children, is too
remote to be considered. *Tilley v. Hudson*
River R. Co., 24 N. Y. 471, 23 How. Pr. 363.
—APPLIED IN *McIntyre v. New York C. R.*
Co., 37 N. Y. 287. QUOTED IN *Kansas*
Pac. R. Co. v. Cutter, 19 Kan. 83; *St. Law-*
rence & O. R. Co. v. Lett, 11 Can. Sup. Ct.
422. REVIEWED IN *Trafford v. Adams*
Exp. Co., 8 Lea (Tenn.) 96.

**402. Loss of wife's society—Men-
tal suffering.**—In an action under the
N. Y. Act of 1847, as amended in 1849, by a
husband for the death of his wife, the dam-
ages are limited to what are purely pecuni-
ary; and, therefore, the loss of the society
of the wife cannot be considered. *Green v.*
Hudson River R. Co., 32 Barb. (N. Y.) 25;
affirmed in 30 How. Pr. 593, n.—QUOTING
Gillard v. Lancashire & Y. R. Co., 12 L. T.
356. REVIEWING *Blake v. Midland R. Co.*,
18 Q. B. 93; *Oldfield v. New York & H.*

R. Co., 14 N. Y. 310; *Quin v. Moore*, 15 N. Y. 432.

In such case the husband may recover for the loss of the service of his wife, and it is proper for the court to instruct the jury that they may consider the fact that the wife was an educated and amiable woman. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25; affirmed in 30 How. Pr. 593, n. —QUOTED IN *Bolinger v. St. Paul & D. R. Co.*, 29 Am. & Eng. R. Cas. 408, 36 Minn. 418, 31 N. W. Rep. 856.

f. Death of Child.

403. In general.*—The damages recoverable by the father, in a statutory action for injuries resulting in the death of his minor son (Code, § 2588), are compensatory only, and not punitive. *Williams v. South & N. Ala. R. Co.*, 91 Ala. 635, 9 So. Rep. 77.

Where injuries received by a child from a running train would not prove fatal but for the want of reasonable care of the parent after the injury, he cannot aggravate his damages against the company beyond damages for the wounding, etc. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41.

Where a parent sues for the death of his minor child, the jury is not limited in giving damages to the actual pecuniary injuries sustained by reason of the loss of services of the child. *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.—DISTINGUISHED IN *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303; *Morgan v. Southern Pac. Co.*, 95 Cal. 510; *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 17.

The pecuniary condition of the parent and his inability to employ servants to take care of his children, are not proper subjects for consideration by the jury in an action by him for negligently causing the death of a child. *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 N. E. Rep. 70.

The rule that in actions brought under How. Stat. § 8314, where the parents are the beneficiaries, if the evidence shows that the deceased had been in the habit of making contributions from his own means to them,

their damages might be based and estimated upon such customary contributions, is not applicable in the case of a very young child who has never made any such contributions, and when it is impossible to show that she ever will. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306.—DISTINGUISHING *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

Only pecuniary damages are recoverable by a parent for the negligent killing of a child, but the word "pecuniary" is not to be construed in a strict sense. The recovery is not to be limited to the present loss in money, but prospective advantages of a pecuniary nature may be considered. *Vicksburg v. McLain*, 67 Miss. 4, 6 So. Rep. 774.

An intelligent jury, from common experience, may determine approximately in any given case what amount would compensate a parent for all pecuniary losses sustained by reason of the death of a minor child, and the parent should not be restricted to the recovery of merely nominal damages because of failure to prove the value of the services of the child, or the amount of expenses incurred in its behalf. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 12 West. Rep. 615, 6 S. W. Rep. 464.

In an action under the New Jersey statute to recover damages for the death of plaintiff's son, only pecuniary loss or injury sustained by the plaintiff can be allowed; and in estimating that, the chances of health and life are to be considered in connection with the value of services. *Telfer v. Northern R. Co.*, 30 N. J. L. 188.—FOLLOWING *Blake v. Midland R. Co.*, 18 Q. B. 93. QUOTING *Quin v. Moore*, 15 N. Y. 432.—REVIEWED IN *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344.

In an action under N. Y. Code of Civ. Pro. (§§ 1902, 1904), to recover the "pecuniary injuries" resulting from the death of a young child, caused by the wrongful act or negligence of defendant, the recovery is not limited to nominal damages merely. The amount of damages upon such proof as can be made is for the determination of the jury, subject to be reviewed and modified, if the discretion is abused, in the court of original jurisdiction, but not in this court. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. Rep. 108, 18 N. Y. S. R. 130; affirming 41 Hun 404, 10 Civ. Pro. 52, 3 N. Y. S. R. 133.

* Damages for death of minor child, see notes, 19 AM. & ENG. R. CAS. 212; 12 AM. ST. REP. 381.

The measure of damages because of the death of a young child would necessarily be indefinite. Absolute accuracy cannot be attained, and hence the amount must be left to the sound discretion and common sense of the jury. *Houston City St. R. Co. v. Sciacca*, 80 *Tex.* 350, 16 *S. W. Rep.* 31.

In arriving at a conclusion, the mental and physical characteristics of the child should be taken into consideration, as well as his probabilities of life and his present or prospective ability. *Heusner v. Houston, W. S. & P. F. R. Co.*, 27 *N. Y. Supp.* 365, 57 *N. Y. S. R.* 528, 7 *Misc.* 48.

In an action for the death of a child, the measure of damages is the mere pecuniary loss to the parents; confined to direct pecuniary loss, funeral expenses, doctor's bill, necessary loss of time, present probable value of the service of the deceased until twenty-one years of age, less the cost of maintenance and education, allowing for probable sickness and other casualties. *Pennsylvania Co. v. James*, 81* *Pa. St.* 194.

In an action by a father, under the Texas statute, for the killing of his son, no recovery can be had for physical suffering or mental pain and anguish endured on account of the son's death; nor can anything be recovered because of the loss of the son's society; but the pecuniary damages are not to be given merely with reference to the loss of a legal right, but with reference to the reasonable expectation which the father had of aid from the son, not as a matter of right or obedience to filial duty, but based upon the disposition and ability of the son to assist. *Hall v. Galveston, H. & S. A. R. Co.*, 39 *Fed. Rep.* 18.

Under the Virginia statute allowing the jury to award "such damages as to them may seem fair and just," where the action is for the death of an unmarried man who lived with his mother, it is not error to instruct the jury that in assessing the damages they are to allow not only for the pecuniary loss sustained by the mother, but also for the loss of his care to her and for her mental anguish, provided the whole damages do not exceed the statutory limit. *Baltimore & O. R. Co. v. Noell*, 32 *Gratt. (Va.)* 394.

404. Value of services during minority.—Where a parent sues for the death of his minor child, the measure of damages is the pecuniary value of the child's services during minority, less the reasonable

and necessary expense of caring for it during minority, and the cost and expense incurred by the parent on account of the injury; the value of the child's services to be estimated with reference to what children in the same condition and station in life ordinarily are worth, without any regard to any peculiar value that the parent might attach to such services. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 *Am. & Eng. R. Cas.* 608, 36 *Ark.* 41. *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 *Ill.* 198.—QUOTING *Chicago v. Scholten*, 75 *Ill.* 468.—*Louisville, N. A. & C. R. Co. v. Kush*, 127 *Ind.* 545, 26 *N. E. Rep.* 1010.—REVIEWING *Citizens' St. R. Co. v. Twiname*, 121 *Ind.* 375, 23 *N. E. Rep.* 159; *Pennsylvania Co. v. Lilly*, 73 *Ind.* 252.—*Benton v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 496, 8 *N. W. Rep.* 330. *Lehigh Iron Co. v. Rupp*, 7 *Am. & Eng. R. Cas.* 25, 100 *Pa. St.* 95, 1. *N. C.* 47.—QUOTING *Pennsylvania R. Co. v. Butler*, 57 *Pa. St.* 335.

The jury should only consider the benefits the parent might have derived from the life of the child during its minority, and not during the whole course of its probable existence. *Parsons v. Missouri Pac. R. Co.*, 94 *Mo.* 286, 12 *West. Rep.* 615, 6 *S. W. Rep.* 464.—QUOTED IN *Goss v. Missouri Pac. R. Co.*, 50 *Mo. App.* 614.

The main element of damage is the probable value of the services of the deceased until its majority, considering the cost of its support and maintenance during the early and helpless part of its life; and a charge to the jury that they were not limited by the actual pecuniary injury sustained by the parent by reason of the death of the child is error. *Morgan v. Southern Pac. Co.*, 54 *Am. & Eng. R. Cas.* 101, 95 *Cal.* 510, 30 *Pac. Rep.* 603.

405. Probable earnings of deceased.—In a suit by the administrator of a deceased infant whose parents are entitled to the damages recoverable under How. Stat. Mich. § 8314, for his negligent killing, the measure of such damages is limited to his prospective earnings until of full age, which damages are special in their character and must be specially pleaded and established by the evidence. *Hurst v. Detroit City R. Co.*, 84 *Mich.* 539, 48 *N. W. Rep.* 44.

In an action to recover, for the benefit of a father, damages for the killing of his son, where it is shown that the latter's expectancy of life exceeded that of his father, an instruction to the jury that the measure of

damages is the probable earnings of the son during his expectancy of life, less his expenses, etc., is erroneous, since it permits the father to recover as a pecuniary loss to himself accumulations of the son for a period after he (the father) is presumed to have died. *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. Rep. 694.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Needham*, 54 Am. & Eng. R. Cas. 88, 52 Fed. Rep. 371, 10 U. S. App. 339, 3 C. C. A. 129.

406. Expectation of pecuniary benefit after majority.—In estimating the "pecuniary injuries" of a father as next of kin, resulting from the death of a minor son eighteen years old, the jury are not bound to confine their consideration to the son's minority, but may take into account the father's expectation of pecuniary benefit from the continuance of the son's life after his majority, where he had manifested an intent to aid his father after that time. *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462, 18 S. W. Rep. 628.—DISTINGUISHING *State v. Baltimore & O. R. Co.*, 24 Md. 84; *Agricultural & M. Assoc. v. State*, 71 Md. 86.—*Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. Rep. 108, 18 N. Y. S. R. 130; *affirming* 41 Hun 404, 10 Civ. Pro. 52, 3 N. Y. S. R. 133.

In an action by an administrator for damages on account of the death of an infant, substantial damages may be recovered, notwithstanding such recovery must be based upon the probable accumulation of an estate after the infant has reached his majority. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

Where an aged and infirm parent sues to recover damages for the death of his adult female child the jury may consider the care and attendance which the child would have been liable to give plaintiff, based upon her custom in the past and contributions of money and services, as well as the age, health, and pecuniary circumstances of the parents. *Bowles v. Rome, W. & O. R. Co.*, 46 Hun 324, 12 N. Y. S. R. 457; *affirmed in* 113 N. Y. 643, *mem.*, 21 N. E. Rep. 414, 22 N. Y. S. R. 997.

Under Wis. Rev. St. ch. 135, §§ 12 and 13, the damages recoverable by a parent for the death of a minor child are the pecuniary loss resulting from the death. The pecuniary advantage that the child might be to the parent after his majority can only be considered where there is proof that the

parent was dependent upon the child. *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372.—DISAPPROVED IN *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205. FOLLOWED IN *Castello v. Landwehr*, 28 Wis. 522. QUOTED IN *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613. REVIEWED IN *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344.—*Potter v. Chicago & N. W. R. Co.*, 22 Wis. 615.—REVIEWED IN *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.

In an action by a father for the death of his daughter the evidence showed that the plaintiff was her next of kin and heir at law, and that he was sixty-six years old and in poor health; that his wife was fifty-eight years old and both were without property; that for a number of years the daughter had contributed from three to four hundred dollars per annum toward their support, and that she was thirty-six years old at the time of her death, in good health, and earning from eight to nine dollars per week. *Held*, that a verdict for four thousand dollars should not be disturbed as excessive. *Bowles v. Rome, W. & O. R. Co.*, 46 Hun 324, 12 N. Y. S. R. 457; *affirmed in* 113 N. Y. 643, *mem.*, 21 N. E. Rep. 414, 22 N. Y. S. R. 997.

A son was twenty-eight years of age when killed. He had been away from home, at intervals, after he attained his majority, and been in business on his own account. He had returned, however, to his father's house and was engaged in his father's business, for which no compensation was paid him. It appeared that he intended to remain with his father, and that his services were valuable to him in his business. *Held*, that it was for the jury to decide whether there was a reasonable expectation of pecuniary advantage accruing to plaintiffs, which was destroyed by the loss of the son. *North Pa. R. Co. v. Kirk*, 1 Am. & Eng. R. Cas. 45, 90 Pa. St. 15.—QUOTED IN *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344.

407. Loss of child's society, comfort, etc.—In an action by a parent for the negligent killing of his child, loss of the child's society, and the comfort the father would have had in rearing him are not elements of damage. Compensation is limited to the actual pecuniary loss sustained, on the theory of the parent's right to the services of the child during minority. *Mobile & O. R. Co. v. Wally*, 69 Miss. 145, 13 So. Rep. 825.

403. Mental anguish and suffering of parents.

—The amount recoverable by a father for the death of his minor child, in an action under the California statute, is such sum as is just and reasonable, to be determined by reference to the loss of the child's services during minority, the medical attendance and funeral expenses, and the mental anguish and suffering of the parents. *Cleary v. City R. Co.*, 76 Cal. 240, 18 Pac. Rep. 269.—OVERRULED IN *Morgan v. Southern Pac. Co.*, 95 Cal. 510.

Where the action is by a father for the death of his child, only the actual pecuniary loss can be allowed as damages, excluding a consideration of the suffering or wounded feelings of the parents; but if the latter are poor, the fact that the child would probably have assisted in supporting the family in the future had he lived may be considered. *Barley v. Chicago & A. R. Co.*, 4 Biss. (U. S.) 430. *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372.

In an action for causing the death of a child, the jury cannot consider, as an element of damages, the suffering of the child or the mental suffering of the father. *Dorman v. Broadway R. Co.*, 16 N. Y. S. R. 753; 1 N. Y. Supp. 334.—APPLYING *Holmes v. Atlantic Ave. R. Co.*, 16 N. Y. S. R. 743. QUOTING *Mentz v. Second Ave. R. Co.*, 3 Abb. App. Dec. 274.

409. Other items of damage.

—In an action by a parent for the death of his infant child, the proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses, and medical services. *Pennsylvania Co. v. Lilly*, 4 Am. & Eng. R. Cas. 540, 73 Ind. 252. *Rains v. St. Louis, I. M. & S. R. Co.*, 5 Am. & Eng. R. Cas. 610, 71 Mo. 164.—APPROVED IN *Hedrick v. Ilwaco R. & N. Co.*, 54 Am. & Eng. R. Cas. 45, 4 Wash. 400.—*Hedrick v. Ilwaco R. & N. Co.*, 54 Am. & Eng. R. Cas. 45, 4 Wash. 400, 30 Pac. Rep. 714.—APPROVING *Mayhew v. Burns*, 103 Ind. 328; *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371; *Rains v. St. Louis, I. M. & S. R. Co.*, 71 Mo. 164, 36 Am. Rep. 459.

410. Effect of emancipation of

child killed.—In a suit for the death of a minor, under section 422 of the Kansas Code, the fact that the parents had released to such minor his time and services during his minority may properly be considered by the jury in determining the amount of recovery; but it will not prevent the parents from recovering any pecuniary damages, such as the loss of support, that they may be able to prove resulted from his death. *St. Joseph & W. R. Co. v. Wheeler*, 26 Am. & Eng. R. Cas. 173, 35 Kan. 185, 10 Pac. Rep. 461.

411. Rule in action by mother, or for her benefit.*—In an action by a mother for the death of her son, the jury should allow such damages as will be an adequate compensation for the loss of such pecuniary support as she would have received from the deceased, taking into consideration the age of the plaintiff and her probable duration of life. *Maryland v. Baltimore & P. R. Co.*, 1 Hughes (U. S.) 337.

The measure of damages to a mother for the negligent killing of her infant child is, under the statute, the expense necessarily incurred by her for medical attendance, nursing, and burial of the child, and reasonable compensation for the loss of the probable services of the child during its minority. For the loss of companionship and association of the child, and the grief of the mother at its death, the statute gives no compensation. *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350.—REVIEWING *Chicago v. Major*, 18 Ill. 349.

Where a mother sues for the death of her son, under the California statute, which allows such damages to be given as "under all the circumstances of the case may be just," damages for sorrow, grief, and mental suffering occasioned by the death, as well as damages sustained by the loss of the son's comfort and society, support and protection, may be allowed. *Munro v. Pacific Coast D. & R. Co.*, 54 Cal. 515, 24 Pac. Rep. 303.—DISTINGUISHING *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320; *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Morse v. Auburn & S. P. Co.*, 10 Barb. (N. Y.) 623. EXPLAINING *Blake v. Midland R.*

* Dependency of mother, see 48 AM. & ENG. R. CAS. 530, *abstr.*

Co., 18 Q. B. 93; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20.—FOLLOWED IN *Morgan v. Southern Pac. Co.*, 95 Cal. 510.

Where father and mother and minor children all reside together, and are mutually dependent upon the labor of the family for support, a minor child over fifteen years of age, whose labor, or the proceeds of it, come into the common stock, is to be considered as contributing substantially to the support of the mother. *Augusta R. Co. v. Glover*, 58 Am. & Eng. R. Cas. 269, 92 Ga. 132, 18 S. E. Rep. 406.

The law entitles the mother to the services of her child only during his minority (the father being dead); the chances of survivorship, his ability or willingness to support her, and the mental suffering of the mother because of the death of her child, are matters too vague to enter into an estimate of damages merely compensatory. *State v. Baltimore & O. R. Co.*, 24 Md. 84.—QUOTING *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372. REVIEWING *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437.—DISTINGUISHED IN *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462; *Walters v. Chicago, R. I. & P. R. Co.*, 36 Iowa 458. REVIEWED IN *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.

The measure of damages of a widowed mother for loss of her minor child's services is the loss of service caused by the injury, less the cost of the child's maintenance. *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75.

In estimating the pecuniary damages that a mother has suffered by the death of her child the jury are not confined to the mere amount that the child would have been able to earn, above the cost of its education and support, but may also include any extra expense or care that the mother has been subjected to by reason of the accident. *Cumming v. Brooklyn City R. Co.*, 1 Silv. Sup. Ct. (N. Y.) 327.

As between the mother and child recourse may be had to the child's property before the mother will be compelled by law to support the child. So where a mother sues for the death of her child, the amount of the separate property of the child may be considered in estimating the pecuniary loss to the mother. *Cumming v. Brooklyn City R. Co.*, 1 Silv. Sup. Ct. (N. Y.) 327.—

FOLLOWING *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 14 N. Y. S. R. 788.

The Pa. Act of April 26, 1855, expressly gives the widowed mother power to recover damages for the death of a child by negligence; the damages are not limited to nursing and medical attendance, but are such as a court and jury under all the circumstances shall consider reasonable. *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495.—DISTINGUISHING *Fairmount & A. St. Pass. R. Co. v. Stutler*, 54 Pa. St. 375.—DISTINGUISHED IN *Edgar v. Castello*, 14 So. Car. 20. REVIEWED IN *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491.

The jury are not limited in damages to the present value of an annuity for the probable duration of life of the plaintiff, for the amount shown to have been actually furnished the plaintiff per annum during her life by the deceased son. *International & G. N. R. Co. v. Kindred*, 11 Am. & Eng. R. Cas. 649, 57 Tex. 491.—QUOTED IN *Missouri Pac. R. Co. v. Lee*, 35 Am. & Eng. R. Cas. 364, 70 Tex. 496.

The correct rule for measuring damages, where a mother sues to recover for the killing of a son, an engineer, claiming that she is dependent upon his earnings, is the probable amount that the deceased would have contributed to the support of the plaintiff had he lived; and in determining the amount the age and probable length of time that plaintiff would live, as well as that of the deceased had he not been killed, and the probability of his continuing to make such allowances had he lived, should be taken into consideration. *Texas & P. R. Co. v. Burnes*, 2 Tex. Unrep. Cas. 239.

In an action by a widow for the death of her son, aged fourteen, who had never earned wages, the jury may consider the probability that he would have enabled his mother to earn more or would have divided part of his earnings to her support. *Condon v. Great Southern & W. R. Co.*, 16 Ir. C. L. 415.

412. Apportioning the damages between father and mother.—In a suit by the parents against a defendant for negligently causing the death of their son it is required that the jury apportion the damages recovered. This is required whether they sue jointly or if the husband sue alone. *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350, 16 S. W. Rep. 31.

g. Medical and Funeral Expenses.

413. When recoverable.—In New York a widow is entitled to the services of her infant child, and therefore may maintain an action for the wrongful death of a minor son, without proving any actual loss of services; and being entitled to his services she is bound to maintain and care for the child, and is therefore liable for the doctor's bill of the child occasioned by the injury, and may recover the same. *Kennedy v. New York C. & H. R. R. Co.*, 35 *Hun* (N. Y.) 186.

Under the Pa. Act of April 4, 1868, limiting the damages recoverable in suits against common carriers or corporations, to such as are proven "to have been pecuniarily suffered or sustained," no exemplary damages can be recovered, but a recovery may be had for nursing and medical and funeral expenses. *Cleveland & P. R. Co. v. Rowan*, 66 *Pa. St.* 393.—REVIEWED IN *Little Rock & Ft. S. R. Co. v. Barker*, 33 *Ark.* 350.

In an action under the South Carolina statute the funeral expenses of the deceased may be considered as an element of damages if they have been paid by the plaintiff. *Petrie v. Columbia & G. R. Co.*, 35 *Am. & Eng. R. Cas.* 430, 29 *So. Car.* 303, 7 *S. E. Rep.* 515.

In an action under the statute N. Y. Laws of 1847, ch. 450, as amended by Laws of 1870, ch. 78, the necessary funeral expenses of the deceased are proper items of damages, where any of those for whose benefit the action is brought are legally bound to pay such expenses; and proof thereof is, therefore, competent. (Andrews, Ch. J., dissenting.) It is immaterial that all of those interested in the recovery are not legally bound to pay such expenses. *Murphy v. New York C. & H. R. R. Co.*, 8 *Am. & Eng. R. Cas.* 490, 88 *N. Y.* 445; *affirming* 25 *Hun* 311.—FOLLOWING *Brassell v. New York C. & H. R. R. Co.*, 84 *N. Y.* 241. NOT FOLLOWING *Dalton v. South Eastern R. Co.*, 4 *C. B. N. S.* 296; *Boulter v. Webster*, 13 *W. R.* 289.—APPLIED IN *Houghkirk v. Delaware & H. Canal Co.*, 92 *N. Y.* 219, 44 *Am. Rep.* 370.

414. When not recoverable.—In an action for wrongfully causing death, no compensation is recoverable for funeral expenses or for family mourning. *Dalton v. South Eastern R. Co.*, 4 *C. B. N. S.* 296, 4 *Jur. N. S.* 711, 27 *L. J. C. P.* 227.

The damages given to an administrator for the death of his intestate by the Oregon statute (Comp. L. 1887, § 371) are, when recovered, assets of the estate; they do not include anything but what is consequent on the death, and therefore no allowance can be made for the expenses of the illness attendant on the injury which caused the death, or of the burial of the deceased. *Holland v. Brown*, 13 *Sawy. (U. S.)* 284.—QUOTING *Illinois C. R. Co. v. Barron*, 5 *Wall. (U. S.)* 90; *Pennsylvania R. Co. v. McCloskey*, 23 *Pa. St.* 526.

These damages are in the nature of a compensation paid by the wrong-doer to creditors and next of kin of the deceased for the loss of life in which they have a pecuniary interest, and incidentally the liability to pay them is calculated to secure from carriers and corporations more consideration for the lives of passengers and employees committed to their care. *Holland v. Brown*, 13 *Sawy. (U. S.)* 284.

Expenses incurred by a person injured, for medical treatment or for support, between the happening of an injury and death resulting therefrom, are not recoverable by his administrator in the statutory action given by the New York Act of 1847; and the payment of such expenses by the defendant cannot be shown, either in bar or in mitigation of damages. *Murray v. Usher*, 117 *N. Y.* 542, 23 *N. E. Rep.* 564, 27 *N. Y. S. R.* 928; *affirming* 46 *Hun* 404, 11 *N. Y. S. R.* 789.

h. Prospective Damages.

415. Such damages recoverable.*—While a jury must assess the damages for causing death with reference to the pecuniary injuries sustained by the distributees, they are not limited to the loss actually sustained at the precise period of his death, but may include prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as proximate damages arising from the death. *Searle v. Kanawha & O. R. Co.*, 37 *Am. & Eng. R. Cas.* 179, 32 *W. Va.* 370, 9 *S. E. Rep.* 248.

In an action for wrongfully causing death, the reasonable expectation of pecuniary advantage by the relation remaining alive may be considered by the jury; and damages may be given in respect of that expectation

* See ante, 385.

being disappointed. *Dalton v. South Eastern R. Co.*, 4 C. B. N. S. 296, 4 Jur. N. S. 711, 27 L. J. C. P. 227.

416. How computed.—In estimating the prospective damages to a widow for the death of her husband, the jury are to take into consideration the reasonable probabilities of her life and the life of her husband, or in other words the probable duration of their joint lives. *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. Rep. 884.

417. Right of father to prospective damages for death of minor son.—A father sued for the death of his son seventeen years of age, who was in the employ of defendant and earning two dollars per day, claiming as damages in addition to the actual expenses incurred, the value of his son's services at the date of his death until he would have become of age. The action was in Nebraska, where there was no statute giving such action. Death resulted in six hours after the injury was received. *Held*, that in such case where death does not immediately ensue, the father is not limited in the recovery of damages to the loss of services up to the time of death. *Sullivan v. Union Pac. R. Co.*, 3 Dill. (U. S.) 33;—REVIEWING *Skinner v. Housatonic R. Corp.*, 1 Cush. (Mass.) 475; *Eden v. Lexington & F. R. Co.*, 14 B. Mon. (Ky.) 165.—CRITICISED IN *Wilson v. Bumstead*, 12 Neb. 1. DISAPPROVED IN *Grosso v. Delaware, L. & W. R. Co.*, 50 N. J. L. 317, 11 Cent. Rep. 574, 13 Atl. Rep. 233. NOT FOLLOWED IN *Davis v. St. Louis, I. M. & S. R. Co.*, 44 Am. & Eng. R. Cas. 690, 53 Ark. 117. QUOTED IN *Holmes v. Oregon & C. R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 75.

But upon a subsequent hearing of the above cause—*held*, that in the absence of a statute, such damages cannot be recovered. *Sullivan v. Union Pac. R. Co.*, 2 Fed. Rep. 447, 1 McCrary 301.

i. Exemplary Damages.

418. When recoverable, generally.—The damages allowed by the Alabama statute are punitive, and are not confined to the pecuniary loss sustained by the family of the deceased by reason of his death. *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.—REVIEWED IN *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272.

Under Cal. Act of April 26, 1862, § 3, allowing damages both pecuniary and exemplary, as to the jury shall seem fair and just, exemplary damages may be allowed for the death of an infant. *Myers v. San Francisco*, 42 Cal. 215.

Where an administrator sues under the Connecticut statute, and the court hears the case in damages, punitive damages may be given, where the court finds as a fact that death was not instantaneous, and allows damages for the injury and pain suffered by the deceased. *Murphy v. New York & N. H. R. Co.*, 29 Conn. 496.—FOLLOWING *Linsley v. Bushnell*, 15 Conn. 225.

Whether exemplary damages are allowed in Iowa, in an action by an administrator, *quere*. *Sherman v. Western Stage Co.*, 24 Iowa 515.

In Kentucky, in an action by the personal representative of one killed by reason of negligence, or carelessness, or unfitness of the servants or agents of the company, exemplary damages may be given by the jury. *Bowler v. Lane*, 3 Metc. (Ky.) 311.

Where the action is under Tenn. Code, §§ 2291, 2292, by a personal representative, exemplary damages may be recovered whether the death was instantaneous or not, if the defendant was guilty of gross negligence, fraud, malice, or oppression. *Haley v. Mobile & O. R. Co.*, 8 Am. & Eng. R. Cas. 541, 7 Baxt. (Tenn.) 239.—FOLLOWED IN *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 45 Am. & Eng. R. Cas. 69, 88 Tenn. 721, 13 S. W. Rep. 698; *Louisville & N. R. Co. v. Garrett*, 3 Am. & Eng. R. Cas. 416, 8 Lea (Tenn.) 438, 41 Am. Rep. 640.—*Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 45 Am. & Eng. R. Cas. 69, 88 Tenn. 721, 13 S. W. Rep. 698.—FOLLOWING *Haley v. Mobile & O. R. Co.*, 8 Am. & Eng. R. Cas. 541, 7 Baxt. 242.

The Texas constitution of 1869 left the statute of February 2, 1860, in force; but in cases which were the result of wilful act or omission, involving that degree of moral delinquency which, on settled legal principles, renders exemplary damages appropriate, it allowed to the husband, or widow and children, such damages in addition to their pecuniary loss. *March v. Walker*, 48 Tex. 372.—FOLLOWING *Houston & T. C. R. Co. v. Bradley*, 45 Tex. 171.

Exemplary damages for killing a member of one's family were unknown to the common law, and originated in the idea rather of punishment to the offender than of

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To authorize a verdict for exemplary damages under the statute for the negligence of a servant, it must be shown that the act complained of was performed by the direction of the employer, or that the employer has adopted and ratified such acts as his own, or that he has been guilty of negligence in the selection of employment of the servant whose act is complained of. *International & G. N. R. Co. v. McDonald*, 42 *Am. & Eng. R. Cas.* 211, 75 *Tex.* 41, 12 *S. W. Rep.* 860.

419. When not recoverable.—The damages under Ala. Code, §§ 2590-2592, to be recovered against a railroad company for the homicide of an employé, are generally not punitive, but compensatory. *Louisville & N. R. Co. v. Chaffin*, 84 *Ga.* 519, 11 *S. E. Rep.* 891.

A recovery of punitive damages for the loss of life under section 3 of the Ky. Act of 1854 bars any other action for the injury or any of its consequences; and if a personal representative elects to sue and enforce the right of action that survives to him, he will not be allowed afterward to avail himself of the benefits of the punitive statute and recover under its provisions. *Hansford v. Payne*, 11 *Bush (Ky.)* 380.—DISTINGUISHED IN *Conner v. Paul*, 12 *Bush* 144.

Punitive damages cannot be recovered by a father in a suit for the death of his child. *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 *La. Ann.* 824, 8 *So. Rep.* 586.

The suit having been instituted to recover punitive damages, damages cannot be allowed for a larger amount than fixed in the decree of the court. *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 *La. Ann.* 824, 8 *So. Rep.* 586.

In an action for damages under Missouri statute (Rev. St. § 2122), where the wrongful act was not accompanied by an aggravating circumstance, but the injury was the result, simply, of the want of ordinary care, exemplary damages cannot be recovered. (Rev. St. § 2123). *Parsons v. Missouri Pac. R. Co.*, 94 *Mo.* 286, 12 *West. Rep.* 615, 6 *S. W. Rep.* 464.

Under the Tennessee statute which provides that the administrator of the estate of the decedent wrongfully killed by another, or the next of kin by the use of his name, may, in right of the deceased, re-

3 D. R. D.—60.

cover damages for mental and physical suffering, loss of time, and necessary expenses, exemplary damages cannot be recovered; and it is error for the court to instruct the jury that total disablement for the decedent's period of expectancy of life before the injury may be taken as the standard of measurement of the damages recoverable. *Illinois C. R. Co. v. Crudup*, 63 *Miss.* 291.

420. — unless wilful or gross negligence be shown.—Exemplary damages are only justified where the negligence of the defendant is gross or wanton. Therefore, where the action is for negligently causing the death of a passenger, such damages are not allowable where the accident occurred by reason of certain rotten ties, where it appears that there was no negligence in the operation of the train, and that a suitable person had been employed as section boss, who had regularly inspected the track and had from time to time replaced rotten ties with sound ones. *Kansas Pac. R. Co. v. Cutter*, 19 *Kan.* 83.

Actions under the statute for injuries causing death, where the damages are wholly compensatory for pecuniary loss, distinguished from those for wilful torts or for personal injuries in which punitive damages, or damages for injuries not pecuniary in their nature, such as² injury to the feelings or for mental and physical pain and suffering, are allowed. *Hutchins v. St. Paul, M. & M. R. Co.*, 44 *Minn.* 5, 46 *N. W. Rep.* 79.

A widow cannot recover, under the Pennsylvania statute, exemplary damages for the death of her husband unless the negligence of the defendant is wilful or gross. *Pennsylvania R. Co. v. Ogier*, 35 *Pa. St.* 60.

Under the provision of the Texas statute (Rev. St. art. 2901) that "when death is caused by the wilful act or omission or gross negligence of the defendant exemplary as well as actual damages may be recovered," exemplary damages can only be recovered from a railroad company when there is evidence tending to show that the death was occasioned by the wilful act or omission or gross negligence of the company acting by and through its corporate officers. *International & G. N. R. Co. v. McDonald*, 42 *Am. & Eng. R. Cas.* 211, 75 *Tex.* 41, 12 *S. W. Rep.* 860.

421. Not recoverable in absence of statute, even in cases of gross or wil-

ful negligence.*—Under a statute which gives to the next of kin a right of action against a party for the injury resulting to them for the wrongful killing of a relative, punitive damages cannot be recovered unless expressly provided for in such statute. *Illinois C. R. Co. v. Crudup*, 63 Miss. 291.

Under Ky. Gen. St. ch. 57, § 1, giving the personal representative of one killed by the negligence of a railroad company or its agents or servants, the deceased not being an employé, the right to maintain an action for damages the same as the person would have had if death had not resulted, there can be no recovery for punitive damages on the ground that death was caused by the wilful negligence of the company or its agents. *Cincinnati, N. O. & T. P. R. Co. v. Privitt*, 92 Ky. 223, 17 S. W. Rep. 484.—FOLLOWING *Givens v. Kentucky C. R. Co.*, 89 Ky. 231, 12 S. W. Rep. 257; *Baker v. Louisville & N. R. Co.*, (Ky.) 17 S. W. Rep. 191.

Under N. Y. Act of 1847, giving to the representatives of a deceased person a remedy by action where death was caused by wrongful act, neglect, or default, the measure of damages is the pecuniary loss which the widow and next of kin have sustained by the death. And in their verdict a jury cannot give vindictive damages, nor award anything as a punishment of the wrong-doer or from sympathy for the loss of the survivors, the standard created by the statute being purely pecuniary loss. *Wise v. Teerpenning*, 2 Edm. Sel. Cas. (N. Y.) 112.

The fact that the death of the deceased was caused by the negligence or carelessness of the employés or agents of the railroad, under the constitution of 1869, would only entitle plaintiff to actual damages, though it amounted to gross neglect. *Houston & T. C. R. Co. v. Baker*, 11 Am. & Eng. R. Cas. 667, 57 Tex. 419.

422. How far in the discretion of the jury.—Ala. Code 1886, § 2589, is punitive in its nature and requires the jury to assess, without regard to actual compensation, such damages as they may deem necessary to effect the punishment of the defendant for the wrongful act by which the death of the plaintiff's intestate was caused. *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 So. Rep. 800.—FOLLOWING

* Punitive damages not recoverable in actions for causing death unless allowed by statute, see note, 12 AM. ST. REP. 377.

Savannah & M. R. Co. v. Shearer, 58 Ala. 672; *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272.

In an action under Ky. Gen. St. ch. 57, § 3, punitive damages may or may not be given, in the discretion of the jury. It was, therefore, error in this case to instruct the jury that they "should" give punitive damages if they found wilful neglect. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129.

423. Compensatory damages recoverable on failure to show case for punitive damages.—In an action under Ky. Gen. St. ch. 57, §§ 1, 3, the allegation of wilful negligence includes all inferior degrees of negligence; and if the complainant fails to establish a right of action to punitive damages by proving wilful negligence, he may, nevertheless, recover compensatory damages upon proof of culpable neglect, if the deceased was not an employé of the company. *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12.—REVIEWING *Louisville, C. & L. R. Co. v. Case*, 9 Bush 728.—OVERRULED IN *Cincinnati, N. O. & T. P. R. Co. v. Privitt*, 92 Ky. 223.

j. Nominal Damages.

424. When the limit of recovery in action by husband for death of wife.—Where a husband sues for the death of his wife by wrongful act, nominal damages only can be recovered where there is no proof of special loss or injury. *Mitchell v. New York C. & H. R. R. Co.*, 2 Hun (N. Y.) 535, 5 T. & C. 122; affirmed on another point in 64 N. Y. 655, mem.—REVIEWING *McIntyre v. New York C. R. Co.*, 37 N. Y. 287.—APPLIED IN *Parsons v. New York C. & H. R. R. Co.*, 37 Hun 128.

425.—in action for death of employé.—Under the statute which gives an action against the employer, in favor of the administrator of a deceased employé whose death was caused by negligence while in the service (Code, §§ 2590, 2591), only nominal damages can be recovered, when it appears that there are no distributees of decedent's estate, to whose benefit the recovery will enure. *James v. Richmond & D. R. Co.*, 48 Am. & Eng. R. Cas. 522, 92 Ala. 231, 9 So. Rep. 335.—QUOTING *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90.—FOLLOWED IN *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350.

Shearer, 58 Ala. 10. *v. Sullivan*, 59

Gen. St. ch. 57, § 1, or may not be the jury. It was, to instruct the jury on punitive damages. *Louisville*, 83 Ky. 129.

damages recoverable to show case.—In an action for wrongful death, §§ 1, 3, the allowance includes all damages; and if the plaintiff establishes a right of recovery by proving willfulness, nevertheless, recovery is upon proof of death was not necessary. *Claxton v. Bush* (Ky.), 13 Bush (Ky.) 2. — REVIEWING *Case*, 9 Bush (Cincinnati), N. O. & Ky. 223.

damages.

Limit of recovery for death of decedent.—In an action for wrongful act, nominal damages are recoverable where there is no loss or injury. *Case*, 9 Bush (Cincinnati), N. O. & Ky. 223. *Case*, 9 Bush (Cincinnati), N. O. & Ky. 223.

Right of recovery for death of employee.—Where an employer, in favor of the employee whose negligence while in the service (1891), only nominal damages, when it appears that the recovery of damages is not limited to nominal damages, although there is no positive evidence of actual pecuniary loss to the next of kin. *Dickens v. New York C. R. Co.*, 1 Abb. App. Dec. (N. Y.) 504. — FOLLOWING *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.

426. — In action by personal representative.—The damages recoverable by the administrator of one killed by negligent management of a train are not necessarily nominal. *Cortiss v. Worcester, N. & R. R. Co.*, 21 Am. & Eng. R. Cas. 208, 63 N. H. 404.

Where an administrator sues for the benefit of the next of kin, only nominal damages can be recovered if the evidence shows that such next of kin were not dependent upon the deceased in whole or in part. *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197. *Howard v. Delaware & H. Canal Co.*, 41 Am. & Eng. R. Cas. 473, 40 Fed. Rep. 195. — REVIEWING *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 96. — DISTINGUISHED IN *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168.

In an action in behalf of the next of kin, by the personal representatives, nominal damages may be recovered, if it appears that the death was caused by the wrongful act or omission of the defendant, although no actual pecuniary damages may have been shown or suffered. *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877. — REVIEWED IN *Union Pac. R. Co. v. Dunden*, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501.

Under the N. Y. Act of 1847, ch. 450, the recovery is not limited to nominal damages, although there is no positive evidence of actual pecuniary loss to the next of kin. *Dickens v. New York C. R. Co.*, 1 Abb. App. Dec. (N. Y.) 504. — FOLLOWING *Tilley v. Hudson River R. Co.*, 29 N. Y. 252.

If a person who has been struck by a locomotive remains in a perfectly unconscious condition until his death, his administrator is not entitled to recover substantial damages, in the absence of evidence of any considerable expense or loss incurred between the time of the injury and the death. *Tully v. Fitchburg R. Co.*, 14 Am. & Eng. R. Cas. 682, 134 Mass. 499.

k. Excessive Damages.

427. General rules.—The Arkansas statute does not, and could not, under the constitution, limit the recovery of damages for injuries resulting in death, or for injuries to persons or property. But a jury is not without restraint, and if its assessment be so enormous as to shock the sense of jus-

tice, and to indicate that the verdict is the result of prejudice or passion, the trial court should set it aside; and, if it refuse, the supreme court will reverse the judgment. *Little Rock & Ft. S. R. Co. v. Barker*, 19 Am. & Eng. R. Cas. 195, 39 Ark. 491. — QUOTING *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317; *Chicago v. Major*, 18 Ill. 349; *Chicago v. Scholten*, 75 Ill. 469. REVIEWING *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 3 E. D. Smith 103; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495; *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19.

The same is the rule in New York. *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; reversing 28 Hun 407. — FOLLOWING *Oldfield v. New York & H. R. Co.*, 14 N. Y. 314; *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 321, 7 Am. Rep. 450.

And in Canada, *Secord v. Great Western R. Co.*, 15 U. C. Q. B. 631. *Morley v. Great Western R. Co.*, 16 U. C. Q. B. 504.

428. What verdicts are excessive, generally.—The proof was that deceased was 29 years old, and consequently his expectancy of life was 35 years; that the pecuniary loss to his family by reason of his death did not exceed \$540 per annum, with no probability of increase; that an annuity of that amount could be purchased for \$5692.68. Held, that a verdict of \$7500 was so excessive as to show that the jury had adopted an incorrect method of calculating the damages, or was misled by sympathy. *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 Ark. 377, 21 S. W. Rep. 886.

Where it appeared that the deceased was twenty-four years of age, without family, of temperate and industrious habits, and his annual net earnings were found to be \$263, a verdict of ten thousand dollars was held to be excessive, and the judgment was affirmed upon the condition of a remittitur of five thousand dollars. (Beck, J., dissenting.) *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326. — DISTINGUISHED IN *Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662. FOLLOWED IN *Locke v. Sioux City & P. R. Co.*, 46 Iowa 109. REVIEWED IN *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350, 39 Ark. 491.

* Excessive damages, see 45 AM. & ENG. R. CAS. 70, *abstr.*

Where the court gives the jury the method of computing the damages, based upon the party's age, what he had been earning, and his life expectancy, so that if followed the damages could not have exceeded \$2400, a verdict for \$4000 should be set aside. *Balch v. Grand Rapids & I. R. Co.*, 67 Mich. 394, 11 West. Rep. 476, 34 N. W. Rep. 884.

In an action for the death of a bridge carpenter, the evidence showed that his next of kin were a sister and two brothers, living in a foreign country; that the deceased had been at work some four months at two dollars a day, and had sent some money to his sister, but the evidence did not show how much. There was no evidence as to his age or his habits as to saving money, or as to the pecuniary benefit that the next of kin would have received from him had he lived. Held, that a verdict for plaintiff for \$1750 should be set aside as excessive. *Serensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407.

429. What verdicts are not excessive.—(1) *In general.*—When no amount is fixed by law, and no rule is prescribed fixing the amount of damages, the recovery is not limited to the amount of earnings of the person killed; and a finding of the jury will not be disturbed as excessive where it does not appear that the jury was influenced by passion, prejudice, or partiality, and had given due regard to the conditions existing at the time of the death and the facts and conditions of the case. *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. Rep. 838.

(2) \$1000.—Plaintiff's intestate was a junk dealer, and left as his next of kin a brother and sister in a foreign country, and three nephews in this country, where the intestate lived, but there was no evidence as to what he earned, nor as to what was the value of his life to the next of kin. Held, that a verdict for \$1000 should not be set aside as excessive. *Kelly v. Twenty-third St. R. Co.*, 14 Daly (N. Y.) 418, 14 N. Y. S. R. 699.—APPROVING *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523.

(3) \$1400.—Fourteen hundred dollars damages in an action by an administrator against a railroad company to recover for gross negligence, causing the death of the plaintiff's intestate, even if this court may review the case as to damages, is not so large as to require a reversal. *Chicago & A. R. Co. v. Bonifield*, 8 Am. & Eng. R. Cas. 493, 104 Ill. 223.

(4) \$2500.—In an action for the benefit of the estate of plaintiff's intestate, an award of \$2500 for the pain and suffering of deceased will not be set aside where it appears that his leg was mangled and his system subjected to a terrible shock, while he survived for twenty-four hours under intense pain and in the anguish of impending dissolution. *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 Ark. 377, 21 S. W. Rep. 886.

Damages in the sum of \$2333.35 were held not to be excessive in this case for an injury to a passenger resulting in death. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325.

A verdict for \$2500 damages for the death of a workman fifty-five years old, in fair health, who could earn \$2.25 per day of ten hours, and whose family was to a large extent dependent upon his labor for support, is not excessive. *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 30 N. W. Rep. 282, 58 Am. Rep. 848.

(5) \$4500.—Deceased was an industrious man, possessed of some property, in the enjoyment of reasonable health for a man of his years, and between fifty-seven and sixty-five years of age. Held, that a verdict for \$4500 was not excessive. *Walter v. Chicago, D. & M. R. Co.*, 39 Iowa 33.

(6) \$5000.—A verdict of \$5000 for the death of plaintiff's intestate, caused by a misplacement of the rails, due to a defect in the switching apparatus, is, in the opinion of the court, sustained by the evidence, and will not be set aside. *Wabash, St. L. & P. R. Co. v. Schevers*, 18 Ill. App. 52.

Plaintiff's intestate was killed at the crossing of two railroads, his train being run into by a train of the other road through the alleged negligence of the towerman at the crossing, who received a fixed salary paid him by both companies; a verdict of \$5000 was rendered in favor of plaintiff, which this court declines to set aside, holding that the evidence sustains the verdict. *Chicago & N. W. R. Co. v. Snyder*, 18 Ill. App. 640.

Under the New York statute, providing that the damages shall be such as the jury shall deem "a fair and just compensation, not exceeding \$5000," a verdict for the full statutory limit—held, not so excessive as to justify a reversal, where the evidence

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showed that the deceased was twenty-one years old, earning twenty-five dollars a month, and left, as his next of kin, a father and mother, and brothers and sisters in a foreign country. *Bierbauer v. New York C. & H. R. R. Co.*, 15 Hun (N. Y.) 559; affirmed in 77 N. Y. 588, mem.—REVIEWED IN *Bowles v. Rome, W. & O. R. Co.*, 46 Hun 324, 12 N. Y. S. R. 457.

The deceased was twenty-eight years old at the time of his death, industrious, of good habits, in robust health, and receiving \$1.75 a day as a car inspector. Held, that a verdict for \$4995 was not so excessive as to justify a reversal. *Webb v. Denver & R. G. W. R. Co.*, 7 Utah 363, 26 Pac. Rep. 981.—FOLLOWED IN *Wells v. Denver & R. G. W. R. Co.*, 7 Utah 482.

In an action for killing a mother the evidence showed that she was twenty-seven years old, in good health, and left two children, one three years old, and the other a little above one year old; that she was an estimable lady and well fitted to care for her children. Held, that a verdict for \$5000 should not be set aside as excessive, where the jury had a right to consider the loss of the care, intellectual culture, and moral training of the mother to the children. *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32.—QUOTING *Tilley v. Hudson River R. Co.*, 29 N. Y. 286.

(7) \$10,500.—Not excessive damages for the death of plaintiff's intestate where the expectancy of life was forty-two years and his earnings \$650 per annum. *McDermott v. Iowa Falls & S. C. R. Co.*, (Iowa) 47 N. W. Rep. 1037.

(8) \$15,000.—Plaintiff's intestate was a skilful stonecutter, was twenty-nine years of age, of robust health, and left as his beneficiaries, a wife, daughter, and father and mother, to whose support he had been contributing. Held, that the loss could not be measured solely by the remuneration he had been receiving in the past; and that a verdict of \$15,000 is not so clearly excessive as to justify a court in setting it aside. *East Line & R. R. Co. v. Smith*, 65 Tex. 167.

430. Death of husband and father.

—(1) \$3000 is not an exorbitant compensation for the widow and three children of deceased. *Secord v. Great Western R. Co.*, 15 U. C. Q. B. 631.

(2) \$5000.—For the death of a sober, industrious, and competent laborer, without

means, thirty-six years old, who provided for his family as best he could, and who left surviving him a widow and six young children, is not excessive. *Howard County Com'rs v. Legg*, 110 Ind. 479, 9 West. Rep. 212, 11 N. E. Rep. 612.

In an action by a widow to recover damages for the death of her husband, for the benefit of herself and three minor children, a verdict of \$5000 is not excessive where, under the law, \$1666.66 would go to the widow, and \$1111.11 to each of the children. *Staal v. Grand Rapids & I. R. Co.*, 57 Mich. 239, 23 N. W. Rep. 795.

Where it appeared that the deceased left a wife and child surviving, and was a strong, healthy man in middle life, accustomed to earn good wages—held, that \$5000 damages was not so clearly excessive and unreasonable as to warrant the court in setting aside the verdict. *Bolinger v. St. Paul & D. R. Co.*, 29 Am. & Eng. R. Cas. 408, 36 Minn. 418, 31 N. W. Rep. 856.—QUOTING *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25.

For negligently causing the death of an employé, a competent engineer earning \$125 per month, a verdict against the railway company for \$5000 for the widow, and the same for a daughter seven years old, was not excessive. *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. Rep. 104.

Where a common laborer was killed by a railroad, leaving a widow and several minor children, but there was no evidence of what wages he was receiving or capable of earning, \$5000 was regarded as excessive. *Illinois C. R. Co. v. Weldon*, 52 Ill. 290.—FOLLOWED IN *Peoria & P. U. R. Co. v. O'Brien*, 18 Ill. App. 28. REVIEWED IN *Chicago, E. & L. S. R. Co. v. Adamick*, 33 Ill. App. 412.

(3) \$7500.—Intestate, who was fifty-two years old at the time of his death, and had been drawing a pension of \$72 a month, died leaving a widow and three children surviving him. He was of industrious and ordinary business capacity; his services in educating his minor children might have been found to have a pecuniary value to them. Held, that an award of \$7500 as damages to his widow and children was not excessive. *St. Louis, I. M. & S. R. Co. v. Maddry*, 58 Am. & Eng. R. Cas. 327, 57 Ark. 306, 21 S. W. Rep. 472.

(4) \$8000.—The testimony showed that deceased was fifty years old, the surviving family consisting of his widow, and daughter twenty-three years of age; that he was

a game and poultry dealer, and made a good, comfortable living for himself and family. The verdict was for \$8000. The plaintiff was an invalid, having been for years dependent upon her husband. *Held*, the amount given by the jury could not be said to be more than, "under all the circumstances," is just. *Cook v. Clay St. Hill R. Co.*, 6 Am. & Eng. R. Cas. 175, 60 Cal. 604.

There is nothing in the case showing that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death, and the evidence given was of circumstances attendant upon the injury. *Cook v. Clay St. Hill R. Co.*, 6 Am. & Eng. R. Cas. 175, 60 Cal. 604.

(5) \$10,000.—A laborer thirty-five years old, earning \$1.25 a day, was killed while in the employ of a railroad company, leaving a widow and two small children. The testimony showed that he was "stout, healthy, and sober." *Held*, that a verdict of \$10,000 for the widow and children for damages for his death was not so excessive as to be ground for reversal. *Missouri Pac. R. Co. v. Lehnberg*, 75 Tex. 61, 12 S. W. Rep. 538.—QUOTING *McIntyre v. New York C. R. Co.*, 37 N. Y. 289. REVIEWING *Baltimore & O. R. Co. v. State*, 24 Md. 271.

(6) \$12,000.—The keeper of a railroad section house, whose usual earnings had been from fifty-five to one hundred dollars a month, was killed by the negligent conduct of the servants of a railway company in running one of its trains. In an action by the widow and child for damages resulting—*held*: (1) that no standard by which to estimate damages for negligently killing a man can be fixed by reference to what he was earning when he died. The additional experience and skill which he might acquire in some of the years of life of which he was deprived would increase his wages, and create an element of uncertainty in fixing any arithmetical standard. (2) In the absence of any standard, since the size of the verdict did not show any evidence of passion or prejudice, the verdict of \$12,000 could not be pronounced clearly excessive. *International & G. N. R. Co. v. Ormond*, 27 Am. & Eng. R. Cas. 139, 64 Tex. 485.

(7) \$18,000.—J., a brakeman twenty-nine years old, of good health and morals, industrious, without special education or business

qualifications, and earning about \$65 a month, was killed in an accident resulting from ordinary negligence on the part of the company in not keeping its roadway in proper condition. A verdict for \$18,000 in favor of the wife and only child, two years old, of J., is excessive. *Gulf, C. & S. F. R. Co. v. Johnson*, 1 Tex. Civ. App. 103, 20 S. W. Rep. 1123.

431. Death of husband.—(1) \$4000.—Where deceased was thirty years old, was temperate and industrious, had been earning \$55 a month, and left a widow and no estate, the damages were assessed at \$4000. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616.

(2) \$5500.—A verdict of \$5500 in favor of a widow who sued for the homicide of her husband is not excessive where it appeared that the husband had an expectancy of over twenty years of life and an annual income of about \$1000, deductions having been made on account of contributory negligence, the effect of advancing age, and the support of the husband himself, under the charge of the court. *Georgia R. Co. v. Pittman*, 26 Am. & Eng. R. Cas. 474, 73 Ga. 325.

(3) \$6000.—In a suit by a wife for the homicide of her husband, contributory negligence was urged as one ground of defense. The evidence showed that the deceased was twenty-six years of age, and was making a little over \$100 per month. The jury found for the plaintiff \$6000. The presiding judge granted a new trial and this court declined to interfere with his discretion. On a second trial the evidence taken on the former trial was read to the jury, and they found for the plaintiff the same amount as in the first verdict. On motion, the presiding judge granted a second new trial on the ground that the verdict was excessive. *Held*, error. *Cleveland v. Central R. Co.*, 73 Ga. 793.—REVIEWED IN *Taylor v. Central R. & B. Co.*, 79 Ga. 330.

(4) \$7000.—Plaintiff's husband was thirty years old at the time he was killed, and an ordinary laborer earning about \$400 a year. *Held*, that a verdict of \$7000 was not so excessive as to show partiality or prejudice on the part of the jury, and therefore should not be disturbed. *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724.

(5) \$8000.—A verdict for \$8000, in an action for killing a husband, will not be set aside as excessive where the evidence shows

that he was fifty-nine years old, and was making a good, comfortable living for himself and family, and left surviving an invalid wife and a daughter twenty-three years old. *Cook v. Clay St. Hill R. Co.*, 6 Am. & Eng. R. Cas. 175, 60 Cal. 604.

(6) \$10,000.—A verdict of \$10,000 in favor of the widow is not excessive where the deceased was twenty-nine years old, healthy, an engineer by profession, and earning \$125 per month at the time he was killed. *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214.

432. Death of wife.—In an action for the death of a wife there was no evidence of misconduct, mistake, or prejudice on the part of the jury, except it be inferred from the amount of the verdict, which was for \$5000. *Held*, that as there is no standard by which the value of a life can be determined, and as a wide discretion should be given to the jury, the verdict could not be said to be excessive. *Hobbs v. Eastern R. Co.*, 66 Me. 572, 19 Am. Ry. Rep. 210.—REVIEWING *Webb v. Portland & K. R. Co.*, 57 Me. 117.

In an action for the death of a wife, the testimony bearing upon the amount of damages was very indefinite, but it clearly appeared that the deceased was a superior woman, as wife, mother, and member of society. The jury returned a verdict for \$5000, being the statutory limit under the laws of Wisconsin. *Held*, that there was nothing in the amount of the verdict to call for the interference of the court. *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. (U. S.) 282.

In an action for negligently causing the death of plaintiff's wife and an infant child, a verdict for \$8000—*held*, to be excessive, and a reversal ordered, unless the plaintiff would remit \$3000 of the amount. *Sherman v. Western Stage Co.*, 24 Iowa 515.

433. Death of child, generally.—A verdict for \$2000 for the death of plaintiff's daughter five years old, a bright and healthy child—*held*, not excessive. *Hurzeler v. Central C. T. R. Co.*, 48 N. Y. S. R. 649, 20 N. Y. Supp. 676.

A verdict for \$2000 for killing a boy eighteen months old—*held*, not excessive. *Schrier v. Milwaukee, L. S. & W. R. Co.*, 65 Wis. 457, 27 N. W. Rep. 167.

A verdict of \$2300 for the death of a child of 5 years and 10 months, sustained. *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. Rep. 690.

Where the evidence shows that the plaintiff's son was a healthy, sprightly boy five years old, a verdict of \$2500 is not so excessive as to show mistake, passion, or prejudice on the part of the jury. *Ross v. Texas & P. R. Co.*, 44 Fed. Rep. 44. *Johnson v. Chicago & N. W. R. Co.*, 25 Am. & Eng. R. Cas. 338, 64 Wis. 425, 25 N. W. Rep. 223.

A verdict for \$3000 actual damages in favor of parents for negligently causing the death of their son, aged sixteen—*held*, not to be excessive. *Missouri Pac. R. Co. v. Bridges*, 39 Am. & Eng. R. Cas. 604, 74 Tex. 520, 12 S. W. Rep. 210.

Where the action is for the death of a daughter, about ten years old, and there is no evidence to show that there is reason for expecting extraordinary pecuniary benefits from the continuance of her life, a verdict for \$3775 should be set aside as excessive. *Potter v. Chicago & N. W. R. Co.*, 22 Wis. 615.—REVIEWING *McIntyre v. New York C. R. Co.*, 47 Barb. (N. Y.) 515.

Plaintiff's intestate lived with her father and mother, and at the time of her death she was seventeen and a half years old, in good health, and was earning from \$9 to \$11 a week in a cigar factory. Besides her father and mother, she left, as her next of kin, three sisters, two of whom were married, the third one sixteen years old, and two brothers, one seven and the other twenty-five years old. There was no evidence that she contributed anything whatever to the support of her family, or that any member of it, or any of her next of kin, was in any degree dependent upon her. The only thing that authorized more than nominal damages was the fact that she was a minor, which entitled her father to her earnings until she was of age. *Held*, that a verdict for \$5000 was excessive. *Chicago, E. & L. S. R. Co. v. Adamick*, 33 Ill. App. 412.—QUOTING *Chicago v. Scholten*, 75 Ill. 468. REVIEWING *Andrews v. Boedecker*, 17 Ill. App. 213; *Illinois C. R. Co. v. Weldon*, 52 Ill. 290.—Compare *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 12 West. Rep. 615, 6 S. W. Rep. 464.

434. Death of child—Damages to father.—(1) *When deemed excessive.*—Where a complaint, in an action by a father for the death of an infant child, does not aver and demand damages for the loss of the further services of the child, and there is no evidence tending to show such loss, a

verdict for \$1800 is excessive. *Pennsylvania Co. v. Lilly*, 4 *Am. & Eng. R. Cas.* 540, 73 *Ind.* 252.

A verdict of four thousand dollars in favor of a father for the death of a son eight years old, considered excessive to the amount of two thousand dollars, and a remittitur of the excess allowed. *Vicksburg v. McLain*, 67 *Miss.* 4, 6 *So. Rep.* 774.

Where plaintiff's son, at the time he was killed on a railroad, was eighteen years old, in good health, and earning \$50 per month, and the expenses attending his injury and funeral were \$200, and the statute required the damages to be compensatory only, a verdict for \$2250—held, excessive. *Hickman v. Missouri Pac. R. Co.*, 22 *Mo. App.* 344.—QUOTING *State v. Baltimore & O. R. Co.*, 24 *Md.* 107; *North Pa. R. Co. v. Kirk*, 90 *Pa. St.* 15. REVIEWING *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 318; *Telfer v. Northern R. Co.*, 30 *N. J. L.* 188; *Potter v. Chicago & N. W. R. Co.*, 21 *Wis.* 372, 22 *Wis.* 615.

A verdict of \$4000 in favor of a father for the death of his son cannot be sustained on mere proof of the relationship and of the killing, in the absence of evidence as to the physical or pecuniary condition of the father, or of his age. *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 38 *Hun (N. Y.)* 116.—RECONCILING *Franklin v. South Eastern R. Co.*, 3 *H. & N.* 211; *Pennsylvania R. Co. v. Adams*, 55 *Pa. St.* 499.—REVIEWED IN *Bowles v. Rome, W. & O. R. Co.*, 46 *Hun* 324, 12 *N. Y. S. R.* 457.

A verdict for £75, in an action by a father for the death of his son, who did not support the plaintiff, although he slightly assisted him, the plaintiff being an old man, is excessive. *Franklin v. South Eastern R. Co.*, 3 *H. & N.* 211, 4 *Jur. N. S.* 565, 29 *L. J. Ex.* 25.—DISTINGUISHED IN *Sykes v. North Eastern R. Co.*, 32 *L. T.* 199, 44 *L. J. C. P.* 191, 23 *W. R.* 473.

(2) *When not deemed excessive.*—In an action by an administrator, under *Mansf. Ark. Dig.* §§ 5225, 5226, for the benefit of the father of decedent, an adult, the evidence tended to show that the father was poor and dependent and that the son was in the habit of giving him about \$300 per annum. The father's expectancy of life, according to the mortuary tables, was about seventeen years. Held, that the jury were justified in drawing the conclusion that decedent would have continued to aid his

father; and that a verdict in plaintiff's favor for \$2391.50 would not be set aside as excessive. *Fordyce v. McCants*, 55 *Ark.* 384, 18 *S. W. Rep.* 371.

In an action by a father for the killing of his five young children, the damages awarded (\$10,800) are not excessive. *Nehrbas v. Central Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 670, 62 *Cal.* 320.

A jury would have the right, acting upon their own knowledge and without proof, to say that the services of a boy from eleven until twenty-one years of age were valuable to his father, and to estimate their value for the killing of the boy, which is equivalent to a decision that \$1500 are not excessive damages. *O'Mara v. Hudson River R. Co.*, 38 *N. Y.* 445.—APPLIED IN *Lang v. New York, L. E. & W. R. Co.*, 22 *N. Y. S. R.* 110. FOLLOWED IN *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 *N. Y.* 317; *Lang v. New York, L. E. & W. R. Co.*, 51 *Hun* 603.

In an action for negligently killing a girl of thirteen the evidence showed that her mother was dead and that her father had abandoned the family some years before and had not assisted in the support of the daughter since; but it was assumed at the trial, without direct evidence, that he was yet alive. Held, that whether the father was living or not was only material on the distribution of damages and should not affect the right of recovery or the amount; and that a verdict for \$3500 should not be disturbed as excessive. *Pineo v. New York C. & H. R. R. Co.*, 34 *Hun (N. Y.)* 80; affirmed (?) 99 *N. Y.* 644, *mem.*

Plaintiff was a gardener in moderate circumstances and sued for the death of his only child, a daughter six years old, and healthy and bright. Held, that a verdict of \$5000 should not be disturbed. *Hooghkirk v. Delaware & H. Canal Co.*, 63 *Hov. Pr. (N. Y.)* 328, 11 *Abb. N. Cas.* 72.—DISAPPROVING *Lehman v. Brooklyn*, 29 *Barb.* 235. QUOTING *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 *N. Y.* 317. REVIEWING *Oldfield v. New York & H. R. Co.*, 14 *N. Y.* 310; *McGovern v. New York C. & H. R. R. Co.*, 67 *N. Y.* 417.

A verdict for £50 in an action by a father for the death of his son, such son at the time he was killed being fourteen years old and having earned 4s. a week, but being out of employment at the time of his death, is not excessive. *Walker v. South Eastern R. Co.*,

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199, 23 W. R. 473.

435. Death of child—Damages to mother.—(1) *Excessive.*—A verdict of \$4500—*held*, excessive for the death of a child five years old. *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350.—REVIEWING Louisville & N. R. Co. v. Connor, 9 Heisk. (Tenn.) 19; *Chicago v. Scholten*, 75 Ill. 469; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 254; *Allen v. Atlanta St. R. Co.*, 54 Ga. 503; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. St. 395; *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 496.—QUOTED IN *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 7 S. W. Rep. 1.

A verdict of twenty thousand dollars for the death of an infant child, given in an action by the mother, will be set aside as excessive, especially where there was no averment in the complaint of any special damage and there was no evidence whatever introduced or offered upon the subject of damage. *Morgan v. Southern Pac. Co.*, 54 Am. & Eng. R. Cas. 101, 95 Cal. 510, 30 Pac. Rep. 603.

Damages to the amount of \$3916.66 in a suit by a mother for the killing and loss of the services of her son of about eighteen years of age, who was himself guilty of negligence, are excessive. *Yonge v. Kinney*, 28 Ga. 111.

Deceased was a single man, a switchman, and left as his nearest relative a mother possessed of some means, and from the history of his past life and habits it appeared that he had not been of any great pecuniary value to his mother, and would not be in the future. *Held*, that a verdict of \$10,000, the full statutory limit, should be set aside. *Atchison, T. & S. F. R. Co. v. Brown*, 6 Am. & Eng. R. Cas. 228, 26 Kan. 443; *further appeal*, 15 Am. & Eng. R. Cas. 271, 31 Kan. 1.—QUOTED IN *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 7 S. W. Rep. 1. REVIEWED IN *Union Pac. R. Co. v. Dunden*, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501.

Where a mother was 41 years old and able to support herself by her needle, and had two sons living who were respectively 16 and 19 years old, a verdict of \$3000 damages for the death of a son in a railroad

accident was set aside as excessive. *Poulmier v. Erie R. Co.*, 34 N. J. L. 151.

(2) *Not excessive.*—Where the statute fixes the measure of damages at the full value of the life, a verdict of \$5000 for the death of a minor son, eighteen years of age, who made \$1.50 per day with which he supported his mother and her family, is not excessive. *Richmond & D. R. Co. v. Johnston*, 89 Ga. 560, 15 S. E. Rep. 908.—FOLLOWING *Daniels v. Savannah, F. & W. R. Co.*, 86 Ga. 236.

A verdict in favor of a widowed mother for \$2000 for the death of a four-year-old child, where there were three other children, the oldest of whom was but thirteen—*held*, not excessive. *Moskovitz v. Lighte*, 68 Hun (N. Y.) 102.

Suit by a widow for the death of her only child, a son twenty-six years old, earning \$1000 a year, out of which he contributed \$200 a year to his mother's support, who was fifty-one years old. He was "industrious, economical, and temperate." *Held*, a verdict for \$4200 was not ground for reversal. *Texas & P. R. Co. v. Lester*, 75 Tex. 56, 12 S. W. Rep. 955.

A verdict awarding \$2000 to a mother for the death of her daughter sixteen years old, upon whom she was largely dependent for support and who had some capacity for earning money, is not excessive. *Wiltse v. Tilden*, 77 Wis. 152, 46 N. W. Rep. 234.

436. Death of employe.—(1) *Excessive.*—Damages in the sum of \$3400 for the killing of an employe of feeble intellect, hired at \$1.40 a day, are excessive under a statute (Mich. Comp. L. 1871, § 2351) measuring the damages by the "pecuniary injuries" inflicted on the widow or next of kin, inasmuch as the interest on this amount would enable them to realize a perpetual income amounting annually to more than three fourths of his annual earnings. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.—DISTINGUISHED IN *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306. FOLLOWED IN *Beard v. Skeldon*, 13 Ill. App. 54. QUOTED IN *Hunn v. Michigan C. R. Co.*, 78 Mich. 513.

Plaintiff's intestate being in his twenty-first year when killed, unmarried, healthy, of sober, industrious, and economical habits, employed as a switchman on a railroad at a monthly salary of \$66.66, and having an expectancy of life for forty years, a verdict for \$9395.95 was excessive and was properly

set aside. *McAdory v. Louisville & N. R. Co.*, 94 Ala. 272, 10 So. Rep. 507.

(2) *Not excessive*.—In an action for the death of an engineer, the evidence showed that he left a father fifty years old, with but little property, and that the son lived with him and contributed to the support of the family, and paid the premiums on a policy insuring his father's life for the benefit of the deceased's mother, and had promised to keep the same paid in the future. *Held*, that a verdict for \$2000 was not excessive. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.—QUOTED IN *Ohio & M. R. Co. v. Wangelin*, 43 Ill. App. 324. REVIEWED IN *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.

Plaintiff's intestate was killed while working on defendant's gravel train. *Held*, that a verdict for \$2150 should not be set aside as excessive. The life of an industrious workingman, such as the deceased was, is worth the sum found by the jury. *Chicago, B. & Q. R. Co. v. Blank*, 24 Ill. App. 438.

In an action by the administrator of a yard switchman who was killed in the railway yards, five thousand dollars is not excessive damages, it appearing that deceased was thirty-one years old, healthy, and the support of a wife and three children. *Chicago & E. I. R. Co. v. Kneirim*, 48 Ill. App. 243.

Plaintiff's intestate, a car inspector, was killed through the negligence of the company in failing to provide a signal man. *Held*, that a verdict in favor of plaintiff for \$5000 should be sustained. *Potter v. New York C. & H. R. Co.*, 29 J. & S. (N. Y.) 351.

A verdict for \$6500 for the death of an engineer, under the Ark. statute, for the benefit of his mother as next of kin, will not be set aside as excessive where the evidence shows he was earning \$150 a month, was healthy, with a life expectancy of 32½ years; that he contributed to the support of his mother \$30 to \$50 a month, and gave to an invalid sister when necessary \$5 to \$20 a month; the life expectancy of the mother being 14½ years and that of his sister 42 years. *Little Rock & Ft. S. R. Co. v. Voss*, (Ark.) 18 S. W. Rep. 172.

A verdict of \$8000 for negligently causing the death of a young and healthy engineer, whose expectation of life was thirty-one years, is not excessive to a point indicating either partiality, passion, prejudice, caprice, or corruption. *Tennessee C. & R. Co. v.*

Roddy, 31 Am. & Eng. R. Cas. 340, 85 Tenn. 400, 5 S. W. Rep. 286.

In an action for killing a brakeman on a train, by wilful neglect, a verdict for \$10,000 is not so excessive as to indicate that the jury were influenced by passion or prejudice. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129.

Deceased was postmaster and express agent at a station, and was killed while attempting to cross defendant's track. The evidence showed that he was free from contributory negligence, and that the company was guilty of gross negligence. *Held*, that a verdict for \$15,000 was not excessive. *Chesapeake, O. & S. W. R. Co. v. Hendricks*, 88 Tenn. 710, 13 S. W. Rep. 66, 14 S. W. Rep. 488.

A verdict of \$15,000 for negligently causing the death of an employé cannot be said to be excessive, where the evidence shows he was but twenty-nine years old, was considered one of the best workmen in the company's employ, and was earning \$2.50 per day at the time of his death. *Louisville & N. R. Co. v. Shivel*, (Ky.) 18 S. W. Rep. 944.

1. Interest as Damages.

437. Constitutionality of statute.

—The N. Y. Act of 1870, ch. 78, providing that the damages recoverable for wrongfully causing death shall draw interest from the time of the death, and that such interest shall be added to the verdict and entered as part of the judgment, is not in conflict with any provision of the state constitution, neither is it *ultra vires*. *Cornwall v. Mills*, 12 J. & S. (N. Y.) 45.

438. How far discretionary with jury.

—In an action by a widow for the homicide of her husband, it is error to instruct the jury as matter of law that they should add interest to whatever amount of damages they might find at the date of the homicide. The question of increasing damages in such a case is for the jury. *Central R. Co. v. Sears*, 66 Ga. 499.—DISTINGUISHED IN *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.

Under the provisions of the N. Y. Act of 1870 (ch. 78, Laws of 1870), which provides that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the ver-

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dict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk, and this although the jury, in making up the damages awarded, in fact included the interest. *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664; reversing 27 Hun 219.

It seems that the remedy of the defendant in such case, if any, is to move to set aside the verdict. *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664; reversing 27 Hun 219.

439. Not to be allowed as such.—Prior to the N. Y. Act of 1870, in an action for causing death, the jury might consider, as affecting the amount of damages, the time elapsing between the death and the trial; but it is error to agree on a certain sum as damages and add thereto interest as such, from the time of the killing to the time of the trial. *Cook v. New York C. & H. R. R. Co.*, 10 Hun (N. Y.) 426.

Where a complaint in an action for wrongfully causing death only demands judgment for a stated amount and the verdict is rendered for the full amount, interest cannot be added in addition thereto, notwithstanding the N. Y. Code of Civ. Pro. § 1904, providing that when judgment is rendered for the plaintiff, the clerk must add to the sum so awarded interest thereon from the decedent's death, and include it in the judgment. *Robostelli v. New York, N. H. & H. R. Co.*, 34 Fed. Rep. 719.

440. Rate.—Under provisions of the N. Y. Act of 1870, ch. 78, which directs that interest on the damages recovered in an action for wrongfully causing death, from the time of the death shall be added to the verdict, the rate of interest is governed by the statute regulating it in force when the verdict is rendered. *Salter v. Utica & B. R. R. Co.*, 8 Am. & Eng. R. Cas. 215, 86 N. Y. 401; affirming 23 Hun 533.—OVER-RULING *Erwin v. Neversink Steamboat Co.*, 23 Hun 578.

And the above rule is not affected by the act of 1879, ch. 538, § 1, fixing the legal rate of interest at six per cent., and declaring that nothing therein shall affect contracts or obligations made before the passage of the act, as the statute does not apply to a liability for a tort created by statute. *Salter v. Utica & B. R. R. Co.*, 8 Am. & Eng. R. Cas. 215, 86 N. Y. 401; affirming 23 Hun 533.

XIV. CRIMINAL PROSECUTION.

441. Constitutionality of statutes.

—Railroad corporations are by statute subjected to indictment and fine in case of the loss of life by reason of the negligence or carelessness of the proprietors or their servants. Held, that there is no valid objection to such statute; and the corporations may be legally subjected to such proceedings. *Boston, C. & M. R. Co. v. State*, 32 N. H. 215.

442. When a prosecution will lie.*

—The remedy by indictment provided by Me. Rev. St. ch. 51, § 36, for the loss of a life by negligence of a railroad company or its employés, is limited to cases where the injured party dies immediately, and is not an employé of the company. *State v. Maine C. R. Co.*, 60 Me. 490.—FOLLOWING *State v. Grand Trunk R. Co.*, 58 Me. 176; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 59.—FOLLOWED IN *State v. Grand Trunk R. Co.*, 61 Me. 114.—*State v. Grand Trunk R. Co.*, 61 Me. 114.

In order to support an indictment against a railroad corporation for causing the death of a traveler at a railway crossing, it must appear either that the corporation has been negligent or that its servants have been grossly negligent. *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. Cas. 297, 133 Mass. 383.

The driver of a horse-car of the defendant company, after being relieved by another driver, started to leave the car, and in so doing negligently came in contact with a passenger standing on the steps of the platform, so that the passenger fell from the car and was run over and killed. In an action to recover the penalty imposed by statute for the loss of life—held, that the driver while leaving the car was still the servant and acting within the scope of his employment, and the company was responsible. *Commonwealth v. Brockton St. R. Co.*, 30 Am. & Eng. R. Cas. 632, 143 Mass. 501, 10 N. E. Rep. 506.

A railroad company was indicted, under Mass. St. of 1874, ch. 372, § 163, for causing the death of a passenger, and the evidence showed that the deceased had nearly reached his place of destination, but left the train while it was yet moving slowly,

* Indictment of railroad companies for causing death, see note, 21 AM. & ENG. R. CAS. 217.

and was killed by another train on a parallel track while crossing to the station. *Held*, that the deceased had ceased to be a passenger by leaving the train while it was in motion, and that the company was not liable. *Commonwealth v. Boston & M. R. Co.*, 1 *Am. & Eng. R. Cas.* 457, 129 *Mass.* 500, 37 *Am. Rep.* 382.

443. Who liable.—*Mass. St.* 1874, ch. 372, § 163, imposing a penalty where, "by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," a life is lost, applies to a case where such a corporation is using a railroad track reasonably incident to the business in which the corporation is lawfully engaged, although the track is not within the chartered limits of the corporation, or of a road then under its control, but is a private track which it is using by the mere sufferance and license of its owner. *Commonwealth v. Boston & L. R. Corp.*, 126 *Mass.* 61.

An indictment to recover the fine imposed by the New Hampshire statute of 1850, where the life of a person is lost by carelessness on a railroad, must be against the corporation, and not against the individual stockholders. *State v. Gilmore*, 24 *N. H.* 461.

Those controlling and operating a railroad are liable to indictment for negligence whereby one is killed, under a statute making the "proprietors" liable. *State v. Boston & M. R. Co.*, 58 *N. H.* 410.

444. Time within which to prosecute.—An indictment against a railroad corporation under the act of 1840, ch. 80, for negligently causing the death of a passenger, is not within *Mass. Rev. St.* ch. 120, § 21, limiting actions and suits for any penalty or forfeiture to one year after the offense is committed. *Commonwealth v. Boston & W. R. Corp.*, 11 *Cush. (Mass.)* 512.

The act of 1853, ch. 414, § 3, does not apply to indictments pending at the time of its passage. *Commonwealth v. Boston & W. R. Corp.*, 11 *Cush. (Mass.)* 512.

445. Sufficiency of the indictment.—*Maine Rev. St.* ch. 51, § 36, provides that where the life of any person in the exercise of due care is lost through the negligence or carelessness of a railroad company, or its servants or agents, the company shall forfeit not less than \$500 nor more than \$5000, to be recovered by indictment for the benefit of the widow and children of the de-

ceased, or for whichever exists. *Held*, that an indictment must charge that the deceased left the widow or children or both, as the case may be, and state their names. It is not enough to charge that the deceased had a lawful wife and child alive, nor that there is now living a widow and one child; neither is it sufficient to charge that the names of such beneficiaries are to the jurors unknown. *State v. Grand Trunk R. Co.*, 60 *Me.* 145.—*APPROVING Commonwealth v. Boston & W. R. Corp.*, 11 *Cush. (Mass.)* 517.

Mass. St. of 1840, ch. 80, making railroad companies liable to indictment for negligently causing the death of a passenger, applies to corporations owning and running a railroad; but an indictment thereunder need not set out the names of the employés of the company who are charged with the negligence, nor the nature or manner of such negligence; and it is sufficient to aver that the names of the heirs at law of the deceased are unknown. *Commonwealth v. Boston & W. R. Corp.*, 11 *Cush. (Mass.)* 512.—*RECONCILING Benson v. Monson & B. Mfg. Co.*, 9 *Metc. (Mass.)* 562.—*APPROVED IN State v. Grand Trunk R. Co.*, 60 *Me.* 145.

An indictment under *Mass. Act* of 1840, ch. 80, making railroad companies liable to indictment for negligently causing death of a passenger, and providing that the fine shall be to the use of the administrator or executor for the benefit of the widow and heirs of the deceased, must charge that the deceased left a widow or heirs, or both, as the case may be, with an averment that the company is liable to the fine. *Commonwealth v. Eastern R. Co.*, 5 *Gray (Mass.)* 473.

An indictment under *Mass. St.* of 1864, ch. 229, § 37, can be maintained against a street-railway corporation for causing the death of a person, although it does not allege that the death was instantaneous. *Commonwealth v. Metropolitan R. Co.*, 107 *Mass.* 236.

An indictment to recover a fine imposed by the New Hampshire statute for loss of life by carelessness on a railroad, should aver that there is living a surviving relative entitled to the fine. *State v. Gilmore*, 24 *N. H.* 461.

An indictment which charges, in the same count, that the death of the deceased was caused by the negligence and carelessness of the proprietors of the railroad, and by the unfitness of their servants and agents,

and by the gross negligence of their servants, and by the carelessness of their servants, is not objectionable on the ground of the duplicity. *State v. Manchester & L. R. Co.*, 52 N. H. 528.

446. Matters of defense.—On indictment, under Mass. Gen. St. ch. 160, § 34, against a carrier to recover the penalty therein provided in case the life of a passenger is lost through its negligence, defendant is not entitled to a ruling that, if the loss of life was caused by the improper conduct of third persons, and the accident would not otherwise have happened, it cannot be convicted, although it may not appear that it or its servants did all that could be done to restrain such improper conduct. *Commonwealth v. Coburn*, 132 Mass. 555.

It is no defense to an indictment against a railroad corporation, under Mass. St. 1874, ch. 372, § 163, for causing the death of a passenger, that the passenger was not in the exercise of due care. *Commonwealth v. Boston & L. R. Corp.*, 134 Mass. 211.—FOLLOWED IN *Merrill v. Eastern R. Co.*, 139 Mass. 252. REFERRED TO IN *Merrill v. Eastern R. Co.*, 139 Mass. 238, 52 Am. Rep. 705.

Where a statute provides that a railroad corporation having negligently caused the death of a person shall be fined, and the fine "shall go" to the heirs of the deceased, the validity of an assignment by the heirs of their interest in the action, and the equitable rights of the assignee to control the collection of a judgment recovered therein, or to recover the money when collected, are matters which afford no exemption to the corporation from its liability to discharge the judgment. *State v. Boston & M. R. Co.*, 58 N. H. 510.

By the Pa. Act of March 22, 1865, it is made, among other things, a misdemeanor, where by negligence or wilful misconduct a railroad employé shall fail to observe any precautions or obey any rule which it is his duty to observe and obey, which may result in injury or death to another. An engineer of a freight train was indicted under the statute for moving his train on a siding, which caused it to collide with an approaching passenger train, in which several persons were killed. It appeared that he violated a rule of the company in moving his train until the other train had passed, and there was evidence tending to show that he was asleep and moved the train be-

fore he was fully aroused or conscious of what he was doing. *Held*, that either was a violation of the statute, and therefore no defense to an indictment. *Commonwealth v. Griffin*, 3 Brews. (Pa.) 554, 7 Phila. 679.

447. Evidence.—In the trial of a railroad corporation on an indictment under Maine Rev. St. 1857, ch. 51, § 42, for carelessly killing a person who is in the use of due care, the same rules of evidence and principles of law apply as in analogous civil actions for damages. *State v. Grand Trunk R. Co.*, 58 Me. 176.—FOLLOWED IN *State v. Maine C. R. Co.*, 60 Me. 490.

The same rule prevails in New Hampshire. *State v. Manchester & L. R. Co.*, 52 N. H. 528.

A passenger was riding on an excursion train and was last seen alive about midway of the train, passing through a car, on a dark night while the train was running rapidly, where there were frequent and sharp curves. His body was found next morning near a curve, indicating that he had been run over. The passenger cars were closely connected by platforms, but at the rear of the train was a saloon car, not for the use of passengers, so attached as to leave an open space of some eighteen inches between it and the next car, and it was the theory of the prosecution that the passenger fell through this space and was killed. *Held*, that the facts did not prove that he was killed in this manner while exercising due care. *State v. Maine C. R. Co.*, 81 Me. 84, 16 Atl. Rep. 368.

On the trial of an indictment under Mass. St. of 1864, ch. 229, § 37, against a street-railway corporation for causing the death of a person, there was evidence tending to show that the deceased, a girl two years and one month old, went from home, with her mother's consent, in the charge of a girl sixteen years old; that, when last seen before the accident, they were half way across a straight, level street, sixty feet wide; that the child was there run over by the defendant's car and killed, and that the driver of the car was at the time looking at a fire in the neighborhood. *Held*, that the evidence warranted the jury in finding that the deceased was in the exercise of due care and the defendants were guilty of negligence. *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236.

Where a railroad company is indicted under Mass. Act of 1871, ch. 352, for kill-

ing a person through its own negligence or carelessness, or the unfitness or gross negligence or carelessness of its employes, to recover damages for the benefit of the next of kin, in order to convict, gross negligence must be averred and proved as required by Gen. St. ch. 63, § 98. *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372. —EXPLAINED IN *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. Cas. 297, 133 Mass. 383.

Where the indictment is under the above statute, evidence of the failure of the company to give signals as required by the statute, is inadmissible, unless the indictment charged such failure and that it contributed to the accident. *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372.

Mass. Act of 1874, ch. 372, § 163, provides, among other things, that a railroad company shall be liable to indictment for negligently causing the death of a person not a passenger, who is in the exercise of due diligence at the time. *Held*, that the burden is upon the commonwealth to show that the person killed was not in the exercise of due diligence, but this may be done by proving facts and circumstances from which it may be fairly inferred. *Commonwealth v. Boston & L. R. Corp.*, 126 Mass. 61.

Where an indictment for causing death simply makes an averment of negligence, and on the trial no actual negligence on the part of the corporation defendant is proved and no gross negligence is shown on the part of said corporation's servants, the verdict should be for defendant. *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. Cas. 297, 133 Mass. 383.

The fact that the defendants were running their trains in violation of N. H. Gen. St. ch. 148, § 4, when the deceased was killed is competent evidence. *State v. Boston & M. R. Co.*, 58 N. H. 408.—NOT FOLLOWED IN *Savannah, F. & W. R. Co. v. Flannagan*, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

448. Variance between indictment and proof.—Where the indictment is under the Massachusetts statute, and charges negligence in employes of the company in running a train at an unreasonable and improper speed, evidence is not admissible to show that the employes neglected to ring a bell or sound a whistle. *Commonwealth v. Fitchburg R. Co.*, 126 Mass. 472.

Such indictment is not sustained by proof that the engine was run at a high rate of speed, unless it appears that in so doing the company's employes were acting in violation of their duty. *Commonwealth v. Fitchburg R. Co.*, 126 Mass. 472.

Mass. Act of 1874, ch. 372, § 163, imposes a penalty upon the railroad company if, by reason of its negligence or carelessness, or of the unfitness or gross negligence or carelessness of its servants or agents, the life of any person, being a passenger, or of any person in the exercise of due diligence, and not being a passenger, or in the employment of the company, is lost. *Held*, that an indictment charging death by reason of negligence of the company cannot be sustained upon evidence of negligence of an employé of the company. *Commonwealth v. Boston & M. R. Co.*, 8 Am. & Eng. R. Cas. 297, 133 Mass. 383.

449. Entry of nolle prosequi.—A statutory indictment against a railroad company for the negligent killing of a person is a proceeding essentially civil in its nature, and hence the prosecution may be permitted by the court to enter a *nolle prosequi* during the trial. *State v. Maine C. R. Co.*, 21 Am. & Eng. R. Cas. 216, 77 Me. 244.

450. The forfeiture, and how assessed.—Under the Maine statute the fine or forfeiture imposed by the statute should be assessed by the jury, within the minimum and maximum limits fixed. *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.

If the fine is for the benefit of minor children it will be in season if a guardian be appointed when the fine is imposed. *State v. Boston & M. R. Co.*, 58 N. H. 408.

451. Costs.—The cost of obtaining and prosecuting an indictment against a railroad company for causing a person's death is a charge against the complainant, not against the county. *State v. Grand Trunk R. Co.*, 58 N. H. 198.

DEBENTURES.

Municipal, by-laws donating to railroad, see MUNICIPAL AND LOCAL AID, 267.

Priority between mortgages and, see MORTGAGES, 122.

Rights of holders of, see DIRECTORS, ETC., 63.

Right of holder of, to apply for dissolution, see DISSOLUTION, ETC., 15.

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1. Are not within Mortmain Act, 9 Geo. II. c. 36.—Railway debentures are not within the Mortmain Act, 9 Geo. II. c. 36. *Ashton v. Langdale*, 4 De G. & S. 402, 20 L. J. Ch. 234, 17 L. T. O. S. 175.—**HELD OVERRULED IN** *Jervis v. Lawrence*, L. R. 22 Ch. D. 202, 52 L. J. Ch. 242, 47 L. T. 428, 31 W. R. 267.

2. Analogous to promissory notes.—The strict rules of common law relating to debts are not applicable to railroad debenture bonds, but rather the rules of law merchant relating to negotiable securities. *Bank of Toronto v. Cobourg, P. & M. R. Co.*, 26 Am. & Eng. R. Cas. 655, 7 Ont. 1.

Although the railroad debenture bonds may have been under seal, this does not detract from their character, which was rather that of promissory notes than that of mortgages. *Bank of Toronto v. Cobourg, P. & M. R. Co.*, 26 Am. & Eng. R. Cas. 655, 7 Ont. 1.

3. What is a "negotiation," under 38 Vict. c. 47.—Where debenture bonds were delivered by a railway company with a view to facilitate its operations, this was a "negotiation" of such bonds for the purpose of carrying on the company's business, and was within the meaning of 38 Vict. c. 47. *Bank of Toronto v. Cobourg, P. & M. R. Co.*, 26 Am. & Eng. R. Cas. 655, 7 Ont. 1.

4. Power to issue—Validity, generally.—Where the borrowing powers of a railway company are not to arise until a certain portion of its line is completed, it is not illegal for such company to agree with another company that, if the latter will advance a sufficient sum to complete that portion of the line, the former company will, when the borrowing powers arise, issue and deliver to it a sufficient amount of debentures to enable it to repay itself; and debentures issued under such an agreement are valid. *In re Bagnalstown & W. R. Co.*, 4 Ir. Eq. 505.

Where a railway company has exhausted its borrowing powers, and subsequently some debenture holders recover judgment against the company and have their claims satisfied, and the directors then issue more debentures to such an amount as with the existing debentures does not exceed the borrowing powers, such debentures are valid. *Fountaine v. Carmarthen & C. R. Co.*, 37 L. J. Ch. 429, L. R. 5 Eq. 316, 16 W. R. 476.

5. — signature.—A municipal cor-

poration, under the authority of a by-law, issued and handed to the treasurer of the province of Quebec \$50,000 of its debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the government provincial subsidy was payable, under 44 and 45 Vict. c. 2, § 19, viz.: "when the road was completed and in good running order to the satisfaction of the lieutenant-governor in council." The debentures were signed by S. M., who was elected warden and took and held possession of the office after the former warden had verbally resigned the position. In an action brought by the railway company to recover the debentures from the treasurer after the government bonus had been paid, and in which action the municipal corporation was *mise en cause* as a co-defendant, the treasurer pleaded by demurrer only, which was overruled, and the county of Pontiac pleaded general denial and that the debentures were illegally signed. *Held*, that the debentures signed by the warden *de facto* were perfectly legal; and that as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the lieutenant-governor in council, the *onus* was on the municipal corporation, *mise en cause*, to prove that the government had not acted in conformity with the statute. *Corporation of Pontiac County v. Ross*, 17 Can. Sup. Ct. 406.

6. — issued in blank.—Debentures are not void because not made payable to any particular named individual or company, as the legal effect of such instruments must be construed to be an undertaking to pay the moneys therein mentioned to persons to whom it was delivered, and who by the effect of such delivery became the payees in fact. *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513.

Preferential railway debenture bonds, authorized to be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company, by the managing director, are valid, though issued in blank, if the payee's name is subsequently inserted therein. *Bank of Toronto v. Cobourg, P. & M. R. Co.*, 26 Am. & Eng. R. Cas. 655, 7 Ont. 1.

A railroad company having issued debenture bonds in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him

at his discretion, he had the power to complete them by inserting the obligee's name, and the company should be estopped from defending against the bonds. *Bank of Toronto v. Cobourg, P. & M. R. Co.*, 26 Am. & Eng. R. Cas. 655, 7 Ont. 1.

7. Rights of holders, generally.—Holders of debentures issued by a railway company in the form given in Schedule C of the Companies Clauses Act 1845, do not have an interest in land, within the Statute of Mortmain. *In re Mitchell*, L. R. 6 Ch. D. 655, 37 L. T. 145, 25 W. R. 903.

8. — to have debentures registered.—A trustee held certain debentures of a railway company on trust to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale upon the company making default in payment of the advances. The company made default, and the debentures were delivered over to the creditors. *Held*, that the creditors were entitled, under 34 Vict. c. 43, § 33, to be registered as holders of the debentures, to enable them to qualify and vote for directors, and that a mandamus should issue to compel the company so to register them. *In re Thomson*, 8 Ont. Pr. 423.

9. — to tender debentures for freight charges.—A debenture conditioned that it shall not be receivable in payment of freight "to a greater amount than one half of the amount then to be paid by the holder to the company for freights," requires the company to accept it, when tendered, although the freight due is more than double the amount of the debenture tendered; and such company cannot insist that one debenture shall be tendered for each shipment. Upon such contract the freight of several shipments may be added together, and a demand made that one half, or any less amount of it, be paid by acceptance of debentures. *Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. Rep. 419.

10. Interest.—The interest on railway debentures accrues due *de die in diem*. *In re Roger*, 1 Drew. & Sm. 338, 30 L. J. Ch. 153, 6 Jur. N. S. 1363, 9 W. R. 64, 3 L. T. 397.

If a testator, possessed of railway debentures, dies after the time at which the interest is due, but before it is declared, that portion which accrued due in his lifetime is

capital and not income, as between tenants for life and remaindermen. *In re Roger*, 1 Drew. & Sm. 338, 30 L. J. Ch. 153, 6 Jur. N. S. 1363, 9 W. R. 64, 3 L. T. 397.

A company was authorized to borrow money on mortgage to a certain amount, and to issue debenture stock, with a provision that the interest of all debenture stock "at any time created by the company" was to rank *pari passu* with the interest of all mortgages "at any time granted by the company," and should have priority over all principal moneys created by the mortgages. By two subsequent acts the company was authorized to raise further sums in a similar way. A receiver having been appointed for the company, a case was made for ascertaining the priority of the interest under the several acts. *Held*, notwithstanding the words "at any time" in the first act, that the provision applied only to the mortgage debt and debenture stock provided for in that act. *Harrison v. Cornwall Minerals R. Co.*, 3 Am. & Eng. R. Cas. 606, L. R. 18 Ch. D. 334; affirming 1 Am. & Eng. R. Cas. 601, L. R. 16 Ch. D. 66.

Under a true construction of the several acts of 1873, 1875, and 1877, authorizing the Cornwall Minerals Railway Company to raise money on mortgages, and to issue debenture stock, the order of priority of interest thereon is as follows: (1) The interest on the mortgages and debenture stocks granted under the act of 1873 prior to the passing of the act of 1875; (2) the interest on the debenture stock issued under the act of 1873, after the passing of the act of 1875, but before the act of 1877; (3) the interest on the debenture stock created under any of the acts, after the passage of the act of 1877. *Harrison v. Cornwall Minerals R. Co.*, 3 Am. & Eng. R. Cas. 606, L. R. 18 Ch. D. 334; affirming 1 Am. & Eng. R. Cas. 601, L. R. 16 Ch. D. 66.

11. Illegal transfer by one of several trustees.—The possession of railway debentures by one of three trustees gives him no implied authority to deal with them; and if he transfers them on the books of the company by forging the names of the other trustees, the entry will be canceled, and the debentures ordered to be delivered up. *Cottam v. Eastern Counties R. Co.*, 30 L. J. Ch. 217.

12. Mortgage debentures.—Where a railway debenture assigns "the undertaking and all the estate, right, title, and inter-

est of the company in the same," this operates simply as a transfer of the subject-matter till the sum is satisfied; i.e., tolls, unpaid calls, and all that belongs to the company as the proprietors of the railway, but not the stock or property belonging to it as common carriers, nor the soil. *Hart v. Eastern Union R. Co.*, 6 Railw. Cas. 818, 7 Ex. 246; affirmed in 8 Ex. 116, 17 Jur. 89, 22 L. J. Ex. 20.

Where a railway debenture assigns all the estate of the company to hold until the principal sum with interest is satisfied, it imports a covenant by the company that the principal shall be paid on the day named, for the breach of which an action will lie, the judgment to be satisfied out of its general property. *Hart v. Eastern Union R. Co.*, 6 Railw. Cas. 818, 7 Ex. 246; affirmed in 8 Ex. 116, 17 Jur. 89, 22 L. J. Ex. 20.

13. Actions on debentures—Right of action.—If a railway company issues debentures receivable in payment of freight named, and it repudiates them, it is liable for their face value in money, and judgment may be rendered thereon for that amount. *Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. Rep. 419.

14. Tender for acceptance prior to suit.—If a company notify the holder of debentures that it construes the contract so as to make them receivable only in a way contrary to their tenor and effect, this is a notification that it does not regard itself as bound by the contract, and amounts to a renunciation thereof; and such holder is not bound thereafter to tender the debentures for acceptance according to their tenor and effect, but may bring his action at once for the recovery of the amount in money for which the debentures were by their terms receivable in part payment of freight. *Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. Rep. 419.

A refusal to honor one debenture amounts to a refusal to honor all held by the person tendering it; and such holder is not bound to first tender all he has before bringing an action thereon. *Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. Rep. 419.

15. Who may sue.—Where plaintiff is not proved to have been the original bearer or payee of the debentures sued upon, they being choses in action and not assignable, an action cannot be brought in his own name unless he show he is the

bearer payee. *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513.

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